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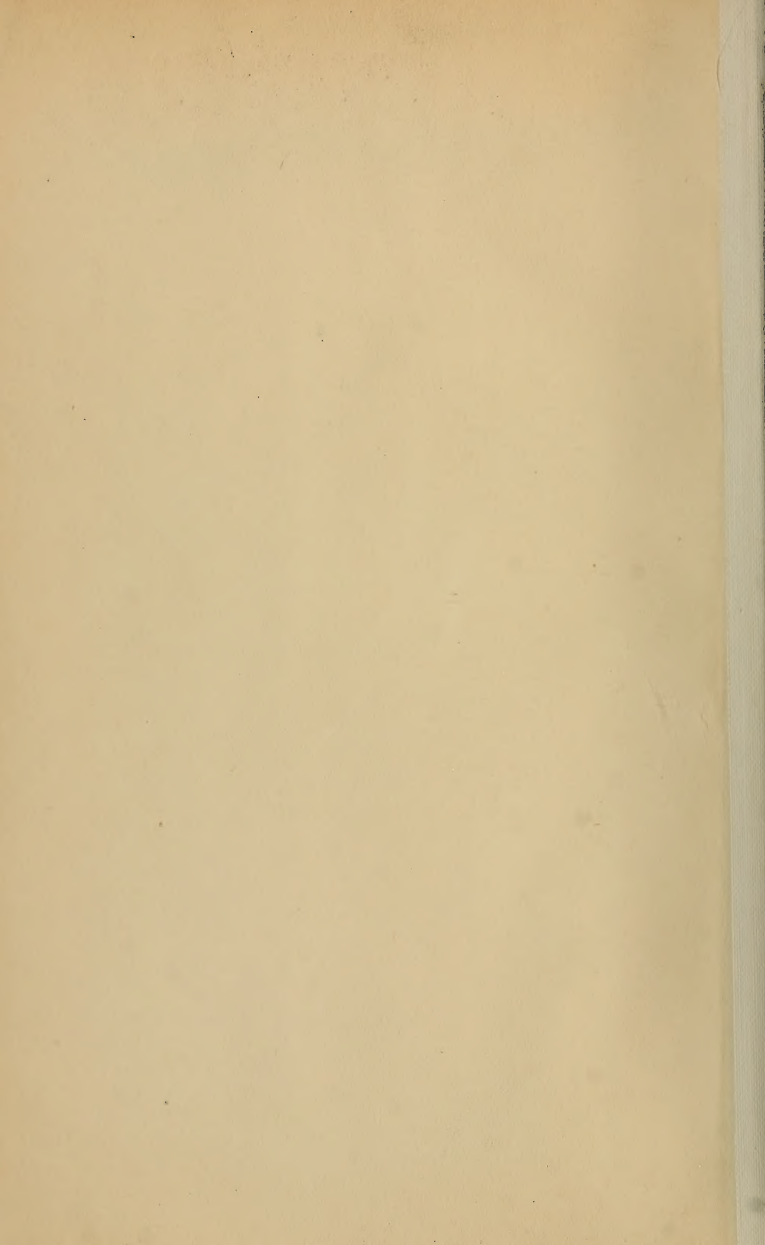
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DOCUMENTAL HISTORY
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IN THE UNITED STATES
1916-1924

IN TWO VOLUMES

VOLUME II
JAPANESE LAND CASES

COMPILED BY
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TABLE OF CONTENTS

CHAPTER I. TERRACE CASE.

SECTION A. IN THE UNITED STATES DISTRICT COURT.

1. Memorandum of Points and Authorities (including Alien Land Law of the State of Washington, 1921).....	1
2. Amended Complaint (Injunction Procedure).....	16
3. Memorandum Decision	18

SECTION B. IN THE SUPREME COURT OF THE UNITED STATES.

1. Appellants' Brief, by James B. Howe.....	28
2. Brief of Appellee, by L. L. Thompson, Attorney-General, State of Washington	79
3. Decision of the Court.....	103

CHAPTER II. O'BRIEN CASE.

1. Alien Land Law of California of 1920.....	111
--	-----

IN THE UNITED STATES DISTRICT COURT, NORTHERN CALIFORNIA.

1. Bill of Complaint.....	114
2. Motion for Temporary Injunction (Memorandum of Points and Authorities)	118
3. Decision of the Court.....	122

IN THE SUPREME COURT OF THE UNITED STATES.

1. Brief for Appellants, by U. S. Webb.....	130
2. Appellees' Points, by Louis Marshall.....	151
3. Decision of the Court.....	172
4. Petition for Rehearing, by Louis Marshall.....	175

CHAPTER III. OKAHARA CASE.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

1. Petitioner's Points and Authorities on Application for Writ of <i>Habeas Corpus</i>	180
2. Brief filed by Attorney-General Webb.....	187
3. Reply and Supplementary Brief for Petitioner, by Thomas Sullivan	196
4. Decision of the Court.....	206

CHAPTER IV. PORTERFIELD AND MIZUNO CASE.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

1. Bill of Complaint.....	213
2. Application for Preliminary Injunction.....	216
3. Plaintiffs' Brief, by D. B. Chapin.....	218
4. Defendants' Points, by U. S. Webb.....	240
5. Plaintiffs' Reply Brief, by D. B. Chapin.....	262

CHAPTER XVII. F. S. JONES AND T. MAKIMOTO CASE (BONUS TEST CASE).

SECTION A. IN THE CALIFORNIA SUPERIOR COURT.

1. Complaint for Injunction 810
2. Decision of the Court (Court granted demurrer)..... 813

SECTION B. IN THE CALIFORNIA SUPREME COURT.

1. Brief for Respondent by U. S. Webb..... 813
2. Brief of *Amicus Curiae* (See Chapter XVIII-B-2)..... 831
3. Decision of the Court..... 1040

CHAPTER XVIII. PORTERFIELD AND MIZUNO CASE.

SECTION A. IN THE CALIFORNIA SUPERIOR COURT.

1. Complaint for Injunction 817
2. Decision of the Court (Court granted demurrer)..... 820

SECTION B. IN THE CALIFORNIA SUPREME COURT.

1. Brief for Respondents..... 820
2. Brief of Albert H. Elliot, *Amicus Curiae*..... 831
3. Decision of the Court..... 1042

CHAPTER XIX. NOSE CASE.

IN THE CALIFORNIA SUPERIOR COURT.

1. Petitioner's Opening Brief..... 854
2. Points and Authorities, by U. S. Webb..... 879

IN THE CALIFORNIA SUPREME COURT.

3. Brief of *Amicus Curiae* (See Chapter XVIII-B-2)..... 831
4. Decision of the Court..... 1049

CHAPTER XX. SHOKUTA, KUSUMI AND MIYAGAWA CASES.

SECTION A. SHOKUTA CASE IN THE SUPREME COURT, STATE OF WASHINGTON.

1. Brief of Appellant..... 881
2. Brief of Respondent..... 886
3. Reply Brief of Appellant..... 896
4. Decision of the Court. (Pending.)

SECTION B. KUSUMI CASE IN THE SUPERIOR COURT, STATE OF WASHINGTON.

1. Complaint 901
2. Findings of Fact..... 907

SECTION C. MIYAGAWA CASE IN THE SUPERIOR COURT, STATE OF WASHINGTON.

1. Findings of Fact and Conclusions of Law..... 909

CHAPTER XXI. GUARDIANSHIP CASES.

1. Kumagai Case. In the California Superior Court (Santa Clara County) 913
2. Kawahara Case. In the California Superior Court (Tulare County) 916
3. Watanabe Case. In the California Superior Court (Tulare County) 925
4. Kawaoka Case. In the California Superior Court (Sonoma County) 928
5. Sakurai Case. In the California District Court of Appeals:
 - a. Petition for Writ of Mandamus..... 930
 - b. Decision of the Court..... 934
6. Matsumoto Case. In the California Superior Court (Tulare County). Discharged 936

TABLE OF CONTENTS

vii

7. Watanabe Case. In the California Superior Court (Tulare County). Removed by court order.....	939
8. Hoshide Case. In the California Superior Court (Tulare County). Property sold.	949
9. Okazaki Case. In the California Superior Court (Tulare County). Resigned voluntarily	958
10. Fujimoto Case. In the Supreme Court of the State of Washington:	
a. Brief of Appellants.....	965
b. Brief of Respondents.....	984
c. Reply Brief of Appellants.....	1002
d. Decision of the Court.....	1009

CHAPTER XXII. APPENDIX.

1. California Alien Land Law, 1913	1014
2. California Alien Land Law, 1920. (See page 111.)	
3. California Alien Land Law, 1923	1015
4. California Code of Civil Procedure Relating to the Alien Land Law of 1923	1019
5. Washington Alien Land Law, 1923	1019
6. Oregon Alien Land Law, 1923	1020
7. Nebraska Alien Land Law, 1921	1024
8. Texas Alien Land Law, 1921	1025
9. Constitutional Amendment of Nevada	1027
10. Alien Land Law of Idaho, 1923	1028
11. Alien Land Laws of Other States:	
a. Alien Land Law of Arizona	1031
b. Alien Land Law of Delaware	1035
c. Alien Land Law of Louisiana	1035
d. Alien Land Law of Montana	1036
e. Alien Land Law of Missouri	1037
f. Alien Land Law of New Mexico	1038

ADDENDA.

DECISIONS OF THE CALIFORNIA SUPREME COURT IN LAND CASES UNDER CHAPTERS:

XVI. Carter Case	1039
XVII. F. S. Jones and T. Makimoto Case.....	1040
XVIII. Porterfield and Mizuno Case.....	1042
XIX. Nose Case	1049

CHAPTER I.—TERRACE CASE.

FRANK TERRACE and ELIZABETH TERRACE, his wife, and N. NAKAT-SUKA, Plaintiffs, vs. LINDLEY L. THOMPSON, as Attorney-General of the State of Washington, Defendant.

SECTION A.—IN THE UNITED STATES DISTRICT COURT. In Equity. No. 132.

(1) MEMORANDUM OF POINTS AND AUTHORITIES (INCLUDING ALIEN LAND LAW OF THE STATE OF WASHINGTON, 1921.)

This action involves the constitutionality of Chapter 50 of the laws of the State of Washington for 1921, commonly known as the Alien Land Bill. For the convenience of the court we copy the act, which is as follows:

“CHAPTER 50. (H. B. 79).

“An act relating to the rights and disabilities of aliens with respect to lands, providing for forfeitures in certain cases, prescribing penalties, and repealing sections 135 and 136 of Pierce’s Code, 8775 and 8776 of Remington & Ballinger’s Annotated Codes and Statutes of Washington.

“*Be It Enacted by the Legislature of the State of Washington:*

“Section 1. In this act, unless the context otherwise requires,

“(a) ‘Alien’ does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens;

“(b) ‘Land’ does not include lands containing valuable deposits of minerals, metals, iron, coal or fire clay or the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom, but does include every other kind of land and every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof except a mortgage and except a right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen;

“(c) ‘Land’ also includes any share or interest in a corporation or other organized group of persons deemed an alien in this act which has title to land either heretofore or hereafter acquired;

“(d) To ‘own’ means to have the legal or equitable title to or the right to any benefit of;

“(e) ‘Title’ includes every kind of legal or equitable title;

“(f) Ownership of or title to land acquired by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts, or acquired by a female citizen afterwards expatriated by marriage to an alien, is excluded;

"(g) 'Inheritance' includes devise;

"(h) 'Mortgage' includes every kind of lien upon land;

"(i) A mortgage of land under which an alien is entitled before default to any control, possession, use or enjoyment of the land, is an absolute conveyance; and

"(j) 'Person' includes an individual, partnership, corporation or any other organized group of persons.

"Sec. 2. An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state.

"Sec. 3. An alien is not qualified to be trustee under a will, executor, administrator or guardian, if any part of the estate is land; Provided, An alien now lawfully acting in any such capacity may continue for not more than two years.

"Sec. 4. If hereafter an alien acquire land by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts and, remaining an alien, hold the same for more than twelve years from the date title was so acquired or control or possession taken, the land shall be forfeited to the state.

"Sec. 5. If an alien, claiming or holding under a mortgage, has control, possession, use or enjoyment of the mortgaged land, the obligation secured by the mortgage shall be deemed matured and the mortgage shall be foreclosed; and if the land be not sold under foreclosure within three years after the alien has obtained control, possession, use or enjoyment, the mortgage and the obligation thereby secured shall be forfeited to the state and shall be foreclosed for the use of the state.

"Sec. 6. Unless an alien who has declared his intention to become a citizen of the United States be admitted to citizenship within seven years after his declaration was made, it shall be presumed that he declared his intention in bad faith.

"Sec. 7. Whoever

"(a) Knowingly transfers or conveys land or title to land to an alien; or

"(b) Knowingly takes land or title to land in trust for an alien; or

"(c) Holding in trust for an alien land or title to land, either heretofore or hereafter acquired, fails for thirty days after acquiring knowledge or notice that he holds in trust for an alien to disclose the fact to the attorney-general or the prosecuting attorney of the county where the land is situated; or

"(d) Being an alien and having title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney-general or the prosecuting attorney of the county where the land is situated the nature and extent of his interest in and title to the land; or

"(e) Being an officer or agent of a corporation or other organized group of persons which has title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney-general or the prosecuting attorney of the county where the land is situated the nature and extent of the interest of persons not citizens of the United States in the corporation or other organized group of persons; or

"(f) Being an officer or agent of a corporation or other organized group of persons which holds in trust for an alien title to land or control or posses-

sion of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney-general or the prosecuting attorney of the county where the land is situated the nature and extent of the alien's interest in and title to the land; or

"(g) Wilfully counsels, aids or abets another in violating or evading this act,

"Is guilty of a gross misdemeanor.

"Sec. 8. It shall be the duty of the attorney-general and of the prosecuting attorneys of the several counties to enforce this act, and of the attorney general to direct and control its enforcement.

"Sec. 9. Property forfeited to the state by this act shall inure to the permanent common school fund and be managed and disposed of accordingly.

"Sec. 10. This act shall not impair any title or right heretofore or hereafter acquired from or derived through an alien in good faith and for value by a person not under an alien's disability.

"Sec. 11. If any section or provision of this act shall be adjudged to be invalid or unconstitutional, such adjudication shall not affect the validity of the act as a whole or any section, provision or part thereof not adjudged invalid or unconstitutional.

"Sec. 12. Sections 135 and 136 of Pierce's Code, 8775 and 8776 of Remington & Ballinger's Annotated Codes and Statutes of Washington, are hereby repealed.

"(Passed by the House February 25, 1921. Passed by the Senate March 2, 1921. Approved by the Governor March 8, 1921.)"

Section 33, article II, of the constitution of the State of Washington is also involved in the controversy, and for the convenience of the court we copy that section as well, it being as follows:

"Section 35. *Ownership of Lands by Aliens, Prohibited—Exceptions.*—The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void; Provided, That the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof, and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition."

The foregoing constitutional provision has been construed and applied by the supreme court of the State of Washington in a number of cases. Chronologically arranged, they are as follows:

Oregon Mortgage Company vs. Carstens, 16 Wash. 165.

In that case, the mortgage company, an alien corporation, took a mortgage on real estate as security for the payment of money loaned. The mortgagor was unable to pay the mortgage and he and the mortgage company entered into an agreement by the terms of which he executed a deed of the land to one Livingstone, as trustee for the plaintiff, and Livingstone subsequently deeded the land to the plaintiff mortgage company, and it entered into a written agreement to sell the land to Carstens and Carstens to buy the land of the mortgage company. Carstens thereafter declined to pay the purchase price and the mortgage company brought suit to recover the amount thereof. During the course of its opinion the court held:

"1. A deed to an alien, in violation of law, will pass a title to real estate good against all the world except the state, and one which only can be attacked by a direct proceeding on the part of the state.

"2. An alien holding land in this state under a defeasible title, which is subject to attack on the part of the state as in contravention of the above constitutional provision, may by deed transfer a good title thereto to any person entitled to hold real estate, if no proceeding has been taken by the state for the purpose of setting aside the deed to the alien.

"3. The above constitutional provision does not apply to cases in which a citizen deeds to an alien mortgaged land in satisfaction of bona fide mortgage debt, because the provision excepts from the prohibition upon alien ownership lands acquired 'under mortgage or in good faith in the ordinary course of justice in the collection of debts.'"

In the course of its opinion the court said:

"The plaintiff contends that this land was acquired within the exception contained in the constitutional provision; that is, that the title was acquired under mortgage or in good faith in the ordinary course of justice in the collection of a debt. It is conceded that McIntosh was the owner of the lands in fee simple, and that the deeds were all sufficient in form to convey the title. It is plain that the purpose of the prohibition is to prevent the acquisition of lands in large quantities by alien and non-residential owners. It is apparent by the exception referred to that it was not intended that the provision should be construed so as to prevent the loaning of money by aliens upon real estate security within this state; but it was contemplated that such loans should be permitted and protected, of course with the limitation that such transactions must be bona fide. In this case there is no claim of any bad faith, but the question is whether, in the case of an actual loan made, an alien can take a direct deed from the mortgagor of the land in satisfaction of the mortgage debt, or whether he must proceed to acquire title by a foreclosure in the courts.

"It will readily be seen that an agreement such as was here entered into between McIntosh and the plaintiff would usually tend to the advantage of both parties. The costs of the foreclosure suit would be avoided, and as well the liability to a deficiency judgment upon the part of the mortgagor. It would seem that there could be but two objections urged against it as tending to defeat the purpose of the provision. One is that, in case of a foreclosure in the courts, the mortgagor would have a right to redeem the premises. But this is a personal right which he might or might not exercise, at his option. We presume it will be conceded that he could waive the right to redeem after a judgment of foreclosure, and we see no reason why he should not be permitted to waive this right at any time, if he should deem it to his advantage in order to avoid costs and a liability for a deficiency. The other objection is that, in case of a foreclosure and public sale thereunder, other parties would be entitled to bid for the lands and the result might be, in consequence of this, that the alien plaintiff would not become the purchaser.

"The respondent contends that, if a proceeding like this can be sustained, it would be an easy matter for an alien desiring to obtain a tract of land in this state to go through the form of making a loan thereon and immediately thereafter take a deed in satisfaction of the mortgage and thus avoid the prohibition. But we are unable to see why, in case of a fraudulent arrangement between the mortgagor and the mortgagee, such a proceeding could not as well be carried out through the form of a foreclosure. The loan could be made in so large an amount and so great a price bid for the lands upon the

foreclosure sale thereunder as to prevent other parties from becoming purchasers, and it would seem that the provision could be as readily violated in the one case as in the other.

"Alien corporations are not prevented from acquiring and holding lands in this state in all cases, and the objections urged against this transaction are substantially only to the form of acquiring title to lands upon which mortgage security has been taken. It is evident that the clause, 'and all conveyances of land hereafter made to any alien directly or in trust for such alien shall be void,' is limited by the other provisions contained in the section, and that it was not intended to prevent an alien from holding land under any circumstances. It simply goes to the means or purpose of the alien in acquiring title. In other words, in cases like this, the original purpose must not have been to acquire title to the lands under the transaction or guise of a mortgage loan, but must have been in good faith to make the loan as a loan, and the mortgage taken as an incident merely to secure its payment, and the land acquired in good faith thereunder. It is apparent that the form of the conveyance is of little or no consequence, unless it should tend to defeat the purpose of the provision."

Answering a contention that land could be acquired under the constitution by process of mortgage foreclosure only, and not by direct deed from the mortgagor to the mortgagee in satisfaction of the indebtedness, the court said:

"The clause in the provision, 'in the ordinary course of justice in the collection of debts,' should not be held to require a proceeding in court in the case of a mortgage debt. The language used does not require it necessarily, and such a construction would go to the form rather than the substance of the transaction. It would afford little or no protection against an attempted fraudulent acquisition. While it is true that a foreclosure might result in a sale to a resident, it is a well-known fact that the usual result is a sale to the mortgagee. There is no attempt or desire upon the part of the mortgagee to retain these lands. On the contrary, it is attempting to dispose of them, and it is evident that the whole transaction has been conceived and carried out in the utmost good faith to collect its debt; and while a direct provision of the constitution as to the form of the conveyance, even, could not be disregarded, there is none in the way here, and it will be time enough to inquire into the validity of such transactions when fraud is charged and the desired protection invoked by a proceeding upon the part of the state.

"It is not an unusual proceeding for a mortgagor to convey lands directly to a mortgagee in satisfaction of a mortgage debt, and, where the parties agree upon such a course, it would seem as though it should be favored in a case like this rather than discriminated against. The only just and effectual enforcement of the constitutional inhibition can be by a proceeding upon the part of the state to have the transaction adjudged fraudulent and invalid, and actual fraud of course could always be inquired into. It would be idle to assume that the state has not ample power to protect itself in such matters, and it might be just as necessary and desirable to resort to such a proceeding where title was acquired through the form of a mortgage foreclosure as in case of a direct deed by the mortgagor to the mortgagee."

Goon Gan vs. Richardson, 16 Wash. 373.

That case was a mortgage foreclosure, and the court held that the incapacity of a mortgagee, by reason of alienage, to take title to real estate, could be shown only in a suit by the state.

State ex rel. Winston vs. Morrison, 18 Wash. 664.

That was a direct proceeding by the state to set aside a ninety-nine year lease of real estate to an alien who had not declared his intention to become a citizen of the United States. Granting the relief prayed for the court said:

"It is conceded that the premises described in the lease do not fall within any of the exceptions enumerated in the proviso contained in the foregoing section. Respondent contends that it is only absolute ownership of certain kinds of realty which is prohibited; that the word 'conveyance' means the transfer of title to another and the instrument by which this is done. The question for determination is, what is the meaning of the section of the constitution under consideration? We have not been referred to a case at all similar to the one we are now considering. We think that the section must be given a reasonable interpretation. If a lease for a term of ninety-nine years can be sustained, then why not one for nine hundred and ninety-nine years? And it would seem to require little argument to demonstrate that if a lease for such a term can lawfully be made to an alien the constitutional prohibition against ownership of lands in this state by aliens becomes meaningless, and parties may indirectly accomplish a result which they are forbidden to do directly. After a vain search for authority bearing directly upon the question we have concluded that a lease of lands in this state to an alien for a reasonable term might be upheld, but that the lease in question is for an unreasonable term, and consequently void."

State ex rel. Winston vs. The Hudson Land Co., 19 Wash. 85.

This was a direct action by the state to set aside certain conveyances of real estate and a lease for forty-nine years of real estate, to a corporation the majority of whose stockholders were aliens at the time of the commencement of the action, although, at the date of the conveyance and the making of the lease, the majority of the stockholders of the corporation were citizens. After quoting the above constitutional provision, the court said:

"It seems to us that this language is not susceptible of construction. A plain policy was plainly enunciated by the constitutional convention. That policy was an inhibition of ownership of lands by aliens except as to the character of lands specially mentioned in the proviso, and the constitutional convention, having in mind no doubt the attempt to evade this law which is made in this case, out of an abundance of caution inserted the last provision, viz., that

"Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition."

"We cannot understand what meaning could be attached to this last provision of the act, if a corporation, the majority of the capital stock of which is owned by aliens, is allowed to become the owner of land. It is contended by the appellant that, because a majority of the stock of this corporation was owned by citizens at the time the land was transferred to the corporation, it would work an injury and a hardship upon the corporation and upon the owners of stock thereof to hold this transfer void, and that, had it been the intention of the constitutional convention to make such an application of the law as this, language more explicit could, and surely would, have been used. We do not think that language more explicit could have been used. Presumably the members of the constitutional convention regarded this question as of great importance, and the article doubtless was passed after careful consideration and revision; and the whole article shows that it was the intention of the law that the ownership of lands by aliens should be prohibited, and that it should be prohibited despite of subterfuges which might

be resorted to by aliens for the purpose of becoming such owners; and we have already seen the wisdom of the makers of the constitution in clothing this article in language which is so plain that it is not susceptible of judicial construction. First, attempts have been made, in the case just above referred to, by aliens to become owners of land through the medium of leases which in effect conferred ownership, and now the constitution is again sought to be avoided and benefits obtained under it by indirection which could not be obtained by direct action. We have no doubt that corporations have it within their power to protect themselves from the dire consequences and hardships which are suggested by appellant in his brief by reason of members of a corporation selling stock to aliens in the corporation; but, if they cannot, our laws confer certain benefits on, and exemptions to, corporations which are valuable, and if men see fit to enter into corporations for the purpose of doing business instead of doing it as individuals, and accept the benefits which the law confers upon the corporation, they must also accept the burdens which are incident to a corporate investment. But outside of all this, when it once becomes the established law that deeds of this character are void, members of corporations will not be quick to obtain such deeds, and the hardships dilated on by the appellant will be more in theory than practice. But even if it be conceded that these hardships would have to be endured, the evident spirit of the constitution must be sustained. The broad doctrine is announced that the ownership of lands by aliens is inhibited. The exceptions to that rule are as plainly announced by the constitution. These transfers not falling within the exceptions, the conveyance must be held to be void. The lease for forty-nine years will be held void under the doctrine announced in *State ex rel. Attorney-General vs. Morrison, supra.*"

Morrell vs. Superior Court, 33 Wash. 542.

In that case the court held that an alien corporation could not acquire real estate in this state by eminent domain.

Abrams vs. The State of Washington, 45 Wash. 327.

In that case it appears that Abrams, the plaintiff, in 1890, conveyed real estate in the State of Washington to Lou Graham, an alien, who died in 1903, intestate. In 1894 Graham filed her declaration of intention to become a citizen of the United States but never took any further steps to acquire citizenship. After the death of Graham, Abrams instituted the above action for the purpose of recovering possession of the property, basing his claim on the proposition that the real estate had been acquired by Graham while an alien, and that she had never become a citizen. In the same case the state sought to escheat the property, because it had been acquired by Graham while an alien, basing its contention on the proposition that Graham's application to become a citizen was not made in good faith. The court held that the deed from Abrams to Graham conveyed an absolute title, so far as Abrams was concerned, and that the state, not having sought to forfeit the property in question during the lifetime of Graham, could not do so after her death, but that her heirs took a fee simple title to the real estate.

In the course of its opinion the court said:

"The appellants, the State of Washington and County of King, claim title by escheat, on the theory that Lou Graham was at all times an alien; that her declaration of intention to become a citizen of the United States was void; that she being an alien of notoriously bad character and an habitual violator of the law could not be held to have made such declaration of intention in good faith; that she was prohibited by the terms of our constitution

from acquiring title to the real estate by purchase; that as against the state, the deed to her was void; that she had no inheritable blood and could not upon dying intestate transmit title to her alien heirs, and that the property, by operation of law and without any proceeding in the nature of office found, upon her death escheated to the state. In view of our conclusions, it will not be necessary for us to determine whether her declaration of intention was, in contemplation of our constitution, made in good faith. We will consider this case upon the theory that she never made any such declaration. Being an alien, it follows that she had no right to acquire title to real estate in this state by purchase, and the deed executed to her by the appellant Abrams was void in the sense that a forfeiture of the property might have been declared by the state at any time while it remained in her possession and under her control, she claiming title under such deed. This court in substance held that an alien holding lands in this state by purchase under a defeasible title, subject to attack on the part of the state, might by deed hold it, provided no proceeding had theretofore been taken by the state for the purpose of declaring a forfeiture or escheat. In other words, if Lou Graham, after receiving her deed from the appellant Abrams, had, for a good and sufficient consideration, conveyed the property to a third party entitled to receive title, the State of Washington could not thereafter, by office found, have forfeited such title as against her grantee. The state could, however, at any time prior to such transfer, have successfully instituted proceedings to declare a forfeiture and escheat.

"The question now before us is whether, by reason of the death of Lou Graham, the state has lost its right to institute proceedings in the nature of office found for the purpose of declaring a forfeiture and escheat, or whether such right still continues. Under our constitution, an alien, who has not in good faith made any declaration of intention to become a citizen of the United States, may acquire title to real estate (1) by inheritance; (2) under mortgage or in good faith in the ordinary course of justice in the collection of debts; (3) in land necessary for mills and machinery to be used in the development of such mineral lands, and in the manufacture of the products therefrom. When the constitution authorized aliens to acquire lands in these several instances and methods, it was undoubtedly contemplated that they might acquire a full and complete estate in fee simple, which would include an estate of inheritance. If this be a correct interpretation, then the estates thus acquired could be transmitted by descent to the heirs of such aliens. It is contended by the state, however, that Lou Graham only acquired a defeasible estate to the land in question, and that, as she was an alien and did not at common law have inheritable blood, she could not transmit any title or estate to her alien heirs, although under the constitution they, as aliens, could receive. In other words, there existed a disability upon her part to transmit, and not upon their part to receive by inheritance. As above stated, the common law of England was so modified by the statute of 11 and 12 Will. III, ch. 6, in the year 1700, as to enable English subjects to inherit from an alien. This statute having been enacted prior to the separation of the American colonies from the mother country, has become a part of the common law of this state, except in so far as it has been supplanted by our constitution or statutory enactments. Under this rule and without the provisions of our constitution, a citizen could inherit from an alien an estate held by such alien at the date of his death, even though it had been defeasible.

"When our constitution conferred upon aliens the right to inherit, we interpret it to have conferred upon them a full and complete right of inheritance, which would imply not only the right in themselves to receive by such

inheritance from a citizen, but also to receive by inheritance from an alien. Were we to place any other interpretation upon the constitution, the necessary result would be that where an alien, under its authority, had rightfully acquired a fee simple title to real estate, for instance by mortgage, or in good faith in the ordinary course of justice in the collection of a debt, and had immediately thereafter died intestate, his heirs, if aliens, would not be able to inherit such real estate, not because of any disability upon their part, but because their deceased ancestor had not inheritable blood enabling him to transmit title to them. Such an interpretation would result in a rule of law causing such property to escheat to the state whenever there was a failure of heirs who were citizens of the United States. No such contingency was contemplated by the framers of our constitution, nor by the people who adopted the same. Our conclusion is that, under our constitution, aliens are entitled to inherit real estate in this state, from, by, or through ancestors whether such ancestors be aliens or citizens. This being true, and the state having failed to forfeit the title of Lou Graham by proceedings in the nature of office found, at any time prior to her death, the real estate in controversy descended to her alien heirs who were authorized to receive the same and became entitled thereto, and the state thereupon lost its right to declare any escheat by forfeiture.

"Our conclusions are (1) that the deed from the appellant Abrams divested him of title to the property; (2) that at all times prior to alienation of the property by Lou Graham, or prior to her death, the state was entitled, by proceedings in the nature of office found, to have declared a forfeiture or escheat; (3) that the state, having failed to declare such forfeiture or escheat prior to her death, lost its right so to do; (4) that upon her death, the real estate descended to her alien heirs. In view of these conclusions, the judgment of the honorable superior court was right, and it is accordingly affirmed."

State ex rel. Atkinson vs. World Real Estate Commerce Company, 46 Wash. 104.

That was a direct action by the state to escheat real estate. An alien had acquired title to the real estate, contrary to the above constitutional provision, and had conveyed the real estate to the defendant prior to the commencement of the above action. The court held that the alien had conveyed a valid and indefeasible title to the defendant and that upon such conveyance the state lost its right to escheat the real estate in question.

State ex rel. Atkinson, vs. Evans, 46 Wash. 219.

That was a direct proceeding by the state to escheat land, and it was admitted, contained valuable deposits of limestone, silica, silicated rock and clay, but it was contended that such deposits were not "minerals, metals, iron, coal, or fireclay," within the meaning of the proviso of the constitutional provision. The court held that the lands were within the excepted class, and in its opinion quoted with approval from *Cooley on Constitutional Limitations* as follows:

"The rule applicable here is that effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. This rule is applicable with special force to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers dele-

gated, leaving as little as possible to implication. It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together. In interpreting clauses we must presume that words have been employed in their natural and ordinary meaning. As Marshall, Ch. J., says: "The framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said."

Prentice vs. How, 84 Wash. 136.

In that case the court reaffirmed the rule that only the state can question an alien's title to real estate, and then only prior to conveyance of the real estate by the alien.

Roger vs. Whitham, 56 Wash. 190, 195.

In that case the court held that the real estate of a citizen who becomes expatriated cannot be forfeited.

State ex rel. Tanner vs. Staeheli, 12 Wash. Dec. 288 (decided September 3, 1920).

That was a direct action by the state to escheat real estate to the state. The defendant was born in Switzerland and after he came to this country his father was duly naturalized, and the defendant alleged that he supposed the naturalization of the father resulted in making him a citizen of the United States, that he exercised all the rights of a citizen until the year 1917; then he was required to respond for military service, and at that time he claimed exemption from military service on account of the fact that he was alien born, and was past twenty-one years of age when his father was naturalized. After the action was brought by the state the defendant filed his declaration of intention to become a citizen of the United States, which action the court held unavailing, and a decree was entered for the state. In the course of its opinion the court said that:

"This land is agricultural land, not valuable for minerals or used for manufacturing purposes, and was not acquired by inheritance or under mortgage, or in the collection of a debt."

State ex rel. Turner vs. Rycken, 13 Wash. Dec. 95 (decided November 1, 1920). That case is similar in all respects to the case last above cited, and the same results were reached by the supreme court.

From the foregoing decisions the following propositions are established:

1. A conveyance of real estate to an alien creates a defeasible title in the alien, but only the state can attack the title, and the state can attack the title only while it remains in the alien.

2. An alien may lawfully lease land in this state for a reasonable term.

3. An alien may lawfully acquire title to real estate in this state by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts, or land containing valuable mineral deposits; and lands necessary for mills and machinery to be used in the development of mineral lands and in the manufacture of the products therefrom; and the title to such land so acquired is a full and complete estate in fee simple.

At common law an alien could take title to land by conveyance, but not by inheritance.

Fairfax's Devisee vs. Hunter's Lease, 7 Cranch. 619.

As above set forth, the supreme court of Washington has held that an alien could take a fee simple title to real estate by inheritance, by virtue of the above constitutional provision. It is not conceived on what reasoning it can be held that the constitutional provision is effective to change the common law rule, but at the same time be subject itself to legislative change. In other words, the exceptions in the constitutional provision are a grant of right to an alien, and being a grant to an alien, are not subject to legislative change or limitation. That being true, it is not perceived why all the exceptions in the constitutional provision are not likewise a grant of right to aliens. Being such grant, the legislature is powerless to abrogate, modify or limit them. And the only question, then, is whether or not the constitutional provision furnishes a complete and exclusive rule as to the ownership or use of real estate by aliens.

It is the plaintiff's position that the state constitutional provision furnishes a complete and exclusive rule on the subject of ownership, possession or use of real estate by aliens, and that the legislature is powerless to act on or take from the same. In determining such question the courts invariably apply the old maxim, *expressio unium est exclusio alterum*. The force of that maxim was stated in *United States vs. Burnes*, 222 U. S. 513, 519, as follows:

"The maxim invoked expresses a rule of construction, not of substantive law, and serves only as an aid in discovering legislative intent when that is not otherwise manifest. In such instances it is of deciding importance; in others, not."

The principle invoked is of such universal application that it is needless to incumber this memorandum of authorities with other cases on the point. Applying the maxim, it appears that the people of the state of Washington adopted as a rule on the question of real estate ownership, use or possession in this state, a rule as laid down in the constitutional provision. To argue, therefore, that anything not in the express terms of the constitutional provision is not limited to the legislature, is to disregard the maxim, contrary to established authority. It is submitted, therefore, the constitutional provision established a complete rule and that the legislature is powerless to enact any law respecting ownership, possession or use of real estate, except those police power measures which all legislatures may enact with reference to all real estate, but not with respect to a particular owner or class of owners.

Aliens are within the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as fully as citizens, subject only to the exceptions hereinafter mentioned.

Yick Wo vs. Hopkins, 118 U. S. 356, 369; *Wong Wing vs. U. S.*, 163 U. S. 228, 242; *U. S. vs. Wong Kim Ark*, 169 U. S. 649, 695; *Truax vs. Raich*, 239 U. S. 33, 39.

The exceptions above mentioned are the following:

1. The various states of the United States may lawfully prohibit alien ownership of land within their respective borders, there being no treaty to the contrary.

Chirac vs. Chirac, 2 Wheat. 259, 272; *Hauenstein vs. Lynham*, 100 U. S. 483, 484; *DeVaughan vs. Hutchinson*, 165 U. S. 566, 570; *Clarke vs. Clarke*, 178 U. S. 186; *Blythe vs. Hinckley*, 180 U. S. 333.

2. The right to take the common property of the state, such as game and fish, may be limited to citizens of the state.

McCready vs. Virginia, 94 U. S. 391.

3. The state or any municipality therein, there being no statute to the contrary, may refuse to employ any but citizens on public work.

Atkins vs. Kansas, 191 U. S. 207; *Heim vs. McCall*, 239 U. S. 175.

4. Of course, the right of franchise may be limited to citizens of the respective states.

The right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure.

Butchers' Union, etc., Co. vs. Crescent City, etc., 111 U. S. 746, 762; *Barbier vs. Connolly*, 113 U. S. 27, 31; *Yick Wo vs. Hopkins*, 118 U. S. 356, 369; *Allgeyer vs. Louisiana*, 165 U. S. 578, 589; *Coppage vs. Kansas*, 236 U. S. 1, 14; *Truax vs. Raich*, 239 U. S. 33, 41.

If a state constitution or statute conflicts with a treaty then the constitution and statute are either void or are at least suspended during the existence of the treaty.

Ware vs. Hylton, 3 Dall. 199; *Chirac vs. Chirac*, 2 Wheat. 259; *Orr vs. Hodgson*, 4 Wheat. 453; *U. S. vs. Lariviere* (1856), 93 U. S. 188; *Hauenstein vs. Lynham*, 100 U. S. 483, 488; *Missouri vs. Holland*, 252 U. S. 416, 434; *In re Stixrud's Estate*, 58 Wash. 339; *State ex rel. Tanner vs. Staeheli*, 12 Wash. Dec. 288.

Where a treaty admits of two constructions, one restricting as to the right which may be claimed under it, and the other liberal, the latter is to be preferred.

Shanks vs. Dupont, 3 Pet. 242; *U. S. vs. Reynes*, 9 Haw. 127; *Hauenstein vs. Lynham*, 100 U. S. 473, 488; *Chew Heong vs. U. S.*, 112 U. S. 536; *DeGeofray vs. Riggs*, 133 U. S. 258; *U. S. vs. Texas*, 162 U. S. 1; *Tucker vs. Alexandroff*, 183 U. S. 424; *Sullivan vs. Kidd*, Adv. Ops. Oct. Term, 1920; *In re Stixrud's Estate*, 58 Wash. 339, 348, 353.

In the *Stixrud* case (*supra*) the supreme court of the State of Washington fully approved the foregoing rule as to the construction of a treaty, to the effect even of holding that the words "goods and effects" in the treaty between the United States and Norway and Sweden included not only personal property but real property as well.

Article 1 of the existing treaty between Japan and the United States is as follows:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and

security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

"They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions."

The question is, then, what is meant by the term "commercial purposes" and by the further term "incident to or necessary for trade" as used in article 1 of the treaty. The court will bear in mind that in the bill of complaint it is alleged that the plaintiff Nakatsuka is engaged in the business of trading, wholesale and retail, in farm products, and, instead of purchasing such farm products he has produced and desired to produce his own farm products for the purpose of selling them in the wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing such farm products for such trade he will be prevented from engaging in trade and the incidents to trade as he is authorized to do under the above treaty. Suppose an alien corporation principally engaged in the wholesale and retail sale of hardware products had leased buildings and real estate for that purpose and, on the leased premises, should manufacture a part or the majority of the articles so sold. Could it be said that the manufacture of such articles was not for commercial purposes, or was not incident to or necessary for trade? It is submitted that such a contention would be untenable. To put the case at bar, can it be successfully contended that the treaty accords only the right to buy from the producer the farm products in the wholesale and retail sale of which the alien plaintiff has been and is engaged and in which he desires to engage, and that producing himself the farm products is not a commercial purpose, and is not incident to or necessary for trade? We submit that the treaty protects the alien plaintiff in the claim that he has a right to produce himself the articles of sale and to lease the necessary land therefor. The court will bear in mind the above rule of liberal construction of treaty provisions to include rights claimed, and we submit that upon the application of such rule it necessarily follows that the alien plaintiff has a right to lease the land in question for a reasonable term, that is, a term sufficiently short as to have no element of ownership, direct or indirect, in it.

Parenthetically we may call the court's attention to the fact that Terrace has the right to urge and rely on the treaty provisions.

Buchanan vs. Warley, 245 U. S. 60, 73.

In the case of *Schooner Nymph*, 1 Summ. (U. S.) 517, in interpreting the word *trade* as used in a statute declaring that if any licensed vessel or ship "shall be employed in any other *trade* than that for which she is licensed" she shall be forfeited, Story, J., said: "The word 'trade' is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit or gain or a livelihood, not in the liberal arts or in the learned professions it is constantly called a *trade*."

In that case codfishing was held to be a trade.

Subdivision (a), section 1, of the act subjects to the pains and penalties of the act every alien except an alien which the subdivision excludes from the meaning of the word "alien."

The language of the subdivision, so far as is pertinent to this case, is as follows:

I.

"(a) 'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens. * * *"

The provisions of the naturalization laws of the United States only apply—

"to aliens being free white persons, and to aliens of African nativity and to persons of African descent."

Revised Stats., sec. 2169.

Subdivision (a), if read as the legislature intended in law it should read, and if by incorporating into it the naturalization law, would read as follows:

"'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, if such alien be a free white person, or of African nativity or African descent, but does include all other aliens."

II.

Under the common law and under the law of Washington, a purchase or lease of land by an alien of every nationality vests in the alien an estate in fee or for a term, subject only to the forfeiture of such estate by the state on office found.

Abrams vs. The State of Washington, 45 Wash. 327; *State ex rel. Atkinson vs. World Real Estate Commerce Co.*, 46 Wash. 104; *Prentice vs. How*, 84 Wash. 136; *Fairfax's Devisees vs. Hunter's Lessee*, 7 Cranch. 619; *In re Stirrud's Estate*, 58 Wash. 339.

III.

Where an estate vests, to which is attached the obligation of performance of a condition subsequent, and such performance becomes impossible without fault on the part of the grantee, the estate is freed from the condition.

Ruling Case Law, vol. 8, p. 1107, sec. 167; Ruling Case Law, vol. 28, p. 320, sec. 308.

IV.

The condition in the act under consideration, requiring a Japanese to declare his intention to become a citizen of the United States, is the requiring of an impossible condition, and, therefore, the Japanese is by law freed from the obligation to comply.

Endlich on Interpretation of Statutes, sec. 441.

"A command which cannot be obeyed is not law. Therefore, possible obedience is an inseparable element in every law without which it cannot exist. So that, though a command should be such as could, in general, be carried out, if in a particular instance it became impossible, it would not be lawful for that instance."

Bishop, Non-contract Law, sec. 156.

"Upon another question, also, the authorities agree, namely, that when the law creates a contract or otherwise casts on one a duty, he is excused if the thing becomes, in the absolute sense we are considering, impossible."

Bishop on Contracts, sec. 595.

V.

The act under consideration, by requiring Japanese, in order to escape its penalties and the forfeiture of their estate, to do the impossible, while

requiring of all European aliens only compliance with the possible, conflicts with the Fourteenth Amendment to the Constitution of the United States and is void.

In re Ah Chong, 2 Fed. 733; *In re Tiburcio Parrott*, 1 Fed. 481.

VI.

The act is void under the Fourteenth Amendment because it deprives both the alien plaintiff and the citizen plaintiff in this case of their property without due process of law, and denies them the equal protection of the law.

Buchannan vs. Warley, 245 U. S. 60, 76; *Sunday Lake Iron Co. vs. Wakefield*, 247 U. S. 350, 352; *Yick Wo vs. Hopkins*, 118 U. S. 356; *Truax vs. Raich*, 239 U. S. 33, 39, 219 Fed. 273; *Barbier vs. Connolly*, 113 U. S. 27; *Allgeyer vs. Louisiana*, 165 U. S. 578, 589; *McFarland vs. American Sugar Co.*, 241 U. S. 79; *Cotting vs. Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly vs. Union Sewer Pipe Co.*, 184 U. S. 540; *The Slaughterhouse Cases*, 16 Wall. 36; *Strauder vs. West Virginia*, 100 U. S. 303; Revised Statutes, U. S., sec. 1977; *Carey vs. City of Atlanta*, 143 Ga. 192; *State vs. Julow*, 129 Mo. 163, 29 L. R. A. 257.

VII.

As the entire act applies only to the aliens subjected to its provisions and excludes all other aliens from its provisions, by reason of the language of subdivision (a), section 1, the entire act is invalid.

Butts vs. Merchants and Miners' Transp. Co., 230 U. S. 126; *McFarland vs. American Sugar Company*, 241 U. S. 79.

CHARACTER OF LEASEHOLD AS PERSONALTY OR REALTY.

The interest of a tenant in a term for years is deemed at common law personal property as distinguished from real estate.

16 R. C. L. p. 536, cases cited Note 3.

"Leases for years," says Taylor, "are considered chattel interests arising out of a contract between the parties and pass only a transient interest in the land, which is not a freehold and might originally be made at common law by parol for any certain period."

Taylor on Landlord and Tenant, 6th Ed. p. 22; *Mosher vs. Redding*, 12 Ms. 482.

"Two requisites," says Blackstone, "were necessary to make a fief or feud. (1) Duration as to time; (2) immobility as to place," and adds, "whatever was not a feud was accounted a chattel."

"Chattel realty," says the commentator, "are such as concern or savor of the realty, including term for years, and are called real chattels, being interest arising out of or being annexed to real estate of which they have that quality, to wit, immobility but within the quality of indeterminate duration, the want of which constitutes them the chattels."

2 Pl. 386; 2 Kent Com. 12 Ed. 342; Coke Littleton, 46, 118 b; *Lycoming Fire Insurance Co. vs. Haven*, 95 U. S. 242, 24 U. S. (1 Ed.) 473.

"By the common law a leasehold interest in land is personal property."

Freeman vs. Dawson, 110 U. S. 264, 28 U. S. (1 Ed.) 141; *Crowe vs. Wilson*, 65 Md. 479, 57 Am. Rep. 343.

"A leasehold interest is not real estate by merely a chattel realty which is personal property."

Townsend vs. Boyd, 217 Pa. 386, 12 L. R. A. (N. S.) 1148, 1151; *Dellsell vs. Lynch*, 4 Watts & S. 255; *Williams vs. Downing*, 114 Pa. 381, 7 Atl. 154; *Iffland vs. Tebuls*, 10 Wash. 451.

(2) AMENDED COMPLAINT (INJUNCTION PROCEDURE).

To the Honorable the Judges of the District Court of the United States for the Western District of Washington, sitting in equity:

Frank Terrace and Elizabeth Terrace, his wife, citizens of the United States and of the State of Washington, and residents of the Western District of Washington, and N. Nakatsuka, a subject of the Emperor of Japan, born in the Empire of Japan, of Japanese parents, and a resident of the Western District of Washington, bring their amended bill of complaint against Lindsay L. Thompson, as attorney-general of the State of Washington, a citizen of the United States and of the State of Washington, and a resident of the Southern Division of the Western District of Washington.

And thereupon the plaintiffs bring their amended complaint and show unto your Honors as follows:

I.

That plaintiffs, suing on behalf of themselves and others similarly situated, bring this amended bill of complaint against said Lindsay L. Thompson as the duly elected, qualified and acting attorney-general of the State of Washington.

II.

That the value of the matter in dispute herein between each plaintiff and the defendant exceeds the sum of \$3,000, exclusive of interest and costs.

The jurisdiction of this honorable court is invoked because of and by reason of the federal question involved in this suit and equity jurisdiction, and because plaintiffs have no adequate remedy at law.

III.

That the plaintiffs Terrace are now, and for a number of years last past have been, the owners of the following described real estate lying and being in King County, State of Washington, to-wit:

The southwest quarter (SW $\frac{1}{4}$) of the southeast quarter (SE $\frac{1}{4}$) of Lot five (5) of Section thirty-six (36), Township twenty-three (23) north, Range four (4) east, of the Willamette Meridian.

That said real estate is particularly adapted to raising vegetables, and for a number of years last past has been, and is now being devoted to that and agricultural purposes. That the plaintiff, N. Nakatsuka, is a capable farmer and is in all respects a desirable person to become a tenant of said real estate. That the plaintiffs Terrace desire to lease said real estate to the plaintiff N. Nakatsuka for the period of five years, and the plaintiff N. Nakatsuka desires to accept such lease, and but for the Act of the State of Washington, hereinafter specifically mentioned, the plaintiffs would execute a lease of said real estate from the plaintiffs Terrace to the plaintiff N. Nakatsuka for a period of five years from this date. N. Nakatsuka, in addition to being a capable farmer, is engaged in the business of trading, wholesale and retail, in farm products, and shipping the same in intrastate, interstate and foreign commerce, and, instead of purchasing such farm products, he has produced, and desires to continue to produce, his own farm products for the purpose of selling them in the said wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing such farm products for such trade he will be prevented from

engaging in trade and the incidents to trade as he is authorized to do under the treaty hereinafter mentioned.

IV.

That there was enacted by the legislature of the State of Washington, in the year 1921, an act entitled, "An Act relating to the rights and disabilities of aliens with respect to lands, providing for forfeitures in certain cases, prescribing penalties, and repealing sections 135 and 136 of Pierce's Code, 8775 and 8776 of Remington & Ballinger's Annotated Codes and Statutes of Washington," approved March 8, 1921.

V.

That the defendant Lindsay L. Thompson, as the attorney-general of the State of Washington, has threatened to, and will enforce said act in each and all of its terms, and the whole thereof, and particularly against these plaintiffs in the event that they enter into a lease of said real estate for the purpose and terms aforesaid, will forfeit or attempt to forfeit such leasehold interest to the State of Washington, and will prosecute these plaintiffs criminally for an alleged violation of said act above mentioned, and the said act is in its terms so drastic, and the penalties attached to a violation of the terms thereof are so great, that neither of these plaintiffs may make or execute such lease, even for the purpose of testing the constitutionality and validity of said act of the legislature above mentioned, and unless this court shall determine the validity of said act in this proceeding, said plaintiffs will be compelled to submit to said act whether the same be valid or invalid, and thereby be deprived of their property without due process of law and denied the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States, and the plaintiffs have no adequate remedy at law, but are relievable only in a court of equity.

VI.

That said act of the legislature of the State of Washington above mentioned is in violation of and contrary to section 33 of article II of the constitution of the State of Washington; and protection of the provisions of said section are hereby expressly invoked by the plaintiffs and each of them.

VII.

That the said act of the legislature of the State of Washington, above mentioned, is in violation of and contrary to the existing treaty between the United States of America and the Empire of Japan, and particularly article 1 thereof, in that it prohibits subjects of the Emperor of Japan from leasing land for residential and commercial purposes, and from doing everything incident to or necessary for trade upon the same terms as native citizens of the United States of America; and the protection of said treaty and of article 1 thereof is especially invoked by these plaintiffs and each of them.

VIII.

That said act of the legislature of the State of Washington is in contravention of section 3 of article I of the constitution of the State of Washington in that it deprives these plaintiffs of property without due process of law; is in contravention of section 12 of article I of the constitution of the State of Washington in that it grants privileges or immunities which upon the same terms do not equally belong to all citizens, and protection of the provisions of said sections of article I of the constitution of the State of Washington is hereby specially invoked by the plaintiffs and each of them.

IX.

That said act of the legislature of the State of Washington, above mentioned, is in contravention of section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiffs of property without due process of law and denies to them, and each of them, the equal protection of the law; and protection of said section 1 of the Fourteenth Amendment to the Constitution of the United States is hereby specially invoked by the plaintiffs and each of them.

X.

That if the plaintiffs are not permitted to enter into a lease of said real estate, as aforesaid, and on the terms above mentioned, a large and irreparable loss will occur to them, and each of them, and the plaintiffs have no adequate remedy at law but are relievable only in a court of equity.

Inasmuch as plaintiffs, and each of them, have no adequate remedy in the premises by the strict rules of law and can obtain relief only in a court of equity where matters and things of the kind and character hereinbefore stated are perfectly cognizable and relievable, and to the end that they, and each of them, may have relief which they, and each of them, can only obtain in a court of equity, they and each of them pray:

1. That Lindsay L. Thompson, as attorney-general of the State of Washington, be enjoined and restrained, provisionally, preliminarily and perpetually, by the order and injunction of this court from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceedings at law or in equity for the purpose of enforcing said act of the legislature of the State of Washington, above mentioned, against these plaintiffs, or either of them, upon their executing or attempting to execute a lease of real estate above mentioned for the above mentioned term, or any other person, or corporation similarly situated, and from causing the plaintiffs or either of them, or any other person or corporation similarly situated, to be arrested for violating the terms and provisions of said act, and from taking any other action in any other manner to prevent or interfere with the complainants, or either of them, from executing and delivering such lease on said real estate, and that an order to show cause issue herein upon application of the plaintiffs herein directed to the above named defendant, requiring him to show cause why a temporary injunction should not issue as prayed for herein, and that a temporary restraining order may issue pending the hearing of said show cause order.

2. That upon the hearing the aforesaid act passed by the legislature of the State of Washington be declared to be unconstitutional, illegal and void and that a perpetual injunction be issued restraining the enforcement thereof as hereinabove prayed for.

3. That a writ of subpoena may issue to defendant requiring him to answer this bill of complaint fully and truthfully, but not on oath, an oath being hereby waived, and that further and general relief be granted as the nature of plaintiffs' case may require or to equity may seem meet.

(3) DECISION OF THE COURT—MEMORANDUM DECISION ON APPLICATION FOR A TEMPORARY INJUNCTION.

CUSHMAN, D. J.:

The bill alleges that the complainants Terrace, owners of certain lands in this district, desire to lease such lands to the complainant Nakatsuka, a subject of Japan, who desires to lease them from them, and that he is engaged in farming and trading, wholesale and retail, in farm products;

that such lease will be prevented by defendant's enforcement of Chapter 50, Laws of Washington, 1921, commonly known as the "Alien Land Bill." It is alleged that the result will be that the complainant Nakatsuka "if he is prevented from leasing land for the purpose of producing such farm products for such trade, * * * will be prevented from engaging in trade and the incidents to trade as he is authorized to do under the Treaty herein-after mentioned."

It is alleged that the act in question is contrary to the Fourteenth Amendment to the Constitution of the United States; to article 1 of the Treaty with Japan, and section 33, article II, of the constitution of the State of Washington.

The act provides, not only for the forfeiture of the lands affected, but that whoever conveys lands to an alien shall be guilty of a gross misdemeanor, the punishment for which may be a year's imprisonment in jail. This, we conclude, is such a severe punishment as to prevent persons affected from resorting to the courts to determine the validity of the statute in question, and that, therefore, the remedy at law is not sufficient. (*Ex parte Young*, 209 U. S. 123.) The remedy at law is also inadequate as to the complainant Nakatsuka. (*Raich v. Truax*, 219 Fed. 273, at 283.)

Rast vs. Van Deman & Lewis (240 U. S. 355, 342, 368) and *Tanner vs. Little* (240 U. S. 369) have no application. In those cases the statute attacked required the payment of a license fee. In such cases an adequate remedy at law exists because, after payment of the license tax, suit can be had for its repayment. For the same reason *McCormack Bros. Co. vs. Tacoma* (201 Fed. 374) is inapplicable, as well as for the further reason that the plaintiff in such case was a corporation which could not be imprisoned for failure to pay the license, being only liable for the payment of a small fine. In such a case the remedy at law would not, necessarily, be inadequate.

The constitution of the State of Washington provides:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: Provided, That the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition." (Sec. 33, art. II.)

The act in question defines "land" as follows:

"'Land' does not include lands containing valuable deposits of minerals, metals, iron, coal or fire clay or the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom, but does include every other kind of land and every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof except a mortgage and except a right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen." (Sec. 1 [b], Laws 1921, chap. 50, p. 156.)

Under the foregoing language, it is not necessary to consider the question of whether at common law a leasehold interest is personalty or realty, for

without doubt, by the foregoing, it is intended to include leases of agricultural lands.

The act also provides:

"'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens." (Sec. 1 [a].)

There is nothing in the bill as to the length of time for which complainant Nakatsuka desires to lease the lands, or for which it will be necessary to lease them.

There is no allegation in the bill as to whether the complainant Nakatsuka has, or has not declared his intention to become a citizen of the United States. All that is disclosed by the bill touching his eligibility for citizenship is the allegation that he is a subject of the Emperor of Japan. There is a possibility that, included among the subjects of the Emperor, there are Caucasians, or "white persons."

Congress has, by section 2169 R. S. (U. S. Comp. Stat. 4358), limited the right of naturalization to those aliens being "free white persons" and to "aliens of African nativity and to persons of African descent."

We feel justified in considering the bill as though it were alleged that Nakatsuka had the prevailing ethnological characteristics of his fellow-subjects, and that he had not declared his intention to become a citizen. He is, therefore, not a "white person" within the meaning of section 2169 R. S. (U. S. Comp. Stat., sec. 4358).

In re Young, 198 Fed. 175; *In re Saito*, 62 Fed. 126; *In re Geronimo Para*, 269 Fed. 643.

Nakatsuka not being eligible to citizenship under the law as it now stands, even if such complainant had filed, or sought to file a declaration of intention to become a citizen, he could not—considering the present uniformity in the decisions—fairly be said to have done so "in good faith."

A state may lawfully prohibit aliens acquiring land within its boundaries, if there is no treaty to the contrary.

Chirac vs. Chirac, 2 Wheat. 259, 272; *Hauenstein vs. Lynham*, 100 U. S. 483, 484; *DeVaughan vs. Hutchinson*, 165 U. S. 566, at 570; *Clarke vs. Clarke*, 178 U. S. 186; *Blythe vs. Hinckley*, 180 U. S. 333.

If a state constitution or statute conflicts with the treaty, it is either void or suspended during the existence of the treaty, for by article VI of the Constitution of the United States it is provided:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, *under the authority of the United States, shall be the supreme law of the land*; and the judges in every state shall be bound thereby, *anything in the constitution or laws of any state to the contrary notwithstanding.*"

Martin vs. Hunter, 1 Wheat. 304; *Carneal vs. Banks*, 10 Wheat. 181; *Hopkirk vs. Bell*, 3 Cranch. 454; *Goefrey vs. Riggs*, 133 U. S. 258; *Ware vs. Hylton*, 3 Dall. 199; *Chirac vs. Chirac*, 2 Wheat. 259; *Hauenstein vs. Lynham*, 100 U. S. 483, at 488; *Missouri vs. Holland*, 252 U. S. 416, at 434; *In re Stixrud's Estate*, 58 Wash. 339; *State ex rel. Tanner vs. Staehli*, 12 Wash. Dec. 288.

This brings us to the question of the terms of the treaty with Japan with which the act is alleged by the bill to conflict.

The only portion of the treaty material to be considered is that part of article I providing:

"The citizens and subjects of each of the high contracting parties shall have liberty to enter, travel, and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established." (37 Stat. at L., p. 1504.)

The lasting impression created by the foregoing language is that it was intended to withhold the right to own or lease agricultural lands. This impression becomes fixed upon consideration of the fact that this, in substance, was true at common law. (Coke upon Littleton, Book 12 b.)

A law of California (Laws of 1913, p. 113) is, in its general purport, similar to the act here in question, although by section 2 of that act aliens were permitted to lease lands for a term of not over three years.

A controversy arose concerning the validity under the treaty of the California act between the Department of Foreign Affairs for the Empire of Japan and our own Secretary of State. In the progress of the exchange of views between the officials so representing the two Governments, the Secretary of State found the act not to violate the treaty and, in part, said:

"This treaty was based upon a draft presented by the Imperial Government. In article I of this draft there is found the following clause:

"s. They (the citizens or subjects of the contracting parties) shall be permitted to own or hire and occupy the houses, manufactories, warehouses, shops and premises which may be necessary for them, and to lease land for residential, commercial, industrial, manufacturing and other lawful purposes."

"It will be observed that in this clause, which was intended to deal with the subject of real property, there is no reference to the ownership of land. The reason of this omission is understood to be that the Imperial Government desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation.

"In the treaty as signed the rights of the citizens and subjects of the contracting parties with reference to real property were specifically dealt with (art. I) in the stipulation that they should have liberty 'to own or lease and occupy houses, manufactories, warehouses and shops' and 'to lease land for residential and commercial purposes.' *It thus appears that the reciprocal right to lease land was confined to 'residential and commercial purposes,' and that the phrases 'industrial' and 'other lawful purposes,' which would have included the leasing of agricultural lands, were omitted.*

"The question of the ownership of land was, in pursuance of the desire of the Japanese Government, dealt with by an exchange of notes in which it was acknowledged and agreed that this question should be regulated in each country by the local law and that the law applicable in the United States in this regard was that of the respective states. This clearly appears from the note of Baron Uchida to Mr. Knox of February 21, 1911, in which, in reply to an inquiry of the latter on the subject Baron Uchida said:

"In return for the rights of land ownership which are granted Japanese by the laws of the various states of the United States (of which, I may observe, there are now about thirty) the Imperial Government will by liberal interpretation of the law be prepared to grant land ownership to American citizens from all the states, reserving for the future, however, the right of

maintaining the condition of reciprocity with respect to the separate states.'

"In quoting the foregoing passage I have italicized the last clause for the purpose of calling special attention to the fact that the contracting parties distinctly understood that in conformity with the express declaration of the Imperial Japanese Ambassador, the right was reserved to maintain as to land ownership the condition of reciprocity in the sense that citizens of the United States, coming from states in which Japanese might not be permitted to own land, were to be excluded from the reciprocal privilege in Japan.

"From what has been pointed out it appears to result first, that the California statute, in extending to aliens not eligible to citizenship of the United States the right to lease lands in that state for agricultural purposes for a term not exceeding three years, may be held to go beyond the measure of privilege established in the treaty, which does not grant *THE RIGHT TO LEASE AGRICULTURAL LANDS TO ALL*; and, secondly, that so far as the statute may abridge the right of such aliens to own lands within the states, the right has been reserved by the Imperial Government to act upon the principle of exact reciprocity with respect to citizens of the individual states. In a word, the measure of privilege and the measure of satisfaction for its denial were perfectly understood and accepted." (Letter of William Jennings Bryan to Viscount Chinda, July 16, 1912, "Annex No. 7," pp. 17 and 18, "Controversy—United States and Japan—California Question.")

(Congressional Library, JV 6888 C2 J4.)

In the case of *Sullivan vs. Kidd*, decided January 3, 1921 (No. 6 U. S. Supreme Court Advance Opinions, p. 192, at 195), the court said:

"While the question of the construction of treaties is judicial in its nature, and the courts, when called upon to act, should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the executive department of the government, charged with the supervision of our foreign relations, should be given much weight."

A clear intention being shown not to supersede, in the particular now in question, the state's authority to regulate the rights of title and possession in lands within its boundaries, that intent may not be defeated by the claim now made that complainant Nakatsuka's business of farming is incidental to his business as a wholesale and retail trader in farm products, for there is no more reason for considering farming an incident of the latter than for considering the latter an incident of the former.

The language of the treaty is:

"and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects. * * *" (37 Stat. at L., 1504.)

In the most liberal construction of this language that may be indulged in, it cannot fairly be said that truck farming is incidental to trading, either wholesale or retail, in the products of a farm, any more than conducting a sheep ranch or growing mulberry trees is incidental to the dry goods trade.

Kidd vs. Pearson, 128 U. S. 1; *U. S. vs. E. C. Knight Co.*, 156 U. S. 1; *Joyce vs. Auten*, 179 U. S. 591, at 594; *Capital City Dairy Co. vs. Ohio*, 183 U. S. 238, 245.

Buchanan vs. Warley (245 U. S. 60, at 73) is, no doubt, authority supporting the right of Terrace to invoke this treaty provision, were the act in conflict with the treaty, but it is not.

Aliens may only come to the United States upon such conditions and terms as our government sees fit to impose. By the treaty, the rights to lease real estate in the United States for agricultural purposes is withheld. (*Hauenstein vs. Lynham*, 100 U. S. 483.) It might have been, by Congress-

sional enactment, prohibited (*U. S. vs. Repentigny*, 72 U. S. 211); but, by the treaty, it was neither granted nor prohibited. It was merely withheld, which left the state free to prohibit it. The United States might have excluded all of the subjects of Japan; but rather chose to admit them, withholding the right to lease agricultural lands, thereby recognizing the right of the state to prohibit it, or regulate it. That purpose is not to be defeated by allowing the citizen land owner the broad construction of his rights under the Fourteenth Amendment for which contention is made. The citizen land-owner may sell to whom he pleases; but he may not sell to one who is rightfully forbidden the right to buy.

That the Fourteenth Amendment was not intended as an instrument to accomplish the end here sought, is shown by legislation early enacted by Congress to give effect to the Fourteenth Amendment, the primary purpose of which was the enfranchisement of the slaves.

Slaughter-House Cases, 16 Wall. (83 U. S.) 36; *Buchanan vs. Warley*, 245 U. S. 60, at 76 and 78.

By the amendment, members of the enfranchised race were made citizens of the nation and state of their residence, a privilege at present denied to the subjects of Japan.

In giving legislative aid to these constitutional provisions Congress enacted in 1866, c. 31, sec. 1, 14 Stat. 27 (Rev. Stats., sec. 1978), that:

"All citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

And in 1870, by c. 114, sec. 16, 16 Stats. 144 (Rev. Stats., sec. 1977) that:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make *and* enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other." (*Buchanan vs. Warley*, 245 U. S. 60, at 78.) (Italics those of this court.)

These statutes show that Congress then understood the Fourteenth Amendment did not forbid the state the right to deny ownership of lands within its boundaries to aliens.

The act of 1897 (U. S. Comp. Stats., secs. 3490-3495), prohibiting the ownership of land by aliens in the territories of the United States, provides that the denial of such rights shall not apply to any alien who shall become a bona fide resident of the United States. By section 3491, Comp. Stats., Congress gave all alien bona fide residents, including the Japanese, rights denied by the act in question; but it is limited to the territories and has no application in the states.

The court in *Buchanan vs. Warley* (*supra*), holding the state statute unconstitutional, accentuated the fact that the discrimination of the statute was "solely because of color" and, again, "this interdict is based wholly upon color, simply that and nothing more."

In the course of the controversy between the State Department and the Minister for Foreign Affairs of the Empire of Japan over the validity of the California statute under the treaty already mentioned, the legal adviser for the State Department said:

"* * * the statute contains no discrimination against Japanese as such, but applies equally to all aliens not eligible to citizenship." ("Annex No. 8," 24, "Aide Memoire, Wash., July 18, 1913," "Controversy—United States and Japan—California Question.")

Still less does the Washington Act discriminate against the Japanese, for it provides that

"'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States."

The prohibition by this definition is made applicable to all aliens, both those eligible, and those not eligible to citizenship, provided that they have not declared their intention to become citizens. To this extent, the present suit is to be distinguished from *In re Ah Chong* (2 Fed. 733).

In the latter case, Judge Sawyer held invalid a California law providing:

"* * * All aliens incapable of becoming electors of this state are hereby prohibited from fishing, or taking any fish, lobster, shrimps, or shell-fish of any kind, for the purpose of selling or giving to another person to sell. Every violation of the provisions of this act shall be a misdemeanor, punishable upon conviction by a fine of not less than \$25, or by imprisonment in the county jail for a period of not less than thirty days." (At p. 734.)

Of this act the court says:

"* * * To exclude the Chinaman from fishing in the waters of the state, therefore, while the Germans, Italians, Englishmen, and Irishmen, who otherwise stand upon the same footing, are permitted to fish *ad libitum*, without price, charge, let, or hindrance, is to prevent him from enjoying the same privileges as are 'enjoyed by the citizens or subjects of the most favored nation'; and to punish him criminally for fishing in the waters of the state, while all aliens of the Caucasian race are permitted to fish freely in the same waters with impunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions 'as are enjoyed by the citizens or subjects of the most favored nation'; and such discriminations are in violation of articles 5 and 6 of the treaty with China, cited in full in Parrott's case. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privilege it must permit all others to enjoy, upon like terms, the same privileges, whose governments have treaties, securing to them the enjoyment of all privileges granted to the most favored nations.

"The Fourteenth Amendment of the National Constitution provides that 'no state shall * * * deny to any person within its jurisdiction the equal protection of the laws.' To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected, and it is to deny to them the equal protection of the laws, contrary to these provisions of the Constitution." (At pp. 736 and 738.)

The present case is not only to be distinguished from the Chong case because of the fact that the present law is made applicable to all aliens and there is no punishment by imprisonment or a fine of the alien grantee of lands, but the case is to be further distinguished because of the fact that the treaty with Japan does not contain, as to land ownership, the "most favored nation" clause or any language of such import.

The fourteenth article of the treaty contains the general favored nation clause:

"Except as otherwise expressly provided in this treaty, the high contracting parties agree that, in all that concerns commerce and navigation,

any privilege, favor or immunity which either contracting party has actually granted, or may hereafter grant, to the citizens or subjects of any other state shall be extended to the citizens or subjects of the other contracting party gratuitously, if the concession in favor of that other state shall have been gratuitous, and on the same or equivalent conditions, if the concession shall have been conditional." (37 Stats. at L., 1507.) (The italics are those of this court.)

In view of the limitation of this clause to "all that concerns commerce and navigation, it is clear that the privileges secured by article XIV do not apply to the limited rights granted by article I, already quoted, in which the right to lease land is limited to that for residential and commercial purposes.

Neither *Guinn and Beal vs. United States* (238 U. S. 347) nor *Myers vs. Anderson* (238 U. S. 368) have any application to the present controversy, for, if it be granted that the present law is aimed primarily at the so-called yellow, or brown races of the Orient, the result is the same. There is no restriction upon the authority of Congress to discriminate in the matter of the eligibility of an alien to become a citizen because of color. The Fifteenth Amendment provides that the right of a *citizen* of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude. The Fourteenth Amendment made the negroes citizens.

It is obvious that the objection on the part of Congress is not due to color, as color, but only to color as an evidence of a type of civilization which it characterizes. The yellow or brown racial color is the hallmark of the Oriental despotisms, or was at the time the original naturalization law was enacted. It was deemed that the subjects of those despotisms, with their fixed and ingrained pride in the type of their civilization, which works for its welfare by subordinating the individual to the personal authority of the sovereign, as the embodiment of the state, were not fitted and suited to make for the success of a republican form of government. Hence, they were denied citizenship. (*In re Ah Yup*, Case No. 104, Fed. Cases, vol. 1, p. 223.) It is this disqualification put upon them by the Federal Government to which the state objects and not their color, although the Federal Government may have made their race-color the irrefutable evidence of disqualification for citizenship.

Congress, in withholding the right to citizenship from these Oriental races, no doubt recognized, as statesmen long have done, that it was of the essence of its duty to insure the perpetuation of our own type of civilization. It has been well said:

"The last two generations have seen an enormous change in the vision of life, wider and deeper than it has ever been comprehended before, and as our knowledge has grown, the narrow utilitarianism has shriveled off us and we see the use and value and nobility of lands and ages far outside the scope of our forefathers. * * * We do not look on them as wrong in differing from ourselves. We begin to understand that they are each adapted to the country and people to which they belong and we are not so certain that we can improve everybody by trying to make them imitate us."

The sympathetic and temperate view here expressed, no doubt, should restrain us from forcing our civilization upon alien types. Yet it lessens no jot or tittle the duty of the court to hold impregnable the barrier erected by Congress to preserve, in its purity, our own type of civilization. The more homogenous its parts, the more perfect the union. It may be that the changes wrought in the Orient in the last fifty or seventy-five years now warrant a different policy; but there is no law or treaty that yet has said "the

twain shall meet," or that, if citizenship be accorded these Orientals, the danger is past of our becoming a "mechanical medley of race fragments."

It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a Tower of Babel from which the tenants in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged.

This is no new thing. Tribal laws of the progenitors of the Anglo-Saxons, while still upon the continent, made an estate in lands, similar to a freehold, a prerequisite to a voice in the tribal government. The "free-necked-man", or "freeman" was synonymous with "freeholder." They were interdependent. A freeman had a vote in determining tribal policies and no one was a freeman without an estate in lands. (Green's History of the English People, book 1, chap. I, subhead, "The Land".) The recognition of this principle has run throughout the history of our race and its government.

Section 33, article II, of the constitution of the State of Washington provides:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, *under mortgage or in good faith in the ordinary course of justice in the collection of debts*; and all conveyances of lands hereafter made by any alien directly or in trust for such alien, shall be void; provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products thereof, every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition."

In *Oregon Mortgage Co. vs. Garsten's* (16 Wash. 165) it was held that an alien corporation which has taken a mortgage had the right to take a deed to the mortgaged land from the citizen mortgagor. As the above section excepts from its prohibition lands acquired "under mortgage or in good faith in the ordinary course of justice in the collection of debts," the court held that this exception did not require "a proceeding in court in the case of a mortgaged debt."

Goon Gan vs. Richardson (16 Wash. 373) was also an alien mortgage case in which the court held that the incapacity to own land can only be shown at the suit of the state.

State ex rel. Winston vs. Morrison (18 Wash. 664) was a suit in which the court held a ninety-nine year lease of real estate amounted to "ownership" as that word was used in the above quoted section.

In *State ex rel. Winston vs. The Hudson Land Co.* (19 Wash. 85) the holding was the same as to a forty-nine year lease.

In *Morrell vs. Superior Court* (33 Wash. 542) it was held that an alien corporation could not acquire real estate in the state of Washington by eminent domain.

Abrams vs. State of Washington (45 Wash. 327) held that the grantor in a deed of real estate to an alien could not recover the real estate; that the state, alone, could invoke rights on account of the disability of the grantee under the above section and that the alien having died before the state sought to escheat the land, the heirs, although themselves aliens, were entitled to inherit the lands, as well as citizens, under the express exception in the constitution, and that the state, to succeed, must proceed while the lands were still in possession of the alien wrongfully acquiring them.

In *State ex rel. Atkinson vs. World Real Estate Commercial Co.* (46 Wash. 104) it was held that, as the alien had conveyed the lands prior to the institution of proceedings to escheat, the state had lost such right.

Prentice vs. How (84 Wash. 136) was a decision to the same effect.

In *State ex rel. Tanner vs. Staeheli* (12 Wash. Dec. 288) decided September 3, 1920, the lands were escheated, although the alien had, at the time of acquiring the land, believed himself a citizen and had, after the proceedings of the state to escheat, filed his declaration to become a citizen.

State ex rel. Tanner vs. Rychen (13 Wash. Dec. 95), decided November 1, 1921, is a decision to the same effect.

From the foregoing, it is clear that the supreme court of Washington has held the common law only changed by this constitutional provision to the extent plainly expressed therein. The exceptions in the constitutional provision constitute a grant to the alien and, of course, are not subject to legislative change or limitation, at least by the state. But it does not follow because the constitution prohibits alien "ownership" of lands with certain exceptions, that, the constitution not having defined what shall constitute ownership, the legislature may not do so. The legislature is not bound to leave the courts to speculate upon that subject. In fact, the act of the legislature but follows the common law:

"But as to a lease for years, there is a diversity between a lease for years of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for years of lands, meadows, pastures, woods, and the like. For if he take a lease for years of lands, meadows, etc., upon office found, the king shall have it. (6) But of a house for habitation he may take a lease for years as incident to commerce; for without habitation he cannot merchandise or trade. (7) But if he depart, or relinquish the realm, the king shall have the lease. So it is if he die possessed thereof, neither his executors nor administrators shall have it, but the king; (8), for he had it only for habitation as necessary to his trade or traffique and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for years, albeit it were for his habitation (9); and so it is if he be an alien enemy. And all this was so resolved by the judges assembled together for that purpose in the case of Sir James Croft, Pasch. 29. of the raigne of Queen Elizabeth." (Coke upon Littleton, Book 12 b.)

The most the act in question does is no more than to invoke a rule of strict construction against the alien as to the meaning of the word "ownership" as appearing in the constitution.

We find the other questions raised as to the validity of this statute to be without merit.

The preliminary injunction is denied.

EDWARD E. CUSHMAN.

Concurring: GILBERT, C. J.
NETERER, D. J.

SECTION B.—IN THE SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1922. No. 302.

1. APPELLANT'S BRIEF, BY JAMES B. HOWE.
STATEMENT OF THE CASE.

This is an appeal from a decree of the United States District Court for the Western District of Washington, Southern Division, granting appellants' motion to dismiss, and dismissing the amended bill of complaint, in an action to restrain the enforcement of the Alien Land Act. The action involves the constitutionality of that act.

THE STATUTE AND CONSTITUTIONAL PROVISION.

"An Act relating to the rights and disabilities of aliens with respect to lands, providing for forfeitures in certain cases, prescribing penalties, and repealing sections 135 and 136 Pierce's Code, 8775 and 8776 of Remington & Ballinger's Annotated Codes and Statutes of Washington.

Be It Enacted by the Legislature of the State of Washington:

"Section 1. In this act, unless the context otherwise requires,

"(a) 'Alien' does not include an alien who had in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens;

"(b) 'Land' does not include lands containing valuable deposits of minerals, metals, iron, coal or fire clay or the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom, but does include every other kind of land and every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof except a mortgage and except a right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen;

"(c) 'Land' also includes any share or interest in a corporation or other organized group of persons deemed an alien in this act which has title to land either heretofore or hereafter acquired;

"(d) To 'own' means to have the legal or equitable title to or the right to any benefit of;

"(e) 'Title' includes every kind of legal or equitable title;

"(f) Ownership of or title to land acquired by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts, or acquired by a female citizen afterwards expatriated by marriage to an alien, is excluded;

"(g) 'Inheritance' includes devise;

"(h) 'Mortgage' includes every kind of lien on land;

"(i) A mortgage of land under which an alien is entitled before default to any control, possession, use or enjoyment of the land, is an absolute conveyance; and

"(j) 'Person' includes an individual, partnership, corporation, or any other organized group of persons.

"Sec. 2. An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to

and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state.

"Sec. 3. An alien is not qualified to be trustee under a will, executor, administrator or guardian, if any part of the estate is land. Provided, an alien now lawfully acting in any such capacity may continue for not more than two years.

"Sec. 4. If hereafter an alien acquires land by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts and, remaining an alien, held the same for more than twelve years from the date title was so acquired or control or possession taken, the land shall be forfeited to the state.

"Sec. 5. If an alien, claiming or holding under a mortgage, has control, possession, use or enjoyment of the mortgaged land, the obligation secured by the mortgage shall be deemed matured and the mortgage shall be foreclosed; and if the land be not sold under foreclosure within three years after the alien has obtained control, possession, use or enjoyment, the mortgage and the obligation thereby secured shall be forfeited to the state and shall be foreclosed for the use of the state.

"Sec. 6. Unless an alien who has declared his intention to become a citizen of the United States be admitted to citizenship within seven years after his declaration was made, it shall be presumed that he declared his intention in bad faith.

"Sec. 7. Whoever

"(a) Knowingly transfers or conveys land or title to land to an alien; or

"(b) Knowingly takes land or title to land in trust for an alien; or

"(c) Holding in trust for an alien land or title to land, either heretofore or hereafter acquired, fails for thirty days after acquiring knowledge or notice that he holds in trust for an alien to disclose the fact to the attorney-general or the prosecuting attorney of the county where the land is situated; or

"(d) Being an alien and having title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney-general or the prosecuting attorney of the county where the land is situated the nature and extent of his interest in and title to the land; or

"(e) Being an officer or agent of a corporation or other organized group of persons which has title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney-general or the prosecuting attorney of the county where the land is situated the nature and extent of the interest of persons not citizens of the United States in the corporation or other organized group of persons; or

"(f) Being an officer or agent of a corporation or other organized group of persons which holds in trust for an alien title to land or control or possession of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney-general or the prosecuting attorney of the county where the land is situated the nature and extent of the alien's interest in and title to the land; or

"(g) Wilfully counsels, aids or abets another in violating or evading this act,

"Is guilty of a gross misdemeanor.

"Sec. 8. It shall be the duty of the attorney-general and of the prosecuting attorneys of the several counties to enforce this act, and of the attorney general to direct and control its enforcement.

"Sec. 9. Property forfeited to the state by this act shall inure to the permanent common school fund and be managed and disposed of accordingly.

"Sec. 10. This act shall not impair any title or right heretofore or hereafter acquired from or derived through an alien in good faith and for value by a person not under an alien's disability.

"Sec. 11. If any section or provision of this act shall be adjudged to be invalid or unconstitutional such adjudication shall not affect the validity of the act as a whole or any section, provision, or part thereof not adjudged invalid or unconstitutional.

"Sec. 12. Sections 135 and 136, Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washington are hereby repealed.

"Passed the house February 25, 1921. Passed the senate March 2, 1921. Approved by the governor March 8, 1921." (Chapter 50, Laws of Washington, 1920-1921.)

Sections 8775 and 8776 of Remington & Ballinger's Annotated Codes and Statutes of Washington, mentioned in section 12 of the act, are as follows:

"Sec. 8775. Any alien, except such as by the laws of the United States are incapable of becoming citizens of the United States, may acquire and hold lands, or any right thereto or interest therein, by purchase, devise, or descent, and he may convey, mortgage, and devise the same, and if he shall die intestate, the same shall descend to his heirs; and in all cases such lands shall be held conveyed, mortgaged, or devised, or shall descend, in like manner and with like effect as if such alien were a citizen of this state or of the United States.

"Sec. 8776. Any alien, except such as by the laws of the United States are incapable of becoming citizens of the United States, whether a resident of this state or not, shall be and is hereby permitted to construct, build, equip, lease, use, sell, hold, and dispose of, or acquire by purchase or otherwise, any railroad, tramway, or bridge in this state, and shall be and is hereby allowed to work and operate the same, to acquire and hold lands in connection therewith, to mortgage the same, or said railroad, tramway or bridge, and to transact the business, collect and receive tolls, hold, use and dispose of the franchise and rights of any such railroad, tramway, or bridge, with the same powers and privileges in all respects as now or may hereafter belong to citizens of this state."

Section 33 of article II of the constitution of the State of Washington is as follows:

"Sec. 33. The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly or in trust for such alien shall be void; provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition."

THE FACTS.

The plaintiffs, suing on behalf of themselves and all others similarly situated, filed their bill of complaint in which they alleged:

That the plaintiffs Terrace, who are citizens of the United States and of the State of Washington and residents of the Western District of Washington, and plaintiff Nakatsuka, who is a subject of the Emperor of Japan (and in the amended bill of complaint it is further alleged that he was born in the Empire of Japan, of Japanese parents), and a resident of the Western District of Washington, bring their bill of complaint against the defendant, as attorney-general of the State of Washington, a citizen of the United States and of the State of Washington, and a resident of the Southern Division of the Western District of Washington; that the value of the matter in dispute in the action between the plaintiffs and the defendant exceeds the sum of \$3,000.00, exclusive of interest and costs; that the jurisdiction of the court is invoked because of the federal question involved in the action and equity jurisdiction and because plaintiffs have no adequate remedy at law; that the plaintiffs Terrace are, and for a number of years have been, the owners of a designated tract of real estate in King County, State of Washington, which is particularly adapted to raising vegetables, and for a number of years last past has been and now is being devoted to that and to agricultural purposes; that the plaintiff Nakatsuka is a capable farmer and is in all respects a desirable person to become a tenant of said real estate; that the plaintiffs Terrace desire to lease said real estate to Nakatsuka for a period of five years, and Nakatsuka desires to accept such lease, and, but for the act, the plaintiffs would execute a lease of said real estate from the plaintiffs Terrace to the plaintiff Nakatsuka for a period of five years from the date of the bill of complaint; that Nakatsuka, in addition to being a capable farmer, is engaged in the business of trading, wholesale and retail, in farm products (in the amended complaint is added "and shipping the same in intrastate, interstate and foreign commerce"), and, instead of purchasing said farm products, he had produced and desires to continue to produce his own farm products for the purpose of selling them in the wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing such farm products for such trade he will be prevented from engaging in trade and the incidents to trade as he is authorized to do under the existing treaty between the United States of America and the Empire of Japan; that the defendant, as attorney-general, has threatened to enforce, and will enforce, each and all of the terms of the act and in the event plaintiffs enter into a lease of said real estate for the purpose and term aforesaid, will forfeit or attempt to forfeit such leasehold interest to the State of Washington, and will prosecute the plaintiffs criminally for an alleged violation of the act; that the act is in its terms so drastic, and the penalties for a violation of its terms are so great, that neither of the plaintiffs may make, nor execute such lease, even for the purpose of testing the constitutionality and validity of said act, and unless the court shall determine its validity in this proceeding, the plaintiffs will be compelled to submit to the act whether the same be valid or invalid. The plaintiffs charge that said act is in contravention of section 33 of article II of the constitution of the State of Washington, and especially invoke the protection thereof; that said act is in violation of and contrary to the existing treaty between the United States of America and the Empire of Japan, and particularly article I thereof, in that it prohibits subjects of the Emperor of Japan from leasing land for residential and commercial purposes, and from doing everything incident thereto or necessary for trade upon the same terms as native citizens of the United States, and especially invoke the protection of said treaty and article I thereof; that said act is in contravention of section 3 of article I of the constitution of the State of Washington in that it deprives the plaintiffs of property without

due process of law, and of section 12 of article I of the constitution of the State of Washington in that it grants privileges or immunities which upon the same terms do not equally belong to all citizens, and especially invoke the protection of the said provisions; that said act is in contravention of section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiffs of property without due process of law and denies to them and each of them the equal protection of the law, and especially invoke the protection of said amendment.

They further allege that if they are not permitted to enter into such lease of said real estate, a large and irreparable loss will occur to them and each of them, and that they have no adequate remedy at law but are relievable only in a court of equity (R. 1-5).

At the time of filing the bill, the plaintiffs served and filed a motion for a temporary injunction, restraining the defendant, *pendente lite*, from enforcing or attempting to enforce the act. At the time that motion came on for hearing, the defendant filed its motion to dismiss (which was later amended by consent) upon the ground of lack of equity, insufficient facts and that the plaintiffs and each of them have a plain, adequate, complete and speedy remedy at law (R. 10, 11). The court denied the motion for a temporary injunction, holding the act valid (R. 30). The opinion appears on pages 12-24 of the record.

Thereafter, on leave, an amended bill of complaint was filed, containing the two amendments heretofore mentioned. The defendant filed a motion to dismiss, on the same grounds as theretofore, and the court sustained the motion to dismiss and dismissed the action (R. 31).

SPECIFICATIONS OF ERROR.

The assignments of error appear on page 33 of the record. They allege that the court erred in holding the act constitutional and not in violation of the equal protection clauses of the Fourteenth Amendment and of the constitution of the State of Washington, and of the alien land provisions of the constitution of the State of Washington and the treaty between the United States and the Empire of Japan.

The question for decision is whether the amended bill of complaint states a cause of action.

THE JURISDICTION.

By the terms of the act, "land" includes "the right to the control, possession, use, enjoyment, rent, issues or profits thereof except a mortgage," etc. (Section 1 [b]). "Title" includes every kind of legal or equitable title (section 1 [e]). An alien may not own land or take or hold title thereto. Land conveyed to or for the use of aliens shall be forfeited to the state (section 2). Whoever knowingly transfers or conveys land or title to land to an alien, and an alien who having title to land or control, use or enjoyment of land, whenever acquired, refuses to disclose the fact to the attorney-general, is guilty of a gross misdemeanor (section 7), which is punishable by imprisonment in the county jail for not more than one year, or by fine of not more than one thousand dollars, or both (Remington & Ballinger's Ann. Codes & Stats., sec. 2267).

Obviously "land," as defined, includes a lease of land. Upon the execution and delivery of the lease, the leasehold interest would, by the terms of the act, *ipso facto* be forfeited to the state, and Nakatsuka would still be liable for the payment of the rent reserved, although possession and use of the land be ended. The state could make any disposition whatever of the leasehold interest, irrespective of appellants' wishes, without rent during the

term, unless the Terraces might be able to collect the same from Nakatsuka; and, in addition, the Terraces would be liable under the criminal penalties prescribed by the act. And of course, if Nakatsuka did not report the making of the lease to the attorney-general, he would be similarly criminally liable.

Obviously no landowner can do other than submit to the act, if equity jurisdiction does not exist. Similarly, no tenant can run the risk imposed by the act. Nor can he test the validity of the act, whatever be his willingness, unless and until he can find a landowner who is willing to incur the forfeiture and suffer the criminal punishment. In addition thereto, the Fourteenth Amendment is invoked, and the act prohibits the Terraces from making use of their land as they otherwise might and prevents Nakatsuka from even using the land.

These facts establish the jurisdiction within the following cases:

Ex parte Young, 209 U. S. 123; *Raisch vs. Truax*, 219 Fed. 273; *Truax vs. Raisch*, 239 U. S. 33; *Buchanan vs. Warley*, 245 U. S. 60.

PROPOSITIONS DISCUSSED.

The propositions we desire to discuss are as follows:

1. The state constitutional provision is exclusive of all disabilities of aliens respecting lands and the legislature had no power to add thereto.
2. The act takes the property of the parties without due process of law, in that it prohibits Nakatsuka from following a common occupation of the community, and makes it a criminal offense for the Terraces to avail themselves of Nakatsuka's services in any capacity other than a mere wage earner, and prohibits them from making a lawful use of their property.
3. The act violates the equal protection clause of the Fourteenth Amendment, in that it makes a classification which bears no reasonable relation to a legitimate legislative end.
4. The act imposes an impossible condition, the declaration of intention in good faith to become a citizen of the United States, and hence Nakatsuka is freed from the obligation of compliance therewith.
5. The act is in violation of the treaty between the United States and Japan, in that it prohibits the leasing of land for commercial purposes, and prohibits Nakatsuka from doing everything necessary for or incident to trade on the same terms as citizens.

ARGUMENT.

I.

THE STATE CONSTITUTIONAL PROVISION IS EXCLUSIVE OF ALL DISABILITIES OF ALIENS RESPECTING LANDS AND THE LEGISLATURE HAD NO POWER TO ADD THERETO.

Section 33 of article II of the constitution of the State of Washington relating to alien ownership of land, has been before the supreme court of the state a number of times and its meaning and purpose has been definitely settled by the court. Those decisions chronologically arranged are as follows:

Oregon Mortgage Company vs. Carstens, 16 Wash. 165.

In that case the mortgage company, an alien corporation, took a mortgage on real estate as security for the payment of money loaned. The mortgagor was unable to pay the mortgage and he and the mortgagee company entered into an agreement by the terms of which he executed a deed of the land to one Livingstone, as trustee for the plaintiff, and Livingstone subsequently deeded the land to the plaintiff mortgage company, and it entered into a written agreement to sell the land to Carstens and Carstens to buy the land

of the mortgage company. Carstens thereafter declined to pay the purchase price and the mortgage company brought suit to recover the amount thereof. The court held:

1. A deed to an alien, in violation of law, will pass a title to real estate good against all the world except the state, and one which only can be attacked in a direct proceeding on the part of the state.

2. An alien holding land in this state under a defeasible title, which is subject to attack on the part of the state as in contravention of the above constitutional provision, may by deed transfer a good title thereto to any person entitled to hold real estate, if no proceeding has been taken by the state for the purpose of setting aside the deed to the alien.

3. The above constitutional provision does not apply to cases in which a citizen deeds to an alien mortgaged land in satisfaction of *bona fide* mortgage debt, because the provision excepts from the prohibition upon alien ownership lands acquired "under mortgage or in good faith in the ordinary course of justice in the collection of debts."

In the course of its opinion the court said:

"The plaintiff contends that this land was acquired within the exception contained in the constitutional provision; that is, that the title was acquired under mortgage or in good faith in the ordinary course of justice in the collection of a debt. It is conceded that McIntosh was the owner of the lands in fee simple, and that the deeds were all sufficient in form to convey the title. *It is plain that the purpose of the prohibition is to prevent the acquisition of lands in large quantities by alien and non-residential owners.* It is apparent by the exception referred to that it was not intended that the provision should be construed so as to prevent the loaning of money by aliens upon real estate security within this state; *but it was contemplated that such loans should be permitted and protected*, of course with the limitation that such transactions must be *bona fide*. In this case there is no claim of any bad faith, but the question is whether, in the case of an actual loan made, an alien can take a direct deed from the mortgagor of the land in satisfaction of the mortgage debt, or whether he must proceed to acquire title by a foreclosure in the courts.

"It will readily be seen, that an agreement such as was here entered into between McIntosh and the plaintiff would usually tend to the advantage of both parties. The costs of the foreclosure suit would be avoided, and as well the liability to a deficiency judgment upon the part of the mortgagor. It would seem that there could be but two objections urged against it as tending to defeat the purpose of the provision. One is that, in case of a foreclosure in the courts, the mortgagor would have a right to redeem the premises. But this is a personal right which he might or might not exercise, at his option. We presume it will be conceded that he could waive the right to redeem after a judgment of foreclosure, and we see no reason why he should not be permitted to waive this right at any time, if he should deem it to his advantage in order to avoid costs and a liability for a deficiency. The other objection is that, in case of a foreclosure and public sale thereunder, other parties would be entitled to bid for the lands and the result might be, in consequence of this, that the alien plaintiff would not become the purchaser.

"The respondent contends that, if a proceeding like this can be sustained, it would be an easy matter for an alien desiring to obtain a tract of land in this state to go through the form of making a loan thereon and immediately thereafter take a deed in satisfaction of the mortgage and thus avoid the prohibition. But we are unable to see why, in case of a fraudulent arrange-

ment between the mortgagor and the mortgagee, such a proceeding could not as well be carried out through the form of a foreclosure. The loan could be made in so large an amount and so great a price bid for the lands upon the foreclosure sale thereunder as to prevent other parties from becoming purchasers, and it would seem that the provision could be as readily violated in the one case as in the other.

"Alien corporations are not prevented from acquiring and holding lands in this state in all cases, and the objections urged against this transaction are substantially only to the form of acquiring title to lands upon which mortgage security has been taken. *It is evident that the clause, 'and all conveyances of land hereafter made to any alien directly or in trust for such alien shall be void,' is limited by the other provisions contained in the section, and that it was not intended to prevent an alien from holding land under any circumstances.* It simply goes to the means or purpose of the alien in acquiring title. In other words, in cases like this, the original purpose must not have been to acquire title to the lands under the transaction or guise of a mortgage loan, but must have been in good faith to make the loan as a loan, and the mortgage taken as an incident merely to secure its payment, and the land acquired in good faith thereunder. It is apparent that the form of the conveyance is of little or no consequence, unless it should tend to defeat the purpose of the provision."

Answering the contention that land could be acquired under the constitution by process of mortgage foreclosure only, and not by direct deed from the mortgagor to the mortgagee in satisfaction of the indebtedness, the court said:

"The clause in the provision, 'in the ordinary course of justice in the collection of debts,' should not be held to require a proceeding in court in the case of a mortgage debt. The language used does not require it necessarily, and such a construction would go to the form rather than the substance of the transaction. It would afford little or no protection against an attempted fraudulent acquisition. While it is true that a foreclosure might result in a sale to a resident, it is a well known fact that the usual result is a sale to the mortgagee. There is no attempt or desire upon the part of the mortgagee to retain these lands. On the contrary it is attempting to dispose of them, and it is evident that the whole transaction has been conceived and carried out in the utmost good faith to collect its debt; and while a direct provision of the constitution as to the form of the conveyance, even, could not be disregarded, there is none in the way here, and it will be time enough to inquire into the validity of such transactions when fraud is charged and the desired protection invoked by a proceeding upon the part of the state.

"It is not an unusual proceeding for a mortgagor to convey lands directly to a mortgagee in satisfaction of a mortgage debt, and, where the parties agree upon such a course, it would seem as though it should be favored in a case like this rather than discriminated against. The only just and effectual enforcement of the constitutional inhibition can be by a proceeding upon the part of the state to have the transaction adjudged fraudulent and invalid, and actual fraud of course could always be inquired into. It would be idle to assume that the state has not ample power to protect itself in such matters, and it might be just as necessary and desirable to resort to such a proceeding where title was acquired through the form of a mortgage foreclosure as in case of a direct deed by the mortgagor to the mortgagee."

Goon Gan vs. Richardson, 16 Wash. 373.

That case was a mortgage foreclosure, and the court held that the

incapacity of a mortgagee, by reason of alienage, to take title to real estate, might be shown only in a suit by the state.

State ex rel. Winston vs. Morrison, 18 Wash. 664.

That was a direct proceeding by the state to set aside a ninety-nine year lease of real estate to an alien who had not declared his intention to become a citizen of the United States. Granting the relief prayed for, the court said:

"It is conceded that the premises described in the lease do not fall within any of the exceptions enumerated in the proviso contained in the foregoing section. Respondent contends that it is only absolute ownership of certain kinds of realty which is prohibited; that the word 'conveyance' means the transfer of title to another and the instrument by which this is done. The question for determination is, What is the meaning of the section of the constitution under consideration? We have not been referred to a case at all similar to the one we are now considering. We think that the section must be given a reasonable interpretation. If a lease for a term of ninety-nine years can be sustained, then why not one for nine hundred and ninety-nine years? And it would seem to require little argument to demonstrate that if a lease for such a term can lawfully be made to an alien the constitutional prohibition against ownership of lands in this state by aliens becomes meaningless, and parties may indirectly accomplish a result which they are forbidden to do directly. After a vain search for authority bearing directly upon the question we have concluded that a lease of lands in this state to an alien for a reasonable term might be upheld, but that the lease in question is for an unreasonable term, and consequently void."

State ex rel. Winston vs. The Hudson Land Co., 19 Wash. 35.

This was a direct action by the state to set aside certain conveyances of real estate and a lease of real estate for forty-nine years, to a corporation the majority of whose stockholders were aliens at the time of the commencement of the action, although at the date of the conveyance and the making of the lease, the majority of the stockholders of the corporation were citizens. After quoting the above constitutional provision, the court said:

"It seems to us that this language is not susceptible of construction. *A plain policy was plainly enunciated by the constitutional convention. That policy was an inhibition of ownership of lands by aliens except as to the character of lands specially mentioned in the proviso*, and the constitutional convention, having in mind, no doubt, the attempt to evade this law which is made in this case, out of an abundance of caution inserted the last provision, viz., that

"Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition."

"We cannot understand what meaning could be attached to this last provision of the act, if a corporation, the majority of the capital stock of which is owned by aliens, is allowed to become the owner of lands. It is contended by the appellant that, because a majority of the stock of this corporation was owned by citizens at the time the land was transferred to the corporation, it would work an injury and a hardship upon the corporation, and upon the owners of stock thereof to hold this transfer void, and that, had it been the intention of the constitutional convention to make such an application of the law as this, language more explicit could, and surely would, have been used. We do not think that language more explicit could have been used. Presumably the members of the constitutional convention regarded this question as of great importance, and the article doubtless was passed after careful consideration and revision; and the whole article shows that it was the

intention of the law that the *ownership* of lands by aliens should be prohibited, and that it could be prohibited despite of subterfuges which might be resorted to by aliens for the purpose of becoming such owners; and we have already seen the wisdom of the makers of the constitution in clothing this article in language which is so plain that it is not susceptible of judicial construction. First, attempts have been made, in the case just above referred to, by aliens to become owners of land through the medium of leases which in effect conferred ownership, and now the constitution is again sought to be avoided and benefits obtained under it by indirection, action which could not be obtained by direct action. We have no doubt that corporations have it within their power to protect themselves from the dire consequences and hardships which are suggested by appellant in his brief by reason of members of a corporation selling stock to aliens in the corporation; but, if they cannot, our laws confer certain benefits on, and exemptions to, corporations which are valuable, and if men see fit to enter into corporations for the purpose of doing business instead of doing it as individuals, and accept the benefits which the law confers upon the corporation, they must also accept the burdens which are incident to a corporate investment. But outside of all this, when it once becomes the established law that deeds of this character are void, members of corporations will not be quick to obtain such deeds, and the hardships dilated on by the appellant will be more in theory than practice. But even if it be conceded that these hardships would have to be endured, the evident spirit of the constitution must be sustained. The broad doctrine is announced that the ownership of lands by aliens is inhibited. The exceptions to that rule are as plainly announced by the constitution. These transfers not falling within the exceptions, the conveyance must be held to be void. The lease for forty-nine years will be held void under the doctrine announced in *State ex rel. Attorney-General vs. Morrison, supra.*"

Morrell vs. Superior Court, 33 Wash. 542.

In that case the court held that an alien corporation could not acquire real estate in this state by eminent domain.

Abrams vs. The State of Washington, 45 Wash. 327.

In that case it appears that Abrams, the plaintiff, in 1890, conveyed real estate in the State of Washington to Lou Graham, an alien, who died in 1903, intestate. In 1894, Graham filed her declaration of intention to become a citizen of the United States but never took any further steps to acquire citizenship. After the death of Graham, Abrams instituted the above action for the purpose of recovering possession of the property, basing his claim on the fact that the real estate had been acquired by Graham while an alien and that she had never become a citizen. In the same case the state sought to escheat the property, because it had been acquired by Graham while an alien, basing its contention on the proposition that Graham's application to become a citizen was not made in good faith. The court held that the deed from Abrams to Graham conveyed an absolute title, so far as Abrams was concerned, and that the state not having sought to forfeit the property in question during the lifetime of Graham, could not do so after her death, but that her heirs took a fee simple title to the real estate. In the course of its opinion the court said:

"The appellants the State of Washington and County of King claim title by escheat, on the theory, that Lou Graham was at all times an alien; that her declaration of intention to become a citizen of the United States was void; that she being an alien of notoriously bad character and an habitual violator of the law could not be held to have made such declaration of

intention in good faith; that she was prohibited by the terms of our constitution from acquiring title to the real estate by purchase; that as against the state, the deed to her was void; that she had no inheritable blood and could not upon dying intestate transmit title to her alien heirs, and that the property by operation of law and without any proceeding in the nature of office found, upon her death escheated to the state. In view of our conclusions, it will not be necessary for us to determine whether her declaration of intention was, in contemplation of our constitution, made in good faith. We will consider this case upon the theory that she never made any such declaration. Being an alien, it follows that she had no right to acquire title to real estate in this state by purchase, and the deed executed to her by the appellant Abrams was void in the sense that a forfeiture of the property might have been declared by the state at any time while it remained in her possession and under her control, she claiming title under such deed. This court, in substance, held that an alien holding lands in this state by purchase under a defeasible title, subject to attack on the part of the state, might by deed hold it, provided no proceeding had theretofore been taken by the state for the purpose of declaring a forfeiture or escheat. In other words, if Lou Graham, after receiving her deed from the appellant Abrams, had, for a good and sufficient consideration, conveyed the property to a third party entitled to receive title, the State of Washington could not therefore, by office found, have forfeited such title as against her grantee. The state could, however, at any time prior to such transfer, have successfully instituted proceedings to declare a forfeiture and escheat.

"The question now before us is whether, by reason of the death of Lou Graham, the state has lost its right to institute proceedings in the nature of office found for the purpose of declaring a forfeiture and escheat, or whether such right still continues. Under our constitution, an alien, who has not in good faith made any declaration of intention to become a citizen of the United States, *may acquire title to real estate (1) by inheritance; (2) under mortgage or in good faith in the ordinary course of justice in the collection of debts; (3) in lands containing valuable mineral deposits, etc., and (4) in land necessary for mills and machinery to be used in the development of such mineral lands, and in the manufacture of the products therefrom.* When the constitution authorized aliens to acquire lands in these several instances and methods, it was undoubtedly contemplated that they might acquire a full and complete estate in fee simple, which would include an estate of inheritance. If this be a correct interpretation, then the estates thus acquired could be transmitted by descent to the heirs of such aliens. It is contended by the state, however, that Lou Graham only acquired a defeasible estate to the land in question, and that, as she was an alien and did not at common law have inheritance blood, she could not transmit any title or estate to her alien heirs, although under the constitution they, as aliens, could receive. In other words, there existed a disability upon her part to transmit, and not upon their part to receive by inheritance. As above stated, the common law of England was so modified by the statute of 11 and 12 Will. III ch. 6, in the year 1700, as to enable English subjects to inherit from an alien. This statute having been enacted prior to the separation of the American colonies from the mother country, has become a part of the common law of this state, except in so far as it has been supplanted by our constitution or statutory enactments. Under this rule and without the provisions of our constitution, a citizen could inherit from an alien an estate held by such alien at the date of his death, even though it has been defeasible.

"When our constitution conferred upon aliens the right to inherit, we

interpret it to have conferred upon them a full and complete right of inheritance, which would imply not only the right in themselves to receive by such inheritance from a citizen, but also to receive by inheritance from an alien. Were we to place any other interpretation upon the constitution, the necessary result would be that where an alien, under its authority, had rightfully acquired a fee simple title to real estate, for instance by mortgage, or in good faith in the ordinary course of justice in the collection of a debt, and had immediately thereafter died intestate, his heirs, if aliens, would not be able to inherit such real estate, not because of any disability upon their part, but because their deceased ancestor had not inheritable blood enabling him to transmit title to them. Such an interpretation would result in a rule of law causing such property to escheat to the state whenever there was a failure of heirs who were citizens of the United States. No such contingency was contemplated by the framers of our constitution, nor by the people who adopted the same. Our conclusion is that, under our constitution, aliens are entitled to inherit real estate in this state, from, by, or through ancestors whether such ancestors be aliens or citizens. This being true, and the state having failed to forfeit the title of Lou Graham by proceedings in the nature of office found, at any time prior to her death, the real estate in controversy descended to her alien heirs who were authorized to receive the same and became entitled thereto, and the state thereupon lost its right to declare any escheat by forfeiture.

"Our conclusions are, (1) that the deed from the appellant Abrams divested him of title to the property; (2) that at all times prior to alienation of the property by Lou Graham, or prior to her death, the state was entitled, by proceedings in the nature of office found, to have declared a forfeiture or escheat; (3) that the state, having failed to declare such forfeiture or escheat prior to her death, lost its right so to do; (4) that upon her death, the real estate descended to her alien heirs. In view of these conclusions, the judgment of the honorable superior court was right, and it is accordingly affirmed."

State ex rel. Atkinson vs. World Real Estate Commerce Company, 46 Wash. 104.

That was a direct action by the state to escheat real estate. An alien had acquired title to the real estate, contrary to the above constitutional provision, and had conveyed the real estate to the defendant prior to the commencement of the above action. The court held that the alien had conveyed a valid and indefeasible title to the defendant and that upon such conveyance the state lost its right to escheat.

State ex rel. Atkinson vs. Evans, 46 Wash. 219.

That was a direct proceeding by the state to escheat lands, which it was admitted were not acquired under mortgage or execution, or by inheritance, but contained silicated clay, but it was contended that such deposits were not "minerals, metals, iron, coal, or fireclay," within the meaning of the proviso of the constitutional provision. The court held that the lands were within the excepted class, and in its opinion quoted with approval from Cooley on Constitutional Limitations, as follows:

"The rule applicable here is, that effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the court must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. This rule is applicable with special force to written constitutions, in which the people

will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication. It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together. In interpreting clauses we must presume that words have been employed in their natural and ordinary meaning. As Marshall, Ch. J., said: 'The framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said.' "

Prentice vs. How, 84 Wash. 156.

In that case the court reaffirmed the rule that only the state can question an alien's title to real estate, and then only prior to conveyance of the real estate by the alien.

Roger vs. Whitman, 56 Wash. 190, 193.

In that case the court held that the real estate of a citizen, who becomes expatriated, cannot be forfeited.

State ex rel. Tanner vs. Staeheli, 112 Wash. 344.

That was a direct action by the state to escheat real estate to the state. The defendant was born in Switzerland and after he came to this country his father was duly naturalized, and the defendant alleged that he supposed the naturalization of the father resulted in making him a citizen of the United States, that he exercised all the rights of a citizen until the year 1917, then he was required to respond for military service, and at that time he claimed exemption from military service on account of the fact that he was alien born, and was past twenty-one years of age when his father was naturalized. After the action was brought defendant filed his declaration of intention to become a citizen of the United States, which was held unavailing, and a decree was entered for the state. In the course of its opinion the court said that

"This land is agricultural land, not valuable for minerals or used for manufacturing purposes, and was not acquired by inheritance or under mortgage, or in the collection of a debt."

State ex rel. Turner vs. Rychen, 113 Wash. 90.

That case is similar in all respects to the case last above cited, and the same result was reached by the court.

By the foregoing decisions, the following propositions are established:

1. The purpose of the constitutional provision is to prevent the acquisition of land in large quantities by aliens and non-resident owners, but it was not intended to prevent an alien from holding land under any circumstances.

2. An alien who has not declared his intention to become a citizen of the United States may acquire an absolute fee simple title to real estate in the State of Washington by inheritance, under mortgage foreclosure, in good faith in the ordinary course of justice in the collection of debts, and also to lands containing valuable mineral deposits, as well as lands necessary for mills and machinery to be used in the development of such mineral lands, and in the manufacture of the products therefrom.

3. In all cases other than those last mentioned, a conveyance of real estate to an alien creates a defeasible title in the alien, and can be attacked only by the state, and by it only prior to conveyance by the alien.

4. An alien may lawfully lease land in the State of Washington for a reasonable term.

5. That the constitutional provision is self-executing.

Applying the familiar rule of construction, *expressio unius est exclusio alterius*, it follows that the act transcends the power of the legislature. When in the constitutional provision certain disabilities with respect to land were imposed upon aliens, it must have been the purpose of the framers of the constitution to make such disabilities exclusive on that subject. In other words, it was contemplated that only *ownership* of lands should be prohibited, and the legislature was thereby rendered powerless to impose other and further disabilities. The change effected by the provision makes this apparent. At common law an alien had no inheritable blood; he could take title to real estate by grant or conveyance, but had no capacity to hold, and the lands were at once subject to forfeiture by the state upon office found.

Governour vs. Robertson, 11 Wheat. 332; *White vs. Bunley*, 20 Kan. 235; *Hauenstein vs. Leynham*, 100 U. S. 483; *Abrams vs. State*, 45 Wash. 327.

Hence, the constitutional provision was not necessary for such purposes. It cannot be said that it is a grant, because the state supreme court holds that it is prohibition.

Oregon Mortgage Co. vs. Carstens (supra), 16 Wash. 165, 167.

Being a prohibition it must, according to familiar rules of construction, be given effect as such. The only way that can be done is by giving it the effect we urge. And that construction necessarily follows from the state supreme court decision in *State ex rel. Winston vs. The Hudson Land Co. (supra)*, 19 Wash. 85, 86, where, speaking of the purpose of the provision, the court said:

"A plain policy was plainly enunciated, by the *constitutional convention*. That policy was on inhibition of *ownership* of lands by aliens except as to the character of lands specifically mentioned in the proviso. * * *"

In the case of *State ex rel. Barker vs. Assurance Co.*, 251 Mo. 278, the court had under consideration the question of jurisdiction in injunction in aid of its jurisdiction in *quo warranto*, and quoted with approval from the decision of the supreme court of Ohio in the case of *State ex rel. Ellis vs. Cuyahoga County*, 70 O. S. 341, as follows:

"The present action is a resort to our original jurisdiction. That we have not original jurisdiction of suits for injunction is entirely clear. If the language of section 5573 Revised Statutes should be thought appropriate to confer it, the effect to be given to that section would nevertheless be indicated by section 2 of article IV of the constitution, which ordains that 'it (the supreme court) shall have original jurisdiction in *quo warranto*, *mandamus*, *habeas corpus*, and *procedendo*, and such appellate jurisdiction as may be provided by law. Applying to this grant the maxim, *expressio unius est exclusio alterius*, the conclusion is irresistible that the general assembly cannot add to the enumerable subjects of our original jurisdiction."

In the case of *Nunnemacher vs. State*, 129 Wis. 190, the question before the court was of the power of the legislature to impose license taxes. The constitutional provision empowered the legislature to impose taxes upon property and in disposing of the question the court said:

"This contention is that by section 1 of article VIII of the constitution taxes can only be levied on property. This provision is the only general

provision of the constitution upon the subject, and reads as follows: 'The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe.' The argument is that this provision, by the rule of *expressio unius est exclusio alterius*, prohibits the levy of any taxes in this state except taxes upon property; and that, as inheritance taxes are held to be excise taxes upon the right to take property, and not taxes upon property, they cannot be levied in this state. * * *

"In approaching the question we start with the familiar proposition that the legislature has all the usual and necessary governmental powers, including the power to levy taxes upon occupations, privileges, franchises, and the like, as well as upon property, unless such power has been taken away by the constitution. There are no express words in the constitution limiting taxation to property taxation, but the question is whether section 1 of article VIII, above quoted, has the effect of such a limitation under the familiar rule of construction, *expressio unius est exclusio alterius*. If we were compelled to decide this question upon the bare words themselves, without the help of the debates occurring in the constitutional convention when this section was formulated, and without the help of subsequent practical construction, the argument would be strong in favor of the plaintiff's contention. But we have a brief record of the constitutional debates, and we have fifty years of practical construction since the adoption of the constitution, and both must be considered."

The court then reviewed the debates in the constitutional convention at the time of the adoption of the above constitutional provision and concluded therefrom that it was not the purpose of the constitutional convention to bar the legislature from imposing license taxes.

In this state there has been no legislation on the subject subsequent to the adoption of the constitution and prior to the enactment in question. But on the other hand, the practical construction given the provision has always permitted the leasing of lands by aliens.

An examination of the constitution reveals the fact that when the convention contemplated legislation on or in connection with the subject of a constitutional provision, that fact was plainly stated.

When reading the Washington constitution, one is forcibly impressed with the fact that a large part of it consists of directions to the legislature to take affirmative action, which provisions are made mandatory by section 29 of article I thereof, reading as follows:

"The provisions of this constitution are mandatory, unless by express words they are declared to be otherwise."

The appellee argues that a state constitution is merely a limitation of legislative power, and that by reason of that fact the rule we contend for does not apply. But, it has been observed that the Washington constitution is not drawn on the theory of being a limitation of legislative power, but that it is a mandatory direction, in a large part, to the legislature to take affirmative action.

In other words, the constitutional convention did not proceed on the theory that it was framing a series of limitations on legislative powers, but proceeded on the opposite theory, namely, that it was directing the legislature what it should do, and inserted a provision making all of the provisions of the constitution mandatory, unless in direct words they were stated to be otherwise. Therefore, the question is not disposed of by the application of the rule that a state constitution is merely a limitation of legislative power. That rule is not an unyielding one, but is adopted merely

for the purpose of construction and in aid of a determination of the meaning of the instrument itself.

Again, an examination of the constitution reveals the fact, unmistakably apparent, that when the convention expected or intended action on the part of the legislature, that fact was plainly stated, and was not left to inference.

It is also to be borne in mind that the meaning of constitutions is to be sought in the plain language of the people who adopted them, and that the language is to be taken in its general and ordinary sense, and as the people generally understand it.

In the case of *State ex rel. Atkinson vs. Evans*, 46 Wash. 219, the court, in speaking of the provision in question, said:

"In interpreting clauses we must presume that the words have been employed in their natural and ordinary meaning. As Marshall, Ch. J., said: 'The framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said.'"

In the case of *Bronson vs. Syverson*, 88 Wash. 264, 275, the court said:

"As we said on another occasion, it is a cardinal rule of construction that the language of a state constitution, more than that of any other of the written laws, is to be taken in its general and ordinary sense. The reason for the rule lies in the fact that its makers are the people who adopt it. Its language is their language, and words employed therein have meaning as the generality of the people understand them. When, therefore, words are used in a constitution which have both a restricted and general meaning, the general must prevail over the restricted, unless the nature of the subject matter or the context indicates that the limited sense was intended. Says Mr. Justice Story:

"Every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtilities, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understanding. The people make them, the people adopt them; the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit to them any recondite meaning or any extraordinary gloss.' 1 Story, Constitution (5th ed.), sec. 451.

"So Sedgwick in his work on Constitutional Law:

"In the consideration of these questions it may be observed in the first place, that, in the construction of a constitution the rule is, 'its terms must be taken in the ordinary and common acceptation, because they are supposed to have been so understood by the framers and by the people who adopted it. This is unquestionably the correct rule of interpretation. It, unlike the acts of our legislature, owes its whole force and authority to its ratification by the people; and they judge it by the meaning apparent on its face according to the general use of the words employed, when they do not appear to have been used in a legal or technical sense.'

"In 6 R. C. L. 52, under title, 'Constitutional Law,' it is said:

"Words or terms used in a constitution, being dependent on ratification by the people, must be understood in the sense most obvious to the common understanding at the time of its adoption, although a different rule might be applied in interpreting statutes and acts of the legislature. This

gives rise to the recognized rule of construction that it is presumed that words appearing in a constitution have been used according to their plain, natural and usual signification and import, and the courts are not at liberty to disregard the plain meaning of words of a constitution in order to search for some other conjectured intent. This rule does not apply, however, to technical words and phrases which necessarily should be given a technical signification.’”

If the foregoing rule be followed, and if the purpose of the framers of the constitution be sought with the idea in mind that constitutional provision must be interpreted in the light of the plain general meaning of the terms used, it must necessarily follow that to the ordinary mind the expression of one disability carries with it the idea of permission of those things not prohibited. This, indeed, is merely the application of the common understanding of the use of language, when understood in its general meaning.

Referring again to the provision in question, it will be observed that the last sentence thereof reads as follows:

“Every corporation, the majority of whose capital stock is owned by aliens, shall be considered an alien for the purpose of this prohibition.”

It is impossible to read that sentence without receiving therefrom the impression that the framers of the constitution intended the disability therein created to be the only disability which should attend alien ownership of stock in corporations. We submit and it cannot be doubted, on the application of any applicable rule of construction, that the legislature has no power to add to the prohibition of the foregoing provision. And if that conclusion be sound, and we cannot doubt that it is, it renders certain the ultimate conclusion that when the framers of the constitution adopted the section in question, it was their purpose to make the disabilities therein enumerated exclusive, and not to leave to the legislature power to add thereto.

In the case of *United States vs. Arrendondo*, 6 Peters 691, 725, this court said:

“*Expressio unius est exclusio alterius* is an universal maxim in the construction of statutes.”

That maxim has been applied, as the reported cases show, in the construction of constitutions as well as of legislative acts. And we submit that the rule is applicable to the constitutional provision in question, and that when it is applied it results in the conclusion that the legislature has not power to prohibit the leasing of lands by citizens to aliens and by aliens from citizens.

It must be remembered that the questions arising out of the presence of aliens on the Pacific Coast was one with which the people were familiar at the time of the adoption of the constitution of the State of Washington. The records show that such questions had even reached this court for decision. It must be assumed that the framers of the Washington constitution were familiar with the questions arising from residence of aliens in the state and that the constitutional provision in question was adopted after mature and deliberate consideration. So assuming, when the framers of the constitution deliberately adopted a *policy*, as the state supreme court held, respecting lands and aliens, it necessarily follows that the policy as adopted was intended to be the policy of the new state, with respect to the right of aliens in or to lands or their use.

The lower court, after citing some of the Washington decisions heretofore cited in this brief, used the following language:

“From the foregoing, it is clear that the supreme court of Washington

has held the common law only changed by this constitutional provision to the extent plainly exercised therein. The exceptions in the constitutional provision constitute a grant to the alien and, of course, are not subject to legislative change or limitation, at least by the state. But it does not follow because the constitution prohibits alien 'ownership' of lands with certain exceptions, that, the constitution not having defined what shall constitute ownership, the legislature may not do so. The legislature is not bound to leave courts to speculate upon that subject."

Clearly that conclusion is not well founded because there exists in the constitutional provision no ambiguity as to what was meant by "ownership"; ownership with respect to real estate can mean just one thing and that is ownership, the meaning of which everybody knows and understands. But, if the legislature had the right to define what "ownership" meant, then it was the right without limitation. Suppose the legislature, instead of passing the act in question, had in an act defined ownership within the meaning of the constitutional provision as any term of years not exceeding one hundred, during which the alien might exercise every right incident to ownership of land in the State of Washington; would anyone for a moment contend that the legislature had power so to do? Suppose the legislature had provided that aliens holding a defeasible title to land might hold the same during their lives and the lives of heirs then in existence; would anyone argue that the legislature had power so to do?

Again, it will be observed that when a matter was made the subject of a constitutional provision, which the framers of the constitution intended should be permitted or prohibited, under such regulations as the legislature should provide, the fact was plainly stated, and not left to inference. This is true even of matters on which the legislature, without limitation in the constitution, would have had absolute power. Therefore, if it had been the purpose of the framers of the constitution to prohibit the possession, use, control, leasing or enjoyment of the rents, issues and profits of real estate, the context of the entire constitution shows that such fact would have been plainly stated in the constitution, as it was in other matters, which were the subject of a constitutional provision. When, therefore, a plain policy was enunciated by the constitutional convention, and when that policy was a prohibition of *ownership* of land by aliens, and when the constitutional convention did not expressly provide that the use, possession, control, leasing and enjoyment of rents, issues and profits of real estate was subject to legislative prohibition, it must follow that the policy so established by the legislature was exclusive, and that the matter was not left to legislative action.

We respectfully submit that the legislature has no power to enact the measure in question.

II.

THE ACT TAKES THE PROPERTY OF THE PARTIES WITHOUT DUE PROCESS OF LAW, IN THAT IT PROHIBITS NAKATSUKA FROM FOLLOWING A COMMON OCCUPATION OF THE COMMUNITY, AND MAKES IT A CRIMINAL OFFENSE FOR THE TERRACES TO AVAIL THEMSELVES OF NAKATSUKA'S SERVICES IN ANY CAPACITY OTHER THAN A MERE WAGE EARNER, AND PROHIBITS THEM FROM MAKING A LAWFUL USE OF THEIR PROPERTY.

It has seemed to us that all that is necessary to dispose of the question in this case is the application of fundamental principles. Among such are the due process clause of the Fourteenth Amendment and a similar clause to

the constitution of the State of Washington. The meaning of the due process clause of the Fourteenth Amendment has been so often stated by this court that a citation of authorities is unnecessary, but it may be of assistance to notice the plain, unequivocal language in which this court has declared its effect.

In the case of *Butchers' Union Slaughter House and Live Stock Landing Company vs. Crescent City Live Stock Landing and Slaughter House Company*, 111 U. S. 746, 754, Mr. Justice Bradley used language which has been frequently quoted by this court with approval, and never, so far as we can find, has his statement been questioned:

"The right to follow any of the common occupations of life is an inalienable right, it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'All men are created equal; that they are endowed by their Creator with certain inalienable rights; that among those are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen."

To the same effect are: *Barbier vs. Connolly*, 113 U. S. 27, 31; *Powell vs. Pennsylvania*, 127 U. S. 678, 699; *Allgeyer vs. Louisiana*, 165 U. S. 578, 589; *Yick Wo vs. Hopkins*, 118 U. S. 356, 370; *Coppage vs. Kansas*, 236 U. S. 1, 14, 19; *Truax vs. Raich*, 239 U. S. 33, 41.

It cannot be disputed that working on a farm and farming and the raising of agricultural products is one of the common occupations of the United States and particularly the State of Washington. It may be stated, without fear of contradiction, that the right of an alien to work on a farm for wages is a right which no act of legislature could prohibit. Having the right so to work, no act of the legislature could prohibit him from receiving compensation therefor, as, to prohibit him from receiving compensation for his work, would be equivalent to prohibiting him from working.

Adams vs. Tanner, 244 U. S. 590.

The amount of compensation to be paid is a matter wholly of agreement between the parties. Hence, if the employer is willing to give to the alien, and the alien is willing to accept, a percentage of the net profits produced by the combined work of the employer and the employee, such a contract may be lawfully entered into and cannot be prohibited by the legislature. We are assuming, of course, that the alien is neither a minor nor a person of unsound mind. It is perfectly clear that if a citizen, owning agricultural lands, desires to employ an alien as superintendent of his agricultural operations and the alien is willing to perform the duties thereof, such a contract may be made and cannot be prohibited by the legislature. It is also clear that the compensation, in such cases, to be paid for such services is a matter of contract between the parties; that it may be fixed at a stipulated sum in money payable at such time or times as is agreed; or that it might be fixed at a percentage, of the receipts, net or gross, resulting from such operation. It is equally clear that if a citizen landowner desires to absent himself from the scene of his agricultural operations, he may lawfully enter into a contract with an alien by the terms of which the alien would become obligated to carry on the agricultural operations of the landowner, and in his name and for his use, and to account to the landowner at a stipulated time or times for the money received from such operation; it is equally clear that the compensation to be received by the alien therefor is a matter purely of contract, and may be fixed at a stipulated sum in money or a percentage of the net or gross receipts arising from the operation, as the parties may

agree. It is confidently asserted that an alien has a right to do the acts mentioned in the foregoing instances, and that an act preventing him from doing any of them would be in contravention of the Fourteenth Amendment. Indeed, we do not understand that the attorney-general contends the contrary. Now, suppose that the citizen landowner, instead of desiring to enter into a contract employing the alien to work as a farm laborer or as a superintendent of the farming operations, should desire instead to enter into a contract with the alien by which the alien should do exactly the same thing, that is, obligate himself to farm the land in question, but, instead of receiving wages from the landowner, or accounting to him for the receipts from the operations, the parties should enter into an agreement by the terms of which the alien agreed to farm the land and to pay the landowner a stipulated sum in money as his share of the profits from said operations. Can it be said, under such circumstances, that the alien is any the less engaged in working as a farm hand than he would be in any of the preceding illustrations suggested? If there is a distinction to be drawn, what is the basis of such distinction? If it be suggested that in the latter case an estate in land is created, the obvious answer is that the supreme court of the state in the case of *Tibbals vs. Iffland*, 10 Wash. 451, 457, has held that a lease does not create an estate in land. The further obvious answer is that to create a legal distinction between the two acts is to relegate substance to form, contrary to all of the decisions of this court on constitutional questions.

That the effect of the decision of the supreme court in the case of *Tibbals vs. Iffland*, *supra*, 10 Wash. 451, 457, may not be mistaken, attention may be called to the fact that section 5918 of Remington & Ballinger's Code entrusts the management and control of community real property to the husband, but prohibits him from selling, conveying, or encumbering the community real estate unless the wife join with him in executing the deed or other instrument of conveyance by which the same is sold, conveyed, or encumbered, and requires such deed or instrument of conveyance to be acknowledged by him and his wife. Section 8745 of Remington & Ballinger's Code requires all conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrances upon real estate, to be by deed. The court had before it for decision the question of the validity of an assignment of a lease made by the husband alone. It was contended that the assignment was invalid because the lease was community property and the wife had not joined in the assignment. The court disposed of the question in these words:

"The respondent was a married man, he had the same right to assign and transfer the lease that he had to dispose of chattels generally, without the consent of his wife (Gear, Landlord and Tenant, sec. 183), and if he was unmarried he could, of course, make such disposition of it as he saw fit. It was therefore immaterial whether he was married or not, so far as the right to make the assignment was concerned."

There is nothing peculiar, in the State of Washington, in the holding that a lease creates no interest in real estate. The supreme court of the state has uniformly held that a contract for the sale and purchase of real estate on deferred payments creates neither a legal nor equitable interest in the real estate. In the case of *Tieton Hotel Co. vs. Manheim*, 75 Wash. 641, 642, the court said:

"It is a settled rule in this state that executory contracts for the sale and purchase of land do not convey title, either legal or equitable. (*Reddish vs. Smith*, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. 781; *Pease vs. Baxter*, 12

Wash. 567, 41 Pac. 899; *Churchill vs. Ackerman*, 22 Wash. 227, 60 Pac. 406; *Johnson vs. Sekor*, 53 Wash. 205, 101 Pac. 829; *Younkman vs. Hillman*, 53 Wash. 661, 102 Pac. 773.)"

It is confidently submitted that, when a lease does not in fact create an interest in real estate, the legislature is powerless to create, by the terms of a lease, that which the instrument itself does not.

In the case of *O'Brien vs. Webb*, 279 Fed. 117, 123, Judge Dooling, speaking for the court in the cropping contract case growing out of the California Alien Land Act, said:

"It would be indeed a strain to say that an alien may not enter into a contract for agricultural purposes; unless, of course, the law is very clear and unambiguous in preventing him from doing so. Being lawfully within the United States and lawfully an inhabitant of the State of California, his right to the ordinary pursuit of agriculture is not to be deemed curtailed, provided, always, he does not acquire an interest in the land which he is cultivating."

The foregoing is equivalent to the statement that the constitutional right of an alien, lawfully within the United States, to follow any of the ordinary occupations of the country, is confined to the right to work for wages, for another, and that the constitutional right does not extend to an alien's working for himself. The constitutional right of the alien cannot be so limited.

We respectfully submit that the prohibition of the act is contrary to the due process clause of the Fourteenth Amendment, because it is, in effect, a prohibition of the right of an alien to engage in one of the common occupations of life.

The foregoing has been written from the point of view of the alien, but the applicability of the due process clause to the right of the citizen land-owner is no less distinct. It is alleged in the bill that the Terraces acquired this property prior to the passage of the act. The direct prohibition of the act extends to any use of the property in connection with an alien. According to the act, the Terraces may not give to their co-plaintiff possession or control or the right to use their real estate, for any purpose whatsoever, for any period of time, however short. In other words, the property was acquired prior to the passage of the act, and at a time when it might validly and lawfully be leased to a Japanese, but the act now prohibits them so doing by the severest of penalties, both civil and criminal. Their right to use their property in a lawful way has been proscribed by the act, and the highly beneficial use which they had a right to make of the property at the time of its acquisition has been absolutely cut off. It must be remembered that there is, in the leasing of lands to Japanese nothing inherently wrong, but the act is merely *malum prohibitum*, in response to one of those demands which have been so frequently the cause of the passage of the most extreme legislation. In other words, in response to a popular demand, the right of the Terraces to make an inherently lawful use of their land has been cut off, without any recourse whatever therefor. The right of each of the parties to this action, under the due process clause, has been cut off by the terms of the act, and on familiar principles each of them may urge the invalidity of the act from the viewpoint of the other.

In the case of *New York Central Railroad Co. vs. White*, 243 U. S. 188, 197, the court said:

"In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed (*Plymouth Coal Co.*

vs. *Pennsylvania*, 232 U. S. 531, 544, 58 L. Ed. 713, 719, 34 Sup. Ct. Rep. 359; *Jeffrey Mfg. Co. vs. Blagg*, 235 U. S. 571, 576, 59 L. Ed. 364, 368, 55 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet as pointed out by the court of appeals in the *Jensen Case* (215 N. Y. 526), the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer."

In the case of *Mountain Timber Company vs. State of Washington*, 243 U. S. 219, 234, this court said:

"While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed (*Plymouth Coal Co. vs. Pennsylvania*, 232 U. S. 531, 544, 58 L. Ed. 713, 719, 34 Sup. Ct. Rep. 359; *Jeffrey Mfg. Co. vs. Blagg*, 235 U. S. 571, 576, 59 L. Ed. 364, 368, 55 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the *quid pro quo* for the burdens imposed upon him, so that if the act is not valid as against employees it is not valid as against employers."

In the case last cited no employee was a party to the action, although the court considered the act from the standpoint of an employee.

In the case of *Truax vs. Raich*, 239 U. S. 33, it was contended that the employee could not urge the unconstitutionality of the act from the standpoint of the employer. But this court held that, in view of the fact that the act affected the right of both employer and employee, the employee in his action might urge the unconstitutionality of the act from the standpoint of the employer, although the latter was not a party to the action.

In the case of *Buchanan vs. Warley*, 245 U. S. 60, 72, this court said:

"The property here involved was sold by the plaintiff in error, a white man, on the terms stated, to a colored man; the action for specific performance was entertained in the court below, and in both courts the plaintiff's right to have the contract enforced was denied solely because of the effect of the ordinance making it illegal for a colored person to occupy the lot sold. But for the ordinance the state courts would have enforced the contract, and the defendant would have been compelled to pay the purchase price and take a conveyance of the premises. The right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property, and had obligated himself to take it. This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own, and not rest the attack upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved."

It stands undisputed that the Terraces own the property in question. Of course, ownership carries with it the right to use the property in all lawful ways. In the case of *Buchanan vs. Warley*, 245 U. S. 60, 74, this court said:

"Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The constitution protects those essential attributes of property. (*Holden vs. Hardy*, 169 U. S. 376, 391.) Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."

It cannot be disputed that a very substantial limitation of the right

of the Terraces to use their property results from the provisions of the act prohibiting the leasing of lands to aliens.

In the Buchanan case this court held that the legislature could not prohibit a white man from selling his property to a colored man and that an act prohibiting the same was in violation of the due process clause and held that that clause protected persons of color as well as white persons. The act in question, in its ultimate effect, prohibits the Terraces from placing their co-complainant in charge of their property for any length of time whatever and the sole reason for so doing is because such co-complainant is an Oriental; in other words, the prohibition is based entirely on color. Unless, therefore, such a prohibition may be based entirely on color, clearly the act is void. We will now consider that question.

III.

THE ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, IN THAT IT MAKES A CLASSIFICATION WHICH BEARS NO REASONABLE RELATION TO A LEGITIMATE LEGISLATIVE END.

The appellants invoke the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

If the act is in violation of the equal protection clause, so far as concerns the alien appellant, the Terraces may invoke the same protection, because their property rights are interfered with by the act.

Buchanan vs. Warley, 245 U. S. 60.

If we understand the decision of the district court, that court held that the act makes no discrimination whatever, but that all aliens are treated alike. On pages 19 and 20 of the record, the court said:

"Still less does the Washington act discriminate against the Japanese, for it provides that

"'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States.

"The prohibition by this definition is made applicable to all aliens both those eligible and those not eligible to citizenship, provided that they have not declared their intention to become citizens. To this extent, the present suit is to be distinguished from *In re Ah Chong* (2 Fed. 733) * * *

"The present case is not only to be distinguished from the Chong case because of the fact that the present law is made applicable to all aliens and there is no punishment by imprisonment or a fine of the alien grantee of lands."

Beyond any possibility of question, the act divides aliens into two classes, namely, those who may and those who may not become citizens of the United States. To each of the former class is extended all rights of citizens with respect to real estate, upon the filing of a declaration of intention, while the bar of the statute is absolute as to the latter class, because none of them can at any time in good faith file a declaration of intention. If our view of the meaning of the foregoing quotation is correct, we shall content ourselves with permitting its statement to stand as its own answer. Hence, we shall consider the discrimination made by the act.

Excepting (1) the right of the state to prohibit the ownership of lands within its border, there being no treaty to the contrary (*Chirac vs. Chirac*, 2 Wheat. 259, 272; *Hauenstein vs. Lyman*, 199 U. S. 483, 484; *DeVaughan vs. Hutchinson*, 165 U. S. 565; *Clarke vs. Clarke*, 178 U. S. 186; *Blythe vs. Blythe*, 180 U. S. 333); (2) the right of the state to limit the right to take the common property of the state, such as game and fish, to citizens of the state (*McCready vs. Virginia*, 94 U. S. 391; *Patson vs. Pennsylvania*, 232

U. S. 138); (3) the right of the state, and (there being no statute to the contrary) of any municipality therein to employ none but citizens on public work (*Atkin vs. Kansas*, 191 U. S. 207; *Heim vs. McCall*, 239 U. S. 173); and (4) the power to limit the right of the franchise to citizens of the state (*Yick Wo vs. Hopkins*, 118 U. S. 336, 370); aliens are within the equal protection clause as fully as citizens. In view of the fact that the attorney-general asserts the absolute right of the state to deal with aliens, because of alienage and of the subject matter of the act, as it may desire, we shall call attention to (and we trust we may be pardoned for quoting from) the applicable authorities in support of the foregoing statement of the effect of the equal protection clause.

In *Ex parte Virginia*, 100 U. S. 339, 345, in speaking of the Thirteenth and Fourteenth Amendments, said:

"They were intended to take away all possibility of oppression by law because of race or color."

In the case of *Yick Wo vs. Hopkins*, 118 U. S. 356, 359, this court said:

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are *universal* in their application, to any difference of *race*, *color*, or of *nationality*; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes, that, 'All persons within the jurisdiction of the United States shall have the right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of *every citizen* of the United States *equally* with those of the strangers and *aliens* who now invoke the jurisdiction of the court." (Italics ours.)

In the case of *Fong Yue King vs. United States*, 149 U. S. 698, 724, this court said:

"By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicile there; and, while they are permitted by the nation to retain such a residence and domicile are subject to its laws, and may invoke its protection against other nations. This is recognized by those publicists who, as has been seen, maintain in the strongest terms the right of the nation to expel any or all aliens at its pleasure. (Citing authorities.)

"Chinese laborers, therefore, like *all other aliens* residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the Government of the United States to remain in the country to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility."

In the case of *Wong Wing vs. United States*, 163 U. S. 228, 242, this court said:

"A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws."

"This has been decided so often that the point does not require argument. (Citing authorities.)

"The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar, in face of the great constitutional amendments which declared that no state shall deny to any person within its jurisdiction the equal protection of the laws."

In the case of *United States vs. Wong Kim Ark*, 169 U. S. 649, 694, this court said:

"Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are 'subject to the jurisdiction thereof' in the same sense as all other aliens residing in the United States." (Citing authorities.)

In the case of *American Sugar Refining Company vs. Louisiana*, 179 U. S. 89, 92, this court said:

"The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon difference of color, *race*, *nativity*, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism and a denial of the equal protection of the laws to the less favored classes." (Italics ours.)

In the case of *Truax vs. Raich*, 239 U. S. 33, 39, this court said:

"Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws. The description, 'any person within its jurisdiction' as has frequently been held, includes aliens. 'These provisions,' said the court in *Yick Wo vs. Hopkins*, 118 U. S. 356, 369 (referring to the due process and equal protection clauses of the amendment) 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.'"

In the case of *Buchanan vs. Warley*, 245 U. S. 60, 76, this court said:

"While the principal purpose of the latter (Fourteenth) Amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the states. This is now the settled law."

In the case of *Ré Tiburcio Parrott*, 1 Fed. 481, there was involved a provision of the California constitution prohibiting corporations formed under the laws of that state from employing, directly or indirectly, in any capacity any Chinese or Mongolians, and an act of the legislature passed to enforce the same. While it may be said that no state can lawfully prohibit any alien lawfully residing within the state from working at any of the common occupations of the state, and cannot accomplish the same results by the indirect method of prohibiting anyone from employing such alien, it may not be amiss to notice the no uncertain terms in which both the constitutional provision and the act of the legislature were condemned. On page 492 Judge Hoffman used the following language:

"Can it be pretended that this law, of the effect of which I have given examples, is reasonable as between the state and the corporations, without regard to the treaty rights of Chinese residents. Can it be said to be in

good faith—that is, in the fair and just exercise of the reserved power to regulate corporations for the protection of the stockholders, their creditors, and the general public? Is it not rather an attempt, 'under the guise of an amendment or alteration', to attain quite a different and, as I shall presently show, an unconstitutional object, viz.: Two to drive the Chinese from the state, by preventing them from laboring for their livelihood? I apprehend that, to these questions but one candid answer can be given. I am, therefore, of opinion that, irrespective of the rights secured to the Chinese by the treaty, the law is void, as not being a 'reasonable' *bona fide*, or constitutional exercise of the power to alter and amend the general laws under which corporations in this state have been formed; that it would be equally invalid if the proscribed class had been Irish, German, or American; that the corporations have a constitutional right to utilize their property, by employing such laborers as they choose, and on such wages as may be mutually agreed upon; that they are not compelled to shelter themselves behind the treaty right of the Chinese, to reside here, to labor for their living, and accept employment when offered; but they may stand firmly on their own right to employ laborers of their choosing, and on such terms as may be agreed upon, subject only to such police laws as the state may enact with respect to them, in common with private individuals."

In the same case, on page 509, Judge Sawyer, in speaking of the Fourteenth Amendment and section 1977 of the Revised Statutes, said:

"It will be seen that in the latter clause the words are 'any person' and not 'any citizen' and prevent any state from depriving 'any person' of life, liberty or property without due process of law, or from denying to 'any person within its jurisdiction the equal protection of the laws.' In the particulars covered by these provisions it places the right of every person within the jurisdiction of the state, be he Christian, heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the Constitution."

Further, speaking of the decision of this court in the case of *Strouder vs. West Virginia*, the eminent jurist continued thus:

"In speaking of the act to enforce this amendment, the court further says: Sections 1977 and 1978 of the Revised Statutes, before cited, 'partially enumerate the rights and immunities intended to be guaranteed by the Constitution;' and that 'this act puts in the form of a statute what had been substantially ordained by the constitutional amendment.' (Id. 228.) If this exclusion of colored men from sitting upon a jury by *implication* is a violation of the Constitution, as denying the equal protection of the laws to colored persons, *a fortiori* must express the positive provisions of the Constitution and act of the legislature of the State of California be in conflict with that instrument, as denying the equal protection of the laws to the Chinese residents of the state. Upon reason and these authorities, then, it seems impossible to doubt that the provisions in question are both, in letter and spirit, in conflict with the Constitution and laws of the United States, as well as with the stipulations of the treaty with China, and this constitutional right is wholly independent of any treaty stipulations, and would exist without any treaty whatever, so long as Chinese are permitted to come into and reside within the jurisdiction of the United States. The protection is given by the Constitution itself and the laws passed to give it effect, irrespective of treaty stipulations."

In the case of *Ah Kow vs. Nunan*, 5 Sawy. 552, there was under consideration an ordinance of the city of San Francisco, commonly known as

the queue ordinance, which required the hair of each Chinese to be clipped within an inch of his head. Mr. Justice Field, in holding the ordinance unconstitutional, said:

"But in our country, hostile and *discriminating legislation* by a state against persons of any class, sect, creed, or nation, in whatever form it may be expressed, *is forbidden by the Fourteenth Amendment to the Constitution*. That amendment in its first section declares who are citizens of the United States and then exacts that no state shall make or enforce any law which shall abridge their privileges and immunities. It further declares that no state shall deprive *any person* (dropping the distinctive term citizen) of life, liberty, or property, without due process of law, nor deny to *any person* the equal protection of the laws. This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative, and judicial departments, and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one while within the United States from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others; and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment."

In *In re Ah Fong*, 3 Sawy. 144, Justice Field held unconstitutional for the same reason, an act passed by the legislature of California requiring a bond conditioned that Chinese immigrants should not become a charge upon the public.

In *State vs. Montgomery*, 94 Me. 192, the court held unconstitutional an act requiring all peddlers to secure a license, and denying a license to an alien, and in so doing said:

"Nor can this discrimination be sustained as a constitutional exercise of the police of the state. It must be noted that the discrimination is not against a class, as criminals, as paupers, as intemperates and disqualified by character or habits, or as harmful to society, but as against a class solely as aliens. Such a discrimination is forbidden."

In *Templar vs. Board*, 131 Mich. 254, the court held unconstitutional an act which required barbers to take out a license, but which denied a license to aliens. In its opinion the court said:

"But had it (the board) the right to require citizenship? If it had the right to couple that with other requirements, it would have the right to make that the only requirement."

In *In re Opinion of Justices*, 207 Mass. 601, the legislature submitted to the court the following inquiry:

"If the legislature is of the opinion that public order, decency, and morality require that girls and young women be excluded from Chinese restaurants and hotels, is it within the constitutional power of the legislature to enact a law making it a criminal offense for any woman under the age of 21 years to enter a hotel or restaurant conducted by Chinese or to be served with food or drink therein, or for the proprietor of any such hotel or restaurant to admit thereto a woman under the age of 21 years or to serve her with food or drink therein?"

The court quoted from *Powell vs. Pennsylvania*, 127 U. S. 678, *Yick Wo vs. Hopkins*, 118 U. S. 356, and *Barbier vs. Connolly*, 113 U. S. 27, and cited

with approval *Re Tiburcio Parrott*, 6 Sawy. 349, 1 Fed. 481, and *Re Lee Sing*, 45 Fed. 359, and then said:

"The business of keeping a hotel or restaurant to which the proposed legislation relates, is a necessary and proper kind of business that is entitled to the protection of the laws. It may be conducted legally or illegally, by a person of any nationality. The proposed law, without reference to the way in which it is conducted, puts a restraint upon it which might be expected very seriously to interfere with the successful management of it, whenever it is carried on by any person of a particular nationality, which is not put upon it when it is carried on by any person of any other race and nationality. By the strict terms of the proposed law it would be a criminal offense for a Chinese proprietor of a hotel or restaurant to permit his wife, if she were under the age of 21 years, or his grown-up daughter of less than that age, to enter his hotel or restaurant, or to be served food or drink therein. This is a very great interference with the liberty of the subjects of a foreign ruler, lawfully residing within the jurisdiction of this state. It is a harmful discrimination against persons of the proscribed class, founded wholly upon their race and nationality, and it plainly falls within the constitutional prohibition quoted above. It subjects Chinese to an oppressive burden that deprives them of liberty which others enjoy and interferes with their right to carry on business, acquire property and earn a livelihood, and denies them the protection of equal law.

"The only question that can be regarded as doubtful by anybody is that which arises on the supposition that the legislature may be 'of the opinion that public order, decency and morality require that girls and young women be excluded from Chinese restaurants and hotels.' This brings us to the consideration of the police power. There is no doubt of the right and duty of the legislature to enact laws for the promotion of public order, decency and morality. But when such legislation interferes with the exercise of personal rights, it must be directed to the prevention of real evils, in the interest of morality. The proposed legislation does not assume to forbid anything that is necessarily evil in itself, or to deal directly with any offense against order, decency or morality. There are good hotels and bad hotels, good restaurants and bad restaurants, kept by men of the Caucasian race, and there are others of both kinds kept by men of other races. The legislation does not refer to the character of the hotel or restaurant that a young woman may not enter, but refers only to the nationality of the person who conducts it. The enactment of such legislation is not a proper exercise of the police power. It has no direct relation to the evil to be remedied. It forbids the entry of a young woman into the hotel or restaurant of a Chinese proprietor, even if it is a model of orderly and moral management, and it permits the entry of a young woman into a hotel or restaurant kept by an American, which is known to be maintained in part for the promotion of immoral or criminal practices. The classification of hotels and restaurants into those that are open to young women and those that are closed to young women is not founded upon a difference that has any just or proper relation to the professed purpose of the classification. The only classification is into hotels and restaurants kept by Chinese and those kept by persons of other nationality.

"In reference to classifications made in an attempted exercise of the police power, Mr. Justice Brewer said, in *Gulf, Colorado and Santa Fe Railway vs. Ellis*, 165 U. S. 150, 165: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must

appear not only that a classification has been made, but also that it is only based upon some reasonable ground—some difference which bears a just and reasonable relation to the attempted classification—and is not a mere arbitrary selection.' (See, also, opinion by Mr. Justice Field in *Ho Ah Kow vs. Hunan*, 5 Sawy. 552, Fed. Cas. No. 6, 546.)

"The fact that a man is white, or black, or yellow is not a just constitutional ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of different color.

"We answer the question in the negative."

The first sentence in the above quotation is the familiar proposition that the keeping of a hotel or restaurant cannot be prohibited under the due process clause of the Fourteenth Amendment. If, however, a legislature has the power asserted in the case at bar, then the opinion of the eminent justices above quoted is without foundation, because, to operate a hotel, the proprietor would either have to own or lease the same, and would thereby at least be leasing or using real estate within the meaning of those terms as used in the act in the case at bar. Therefore, the legislature would have had the absolute right to prohibit the ownership, leasing, using or controlling of that real estate, without which the hotel could not be conducted, and having the absolute right thus to prohibit the business *in toto* a partial exercise of less than the whole of an acknowledged power would be valid.

In the case of *Commonwealth vs. Titcomb*, 229 Mass. 14, the court said:

"It (the legislature) cannot proscribe one class upon the basis of race."

In view of the foregoing authorities, it is submitted that, subject to the exceptions above mentioned, aliens are within the equal protection clause of the Fourteenth Amendment as fully as citizens, that legislation imposing burdens upon, or limiting rights of, aliens, because of alienage, is void, and that however broad the power of classification may be, classification based upon citizenship as against alienage, or, upon alienage as against citizenship, is void.

The legislature being powerless to discriminate against aliens in favor of citizens and to classify upon the ground of alienage, how can it in reason be said that it may nevertheless discriminate against some aliens in favor of others, or classify aliens among themselves, when all aliens are equally within and protected by the equal protection clause of the Fourteenth Amendment? The attorney-general stoutly argues that it may do so, and that a valid classification has been made by the act in question.

Subdivision (a) of section 1 of the act subjects to pains and penalties every alien except an alien which the subdivision excludes from the meaning of the word "alien." The language of the subdivision, so far as is pertinent to the case, is as follows:

"(a) 'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens." * * *

The discrimination in subdivision (a) is therefore founded upon the naturalization laws of the United States. They apply only

"to aliens being free white persons, and to aliens of African nativity and to persons of African descent."

Rev. Stats., sec. 2169, Act February 18, 185 (18 Stats. 316).

Subdivision (a), if read as the legislature intended in law it should read, and if by incorporating into it the naturalization law, would read as follows:

"'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, if such alien be a free

white person, or of African nativity or African descent, but does include all other aliens."

This conclusively follows, because, as the courts have held, a Japanese is not a white person or a person of African descent, and cannot therefore be naturalized.

In re Saito, 62 Féd. 126; *In re Young*, 189 Fed. 175; *In re Geronimo Para*, 269 Fed. 643.

The court, in the instant case, so holds. (Rec., p. 14.)

Not being subject to naturalization, a Japanese could not in good faith declare his intention to become a citizen of the United States. The lower court so held, saying:

"Nakatsuka not being eligible to citizenship under the law as it now stands, even if such complainant had filed, or sought to file a declaration to become a citizen, he could not—considering the present uniformity in the decisions—fairly be said to have done so 'in good faith.'" (Rec., p. 14.)

Hence, the attorney-general asserts this proposition: Discriminatory legislation may be enacted by Congress because the Constitution contains no equal protection clause operative in Congress, and, due to that fact, the naturalization act is valid even though it discriminates against the aliens not included within it, and (if the power of naturalization were not granted to Congress) although that act, if passed by the state, would be in contravention of the equal protection clause of the Fourteenth Amendment, the state may nevertheless make that discriminatory act the basis of its classification in the act in question, merely because the naturalization act was passed by Congress and not by the state. This proposition resolves itself into the further proposition, that, on those matters on which both Congress and the legislatures may act, if Congress, not bound by an equal protection clause, passes an act, any state legislature, although it is bound by the equal protection clause, may enact precisely the same measure, despite the fact that the statement of the proposition is its own answer. But if it be not, it is fundamental that what cannot be directly done cannot be done by indirection.

It is, of course, true that Congress may permit all aliens, or any class of aliens, less than all, to be naturalized, for whatever reason may seem to it sufficient or wise, being bound by no constitutional limitation on the subject. In the case of *United States vs. Wong Kim Ark*, 169 U. S. 649, 694, this court said:

"Whatever considerations, *in the absence of a controlling provision of the Constitution*, might influence the legislative or the executive branch of the government to decline to admit persons of the Chinese race to the status of citizens of the United States, * * * ." (Italics ours.)

It must be remembered, further, that in the matter of admitting aliens to naturalization, Congress was dealing with a political subject, and not a property right. The act in question deals not with political rights, but with property rights, because, at common law, and in the State of Washington, prior to the enactment in question, aliens had the absolute right to lease real estate for a reasonable term, that is a term sufficiently short to have no incident whatever of ownership, direct or indirect.

1 R. C. L. p. 823, sec. 33.

This was the law in the State of Washington from the adoption of the constitution to the passage of the act in question.

State ex rel. Winston vs. Morrison, 18 Wash. 664.

In view of the fact that the naturalization law was passed in the exercise of the unrestrained political right of Congress and the fact that the

act in question attempts to bar the appellants of property rights, and must be found to conform to the requirements of the equal protection clause of the Fourteenth Amendment, it should seem readily apparent that the former act cannot be used as the basis of the classification attempted in the latter.

If, in dealing with subjects which are not matters of property right, the state legislatures are bound to observe the equal protection clause of the Fourteenth Amendment, it would seem obvious that respecting property right similar observance is necessary.

Game and fish are the property of the state, are within the plenary power of legislature, and their killing or taking may be prohibited to all persons who are not citizens of the state.

McCready vs. Virginia, 94 U. S. 395; *Geer vs. Connecticut*, 161 U. S. 519; *Manchester vs. Massachusetts*, 139 U. S. 240; *Ex rel. Silz vs. Hesterberg*, 211 U. S. 31; *Patson vs. Pennsylvania*, 232 U. S. 138.

Therefore, if, with respect to that common property of the state, the legislature may not, consistent with the equal protection clause of the Fourteenth Amendment, prohibit a taking by some aliens while permitting it by others, there can be no escape from the conclusion that the legislature, when dealing not with its own property but with property rights of the inhabitants of the state, cannot discriminate against some aliens in favor of other aliens.

In *re Ah Chong*, 6 Sawy. 45, 2 Fed. 733, Judge Sawyer held in violation of the equal protection clause of the Fourteenth Amendment, and the treaty with China, a statute of California prohibiting all aliens *incapable of becoming electors of the state* from fishing in the waters of the state. In his opinion, that eminent justice said:

"Citizens of other states having no property right which entitles them to fish against the will of the state *a fortiori*, the alien, from whatever country he may come has none whatever in the waters or the fisheries of the state. Like other privileges he enjoys as an alien by permission of the state, he can only enjoy so much as the state vouchsafes to yield to him as a special privilege. To him it is not a property right, but, in the strictest sense, a privilege or favor. To exclude the Chinaman from fishing in the waters of the state, therefore, while the Germans, Italians, Englishmen, and Irishmen, who otherwise stand upon the same footing, are permitted to fish *ad libitum* without price, charge, let or hindrance, is to prevent him from enjoying the same privileges as are 'enjoyed by the citizens or subjects of the most favored nation,' and to punish him criminally for fishing in the waters of the state, while all aliens of the Caucasian race are permitted to fish freely in the same waters with impunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions 'as are enjoyed by the citizens or subjects of the most favored nation.' And such discriminations are in violation of articles V and VI of the treaty with China cited in full in Parrott's case. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privileges it must permit all others to enjoy, upon like terms, the same privileges, whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation.

"The Fourteenth Amendment of the National Constitution provides that 'no state shall * * * deny to *any person* within its jurisdiction the equal

protection of the laws." To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected and it is to deny to them the equal protection of the laws, contrary to those provisions of the Constitution."

The foregoing case has been cited with approval in the following cases:

County of San Mateo vs. Southern Pacific R'y Co., 15 Fed. 722; *United States vs. Balsara*, 180 Fed. 694; *Re Takai Maru*, 190 Fed. 45; *Raich vs. Truax*, 219 Fed. 273; *Tragresser vs. Gray*, 73 Md. 251; *Commonwealth vs. Cosick*, 36 Pa. County Court Reports, 637; *Harper vs. Galloway*, 59 Fla. 255.

It was also cited, but not applied, in *Commonwealth vs. Hanna*, 195 Mass. 262, in which it was held that a statute providing that a license as a hawker and peddler should be granted only to a person who was or has declared his intention to become a citizen of the United States, on the ground that such occupation was a *privilege* and not a property right.

Believing, as we do, that the legislature can no more impose disabilities upon some, but not all, aliens, than it can upon some, but not all, citizens, we call attention to similar cases respecting discriminations against citizens in the taking of game and fish.

In the case of *Harper vs. Galloway*, 58 Fla. 255, the court held in violation of the equal protection clause an act of Florida requiring residents of the state who were not residents of Marion County therein to give notice of an intention to hunt, and the payment of a special license tax for the privilege of hunting in Marion County, but requiring no notice or license tax from residents of Marion County, and in so doing said:

"The unjust discrimination against residents of other counties in the state who have rights as to the game in the state as imposed by section 8 of the act, is in effect a denial to the residents of the state who are not residents of Marion County the equal protection of the laws of the land, and such section 8 is inoperative as to residents of this state."

In the case of *State vs. Savage*, 96 Ore. 53, the supreme court of Oregon held two acts of the legislature of that state, prohibiting the taking of salt water crabs from Coos County for the purpose of sale, and making it inapplicable to those engaged in the canning business, to be discriminatory class legislation and void under article I, section 20, of the state constitution, reading as follows:

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

In its opinion the court said:

"No good reason is suggested or can be conceived that in the protection of fish a portion of the people should be subject to prosecution and punishment for the catching or transportation for mercantile purposes of salt-water crabs taken in Coos County, while another class of persons operating canneries should have the exclusive right of taking and shipping the same kind of fish beyond the limits of the country for the purposes of sale. The act of 1915 and that of 1917 clearly grants a special privilege or monopoly to those engaged in the cannery business without any good reason therefor, and is discriminatory class legislation and repugnant to article I, section 20, of the Constitution and void."

In *Poon vs. Miller* (Tex.), 234 S. W. 573, the court held invalid an act

to secure a license to engage in the business of selling at wholesale fish and oysters, and providing that no person could procure such license without swearing that he was a citizen of the United States or a naturalized alien. The action was by a Chinaman to enforce a provision in a contract made with him by the defendants to the effect that they would not engage in the fish and poultry business within certain territory for a certain time. One defense set up was that the plaintiff could not prevail because he had not secured and could not secure a license under the act in question. The court held against the defendants and said:

"The state may have the power to regulate the sale of property belonging to the citizen or resident which has become a part of the commerce of the country, but cannot absolutely prohibit such sale in the face of the Federal Constitution, by an alien who has the same rights guaranteed to him as has the citizen. * * *

"We conclude that the provision of the statute denying this right to an alien to whom has been given all the rights of citizens of the most favored countries is in conflict with the treaty between the United States and China, and also is obnoxious to the provisions of the Fourteenth Amendment to the Constitution, and is of no force and effect."

Although there does not appear a direct statement that the Chinese whose rights were infringed by the ordinance involved in *Yick Wo vs. Hopkins*, 118 U. S. 356, were all engaged in the hand laundry business as distinguished from steam laundry business, the opinion clearly indicates that to be the fact, and we submit that this court will take judicial notice of that notorious fact. In that case this court held invalid a discrimination against Chinese, although there can be no doubt that the state may prohibit the hand laundry business, because in *Quong Wing vs. Kirkendall*, 223 U. S. 59, 83, this court upheld an act requiring the payment of a license to do hand laundry work but none for the operation of a steam laundry. There Mr. Justice Holmes speaking for the court said:

"If the state sees fit to encourage steam laundries and discourage hand laundries, that is its own affair."

From the foregoing it follows that even though the prohibition is with respect to a business which can be prohibited to aliens and citizens alike, a prohibition with respect thereto against aliens alone, or some aliens, is invalid, as in contravention of the equal protection clause.

An act, similar in many respects to the act in this case, submitted by the initiative and adopted by the electors of California in November, 1920, contains a provision, as does the act in question, prohibiting the proscribed aliens from being appointed guardian of the estate of a minor when the estate consists, even in part, of real estate. That portion of the California act came before the supreme court of California in the case entitled *In the Matter of the Estate and Guardianship of Tetsubumi Yano*, decided May 1, 1922 (not yet officially reported), in which it appeared that the minor was an American citizen, born in California of Japanese parents, who were aliens; that the alien father, resident of California, applied for guardianship of the said minor and that his application was refused by the lower court because of said act. On appeal the supreme court held the provision in violation of the equal protection clause of the Fourteenth Amendment, and in the course of its opinion said:

"Our law provides that the father or mother of a minor child less than fourteen years of age, if competent, is entitled to be appointed guardian of such child in preference to any other person. (Code Civ. Proc., sec. 1751.) This law is general in terms. It is not confined to citizens in its appli-

cation, but purports to confer the right upon all residents regardless of citizenship. The initiatory act of 1920 (Stats. lxxxiii, sec. 4), by its terms, forbids the appointment of an alien not eligible to citizenship as guardian of a minor with respect to the property of the minor of a character which such alien cannot acquire for himself, that is to say, with respect to agricultural land belonging to such minor. Its effect is that a citizen of Japan who is the parent of a native born child cannot be appointed guardian of the property of the child where that property consists entirely of agricultural land. This restriction is not put upon a citizen of any country whose citizens are eligible to citizenship here, nor upon any other class of residents of this state who are not citizens thereof. It is clearly a discrimination against citizens of Japan residing in this state.

"Section I of article XIV of the Constitution of the United States declares that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' We had occasion to consider this language in *Ex parte Kotta*, decided on September 12, 1921 (200 Pac. 957). We there said that 'the word (person) as used in this amendment includes aliens,' and quoting from *Yick Wo vs. Hopkins*, 118 U. S. 396, that it applies 'without regard to any difference of race, of color, or of nationality,' and that the guarantee of 'the equal protection of the laws is a pledge of the protection of equal laws.' These statements are quoted and approved by the Supreme Court of the United States in *Truax vs. Raich*, 239 U. S. 33. In *Barbier vs. Connolly*, 113 U. S. 31, the court declared that this guarantee means that 'equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights.' It needs no argument to demonstrate the proposition that a law which gives to one person the right or privilege of becoming the guardian of his child and withholds it from another, both being alike competent in all respects, is not equal as between the two persons. The person from whom it is withheld is not in such a case accorded the equal protection of the laws. In this respect the initiative act of 1920 is clearly a violation by this state of the guaranty contained in the Fourteenth Amendment, that no state shall deny to any person the equal protection of the laws.

"It cannot be successfully contended that the law may be declared valid in this respect on the ground that persons who are ineligible to citizenship under the laws of the United States form, by reason of that fact alone, a class by themselves, for which the state may enact peculiar legislation depriving them of rights and privileges which are accorded to others not of that class. The rule in regard to classification, peculiarly applicable to such an attempt, is that the classification 'must be founded upon differences which are either defined by the constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification, that legislation really local or *special* may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation.' (Italics ours.) (*Darcy vs. Mayor, etc.*, 104 Cal. 645.) A law 'makes an improper discrimination if it confers particular privileges or imposes peculiar restrictions or disabilities upon a class of persons arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted or burdens imposed, and between whom and the persons not so favored or burdened no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privileges or burdens. The difference on which the classification is based must be such as, in some

reasonable degree, will account for or justify the peculiar legislation.' (*Ex parte Miller*, 162 Cal. 698.) 'While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, having a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.' (*Southern R. Co. vs. Greene*, 216 U. S. 417.) The right or privilege of a father to be the guardian of his own minor child does not in any respect depend upon or arise out of his nationality or his eligibility to citizenship in this country. It has no relation thereto. Such privilege is no doubt as much prized by a Japanese resident of good character who is not a citizen of this country and cannot become such, as by any other father of like character who is a citizen or eligible to become one. A law denying the privilege to one class and giving it to the other cannot be said to be a law justified by a classification based on a distinction which calls for such peculiar legislation. Such attempted classification does not relieve the act from the charge that it violates the Fourteenth Amendment."

The court further held that the provision violated section 21 of article I of the state constitution, which declares that no citizen or class of citizens shall "be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

If the naturalization act had furnished a valid basis of classification by a legislature limited by the equal protection clause, that fact would have resulted in the provision being upheld. Hence, that decision is directly in point and is, in effect, that a state legislature cannot use the naturalization act as a basis of classification of aliens. It must follow that the classification attempted in the act in question in the case at bar must find support, if any it has, not in, but aside from the naturalization act. Hence we proceed to an examination of the act.

In its decision of the case arising out of the California Alien Land Act, *Porterfield vs. Webb*, 279 Fed. 114, that court attempted to answer the question in this manner:

"It is true that Congress has the power arbitrarily to say who may be naturalized and that, exercising such power, it has limited the right of naturalization to 'aliens being free white persons, and to aliens of African nativity, and to persons of African descent.' This limitation excludes three of the five great races of the world, the yellow, the brown and the red. And while such exclusion is in a sense arbitrary, it is not without foundation in reason, and has been in effect, except for a brief period, practically during the existence of our government. In any event, once established, *however arbitrary*, and so long as it continues, it furnishes a fundamental and important distinction, which may well be adopted by a state in determining who may not own land within its borders. That fact was clearly recognized by the court and given expression in the Terrace case in the following language:

"It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens. Such a result would leave the foundation of the state

but a pale shadow, and the structure erected thereon but a Tower of Babel, from which the tenants in possession might, when the shock of war came, bow themselves out, because they were not bound as citizens to defend the house in which they lodged.'"

There are a number of answers to that argument: First, if every foot of land within the State of Washington should pass into the ownership or possession of aliens, then little could be said in defense of the act as an expression of representative government. Second, the presumptions which are permissible to the legislature, when enacting a rule of conduct, do not include such a theoretical possibility as to be a practical impossibility. Third, the act of government forcing on a resident within its jurisdiction a condition which causes him to lack an interest in and power to effectually work for the welfare of the state, and then classifying him on the ground of the necessary result of that condition forced on him, against his will, does not square with the doctrine of American fair play. Fourth, the statement of the court that a difference, however arbitrary, might be availed of as a ground of classification by a state bound by the equal protection clause of the Fourteenth Amendment is directly contrary to every decision of this court on that point. Fifth, Congress, in passing the naturalization act, was not limited by an equal protection clause, but the state, when passing the act in question, was, and what cannot be done directly cannot be done indirectly. It is submitted that the question is not disposed of by the foregoing quotations.

Again, it is to be remembered that the substance of an act of legislature cannot be concealed by its form. This court, when determining the constitutionality of acts of the state legislatures, has so frequently said that the substance, not the form, of an act must be regarded, as to make a citation of authority to that effect unnecessary. In no instance has the substance of an act been more carefully concealed by its form. This act is nothing more nor less than a legislative declaration that only free white persons, and persons of African nativity, and persons of African descent, may lease, control, use, enjoy, etc., lands within the State of Washington. This is so obvious that the point requires no further argument, nor is it necessary to cite authority to the effect that the act, when so regarded, is in violation of the equal protection clause.

It will be observed that an alien as defined by the act excludes an alien who has declared his intention in good faith to become a citizen of the United States. Such a declaration does not make him any the less an alien in fact, since he remains an alien until he is admitted to citizenship by a decree of one of the prescribed courts. Hence, for the purpose of the act, some aliens are *not* aliens, but other aliens *are* aliens. By the express terms of the act of June 25, 1910, chapter 401, section 3, an alien who has so declared his intention may, not less than two years nor more than seven years thereafter, file his petition for citizenship, without which he cannot be admitted to citizenship. By the terms of section 6 of the Washington statute, upon failure to secure admission to citizenship within seven years after the filing of the declaration of intention "it shall be presumed that he declares his intention in bad faith." Hence an alien can declare his intention and thereby become eligible to all the rights of a citizen with respect to real estate, in entire compliance with the act, while the proscribed alien, who is in fact no more an alien than the former, is at all times not only barred from similar rights, but is absolutely barred from declaring his intention to become a citizen of the United States. The said alien who has so declared his intention can fail to apply for citizenship and does not lose

his rights, under the act in question, because his failure to file his petition creates only a presumption that his declaration was not in good faith. Hence, he can remain an alien for fourteen years, and still enjoy all the rights of a citizen with respect to real estate, while the other alien can at no time acquire any right whatever according to the terms of the act. The only difference between the alien who has so filed his declaration, under the foregoing, and an alien of the proscribed class, is that the former filed a declaration of intention from which nothing whatever resulted, while the latter has not at any time been permitted to file his declaration of intention. Yet the one is an alien, by the terms of the act, and the other is not an alien, although, in fact, he is an alien to the same extent that he was prior to the filing of his declaration of intention. Classification cannot change facts; such an arbitrary classification is utterly void.

in its opinion, the lower court said (Rec., p. 21):

"It is obvious that the objection on the part of Congress is not due to color, as color, but only to color as an evidence of a type of civilization which it characterizes. The yellow or brown racial color is the hallmark of the oriental despotisms, or was at the time the original naturalization law was enacted. It was deemed that the subjects of those despotisms, with their fixed and ingrained pride in the type of their civilization, which works for its welfare by subordinating the individual to the personal authority of the sovereign, as the embodiment of the state, were not fitted and suited to make for the success of a republican form of government. Hence they were denied citizenship. * * *

"It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries."

The foregoing quotation suggests the only basis upon which a classification might be made. If under any circumstances the legislature may classify aliens, with respect to the subject matter of the act in question, the classification must be founded upon adherence and attachment to, respect for and interest in American government and its institutions, because, obviously, that is the only *legitimate* end of government for the accomplishment of which the act might in any event be passed.

In the exercise of the police power, the statute must have some fair tendency to accomplish, or must aid in the accomplishment of, some purpose for which the legislature may use the power, and if the means employed have no real, substantial relation to a public object which government can accomplish, the courts will declare the statute invalid (*Welch vs. Swasey*, 214 U. S. 191, 195), and classification must be reasonable, not arbitrary, and the equal protection clause requires that the classification shall be upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation, (*Atchison, Topeka & Santa Fe Railway Co. vs. Vosberg*, 238 U. S. 56, 59), and must be founded upon a distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed (*Southern Ry. Co. vs. Green*, 216 U. S. 400).

As above suggested, the only legitimate end to be accomplished by the act in question is insuring that the rights in or to real estate mentioned in the act shall be exercised only by those persons who adhere and are attached to and who respect the American Government and its institutions. Hence, it remains only to be seen whether the act really and substantially accomplishes that purpose, and whether the means adopted do, in fact,

reasonably result in the determination of that ultimate fact, which must be the basis of the classification attempted. Aliens of the proscribed class, resident in the state, may have the same adherence and attachment to and respect for the American Government and its institutions as the most patriotic citizen in the state, but they are nevertheless proscribed by the act. No means are afforded by which the ultimate fact, which is the legitimate end of such legislation, can be determined, and the question is forever foreclosed by the act, irrespective of the fact. A question, similar in principle, was before this court in the case of *Smith vs. Texas*, 233 U. S. 630, in which case this court held in violation of the equal protection clause an act which made it a misdemeanor for any person to act as a conductor on a railway train without having previously served for two years as a freight conductor or brakeman. In its opinion the court held:

"The statute here under consideration permits those who had been freight conductors for two years before the law was passed, and those who for two years have been freight conductors in other states, to act in the same capacity in the State of Texas. But barring these exceptional cases, the act permits brakemen on freight trains to be promoted to the position of conductor on a freight train, but excludes all other citizens of the United States from the right to engage in such service. The statute does not require the brakeman to prove his fitness, though it does prevent all others from showing that they are competent. The act prescribes no other qualification for appointment as conductor than that for two years the applicant should have been a brakeman on a freight train, but affords no opportunity to any others to prove their fitness. It thus absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor on a freight train.

"Or it is to be noted that under this statute, not only the general public, but also four classes of railroad men, familiar with the movement and operation of trains, and having the same kind of experience as a brakeman, are given no chance to show their competency, but are arbitrarily denied the right to act as conductors. The statute excludes firemen and engineers of all trains, and all brakemen and conductors of passenger trains. But no reason is suggested why a brakeman on a passenger train should be denied the right to serve in a position that the brakeman on a freight train is permitted to fill. Both have the same class of work to do, both acquire the same familiarity with rules, signals, and methods of moving the distributing cars, and if the training of one qualifies him to serve as conductor, the like training of the other should not exclude him from the right to earn his living in the same occupation."

The lower court said that the proscribed races were the "hallmark" of despotism, and that it was that fact to which the legislature objected. History recounts no instance of despotism approaching that which has always prevailed in Russia, or of that which has always prevailed in Turkey, nor of the bloody barbarity which has systematically been practiced in Turkey upon the subjects of that government. Yet the Russian and the Turk are admitted to citizenship in the United States, and may have all the rights of citizens of the state with respect to lands within the state. It is a matter of history and common knowledge that those individuals, in the United States, who habitually spend their time and effort in plotting the forcible overthrow of this government are notably from Russia. These being the facts, it cannot be said that the subjects of Russia and Turkey are attached to or respect the American Government or its institutions. It cannot be said that the admission to citizenship of the Zulu, the Kaffir,

and cannibal tribes of the Congo and the tribes of Ashantee and Dahomey, all admissible to citizenship in the United States, and hence to the rights of citizenship of the state with respect to lands, contribute to the preservation of our form of government and our civilization and its enrichment or the making of our form of government a success by taking in the refinements, social gifts and graces and the firm attachment to republican institutions that have so long made these races an example to Americans. China has been a republic for some years and has been recognized as such by our government, but the Chinese cannot be admitted to citizenship in the United States, and hence are denied the right of other aliens to lands in the State of Washington. Japan stands among the foremost nations today, not only in civilization, accomplishment, civic pride, but in all those national attributes which make her one of the great recognized powers. Her nationals, resident in America, are notably law-abiding and industrious, and actuated by civic pride to such a degree as stands as an example to American citizens. Many of them have been residents of the state for years, have made it their permanent home, but despite these facts it is suggested that they are not attached to this government. Do men voluntarily emigrate to live and raise their children in a country and under a government to which they are not attached and whose institutions they do not respect? Common sense and observation dictate a negative answer.

When an act, which concededly must have a substantial relation to the determination of the existence or absence of adherence and attachment to and respect for American institutions and the American Government, so utterly fails to accomplish that purpose how can it be said that it is other than an arbitrary fiat formulated in utter disregard of the facts? As we have seen, a resident alien may have the same requisites and necessary qualities for citizenship as has the most patriotic, but if he is in the proscribed class the fact is utterly immaterial. Likewise, the classification permits the exercise of rights by and extends privileges to aliens from other countries whose history is utterly subversive of all principles on which the American Government is founded, and whose nationals here have been notably connected with plots for the forcible overthrow of this government. The act, however, permits the latter class to exercise all of the rights of citizens with respect to land. From whatever point of view the act be considered, it is plainly apparent that the classification utterly fails of the purpose of valid classification and that the act is no more than an arbitrary and capricious fiat.

The vice of this act is that it makes a class within a class. The effect following that fact is nowhere better stated than in *State vs. Julow*, 129 Mo. 163, where the court had under consideration and held void a statute of Missouri, making it an offense to discharge a laborer because of membership in a labor union, to which doctrine this court stands firmly committed (*Adair vs. United States*, 208 U. S. 161; *Coppage vs. Kansas*, 236 U. S. 1), and in the course of its opinion the court said:

"But the statute is obnoxious to criticism on other grounds. It does not relate to persons or things as a class—to all workmen, etc.—but only to those who belong to some 'lawful organization or society,' evidently referring to a trade union, labor union, etc. Where a statute does this—where it does not relate to persons or things as a class, but to particular persons or things of a class—it is a special, as contradistinguished from a general, law. (*State vs. Tolle*, 71 Mo. 645; *State vs. Herrmann*, 75 Mo. 340.) Here a non-trade-union man or non-labor-union man could be discharged without ceremony, without let or hindrance, whenever the employer so

desires, with or without reason, while, in the case of a trade-union or labor-union man, he could not be discharged, if such discharge rested on the ground of his being a member of such an organization. In other words, the legislature has undertaken to limit the power of the owner or employer as to his right to contract with or to terminate a contract with particular persons of a class and therefore the statute which does this is a special, not a general law, therefore violative of the Constitution. Judge Cooley says: 'A statute would not be constitutional which would select particular individuals from a class or locality and subject them to particular rules, or impose upon them special obligations or burdens, from which others in the same class or locality are exempt. Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the providence of free government.' (Cooley Const. Lim. 391.) The legislature may legislate in regard to a class of persons,, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each. This would be a mere arbitrary classification, without any basis of reason on which to rest, and would resemble a classification of men by the color of their hair, or other individual peculiarities, something not competent for the legislature to do. (*State vs. Herrmann*, 75 Mo. loc. cit. 353.)"

The same principle was applied in *Gulf, Colorado & Santa Fe Ry. Co. vs.* 184 U. S. 540, in which this court held invalid an Illinois statute, exempting agriculturists and livestock dealers from its provisions, and which prohibited combinations in restraint of trade, saying:

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices for their special benefit is too manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The same principle was applied in *Gulf, Colorado & Santa Fe Ry Co. vs. Ellis*, 165 U. S. 150. The principle was again applied in *Cotting vs. Kansas City Stockyards*, 183 U. S. 79, in which this court held in violation of the equal protection clause an act of Kansas which limited the amount of the charges to be made by a stockyard company, without limiting the charges to be made by similar corporations doing a smaller amount of business, and without any reference to the character or value of the services rendered, although the statute was general in its terms and applicable to any corporation doing business of a certain amount, and notwithstanding the fact that by virtue of the great amount of business done by the corporation affected by the statute it might make a reasonable income, since the statute made a positive and direct discrimination between persons engaged in the same class of business, and based it simply upon the quantity of business which each might do. In its opinion this court said:

"This statute is not simply legislation which in its indirect results affects

different individuals or corporations differently nor with those in which a classification *is based upon inherent differences in the character of the business*, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do." (Italics ours.)

In the case of *McFarland vs. American Sugar Refining Company*, 241 U. S. 79, this court held in violation of the equal protection clause an act of Louisiana defining the business of sugar refining as that of "any concern that buys and refines raw or other sugar exclusively, or that refines raw or other sugar from sugar taken on toll, or that buys or refines more raw or other sugar than the aggregate of the sugar produced by it from cane grown and purchased by it," and created a presumption of participation by a sugar refiner in a forbidden monopoly or combination from the systematic payment in Louisiana by a person or company engaged in sugar refining within that state of a less price for sugar than he paid in any other state, and that the closing or keeping idle of a sugar refinery for more than one year was for the purpose of violating that statute against monopolies, and provided criminal penalties therefor. Answering an argument to sustain the classification, this court said:

"As to the classification, if a powerful rival of the plaintiff should do no refining within the state, it might systematically pay a less price for sugar in Louisiana than it paid elsewhere with none of the consequences attached to doing so in the plaintiff's case. So of anyone who purchases but does not refine. So of any concern that does not buy and refine more sugar 'than the aggregate of the sugar produced by it from cane grown and purchased by it,' as easily might happen with a combination of planters, such as the answer gives us to understand has been attempted heretofore."

The foregoing cases illustrate the rule that a valid classification must have a reasonable relation to a legitimate end of government, and that a classification which has no tendency to the accomplishment of that purpose is void. The vice of the classification attempted in the instant case, because of that lack of reasonable relation to the legitimate purpose of government, is illustrated by the decision in *Atchison, Topeka & Santa Fe Ry. Co. vs. Vosberg* (*supra*), 238 U. S. 56, in which the reciprocal demurrage law of Kansas was sought to be upheld on the argument that the classification had a reasonable relation to the object of securing adequate car service. The contention was summarily disposed of thus:

"In short, it is erroneous to test the classification by its supposed relation to the object of securing adequate car service, because it really relates to the object of securing adequate prosecution in court of actions respecting car service."

So in the case at bar, the act must be tested by its supposed relation to making certain that the right involved may be exercised only by those who adhere and are attached to and respect this government and not by reason of alienage, or those things which are necessarily inherent in aliens because of alienage.

In the case of *Truax vs. Raich* (*supra*), 239 U. S. 239 (in which the facts are too well known to require their statement), Mr. Justice Hughes, speaking for the court, said:

"The discrimination against aliens in the wide range of employment to which the act relates *is made an end in itself*, and thus the authority to deny to aliens, *upon the mere fact of their alienage*, the right to obtain support in the ordinary fields of labor, is necessarily involved. It must

also be said that reasonable classification implies *action consistent with the legitimate interests of the state.*" * * *

Equally in this case as in that, the classification is based wholly upon alienage and the discrimination against the proscribed aliens is likewise made an end in itself, and the classification is not consistent with the legitimate interests of the state, because the means adopted have no reasonable tendency to the accomplishment of the ultimate legitimate object of the state. In *Truax vs. Corrigan* (decided December 19, 1921), Chief Justice Taft, speaking for the court concerning classification, said:

"It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand."

White men, black men, red men and brown men are, by reason of that fact very different, and there is a vast difference between a man of wealth and a poverty-stricken man as universal everyday experience most forcibly teaches, but a rule of conduct based upon such differences would be clearly invalid. In the case of *Gulf C. & S. L. R. Co. vs. Ellis*, 165 U. S. 150, Mr. Justice Brewer said:

"The state may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification."

In the case of *Tanner vs. Little*, 240 U. S. 369, Mr. Justice McKenna said:

"Classification is not different in law than in other departments of knowledge. 'It is the grouping of things in speculation or practice because they agree with one another in certain particulars and differ from other things in those particulars.' (*Billings vs. Illinois*, 188 U. S. 97, 102, 47 L. Ed. 400, 403, 23 Sup. Ct. Rep. 272.) Upon what differences or resemblances it may be exercised *depends necessarily upon the object in view*, and may be narrow or wide according to that object. Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further; make a rule of conduct depend upon it, and distinguish in legislation between red-haired men and black-haired men and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation. The power of legislation over the subject-matter is hence to be considered." (*Italics ours.*)

The foregoing cases clearly demonstrate the rule that classification must be based on real resemblances or real differences having a reasonable relation to a legislative object.

Where is the difference between Japanese, on the one hand, and Russians, Turks, Zulus, Kaffirs, Haitians and the cannibal tribes of the Congo on the other, so far as concerns the distinction made between them by this act as a determination of the ultimate, legitimate legislative purpose to insure the rights respecting real estate being exercised only by those who are attached and adhere to and respect the American Government and its institutions? And if such a difference exists, can this court judicially say that the difference is not in favor of the Japanese? Can this court solemnly adjudge that the two respective classes of aliens so resemble their co-alien, and that between the two classes of aliens there exist such real differences that they

may validly be so classed "in accordance with their pertinence to the purpose in hand"?

Aliens cannot be classified on the ground of alienage. Of course, it is fundamental that, the legislature being powerless so to do, it cannot by indirection accomplish the same result by classifying on that which of necessity, by reason of alienage, inheres in the alien. In its opinion (Rec., p. 21) the lower court said:

"It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries."

The proposition stated by the court may be put in plainer terms, thus: Government, by its legislative action, may force a condition upon its unwilling subjects, and, having done so, may classify subjects on the basis of the conditions so forced on them. If, as stated by the lower court, it is obvious that Japanese lack an interest in and the power to effectually work for the welfare of the state by reason of the naturalization act, it does not square with the requirements of a constitutional government to classify them by reason of the conditions thus forced upon them against their will. This is not the fair play demanded by American institutions.

In *State ex rel. Constantini vs. Darwin, as State Fish Commissioner*, 102 Wash. 402, an application for a writ of mandamus was made to compel the defendant to issue a fishing license for the year 1918. The relator was an Austrian, resident in the state since 1913, in which year he declared his intention to become a citizen of the United States. His application for such license had been denied by the fish commissioner, because of section 5150-43 of Remington's Annotated Code, which provides:

"No license for taking or catching salmon or other food or shell fish required by this act shall be issued to any person who is not a citizen of the United States of the age of eighteen years or over, unless such person had declared his intention to become a citizen and is and has been an actual resident of the state for one year immediately preceding the application for such license. * * *"

And also section 4362 of the 1916 Compiled Statutes of the United States, which provides:

"No alien who is a native citizen or subject, or a denizen of any country, state or sovereignty with which the United States is at war, at the time of his application, shall be admitted to become a citizen of the United States."

The court held that, despite the fact that the relator could not be admitted to citizenship, he was nevertheless entitled to his license. If the law is that as to a *privilege*, an alien is entitled to the same relief as if he were a citizen, it is apparent that an act which denies a *property right* because of alienage, is not only discrimination for the purpose of discrimination, but is invidious discrimination.

Again, a Japanese born in Africa, of Japanese parents, may in good faith declare his intention to become a citizen, and thus be entitled to the same property rights as citizen. There can be no rational difference between such a Japanese and one born in Japan, but such is the effect of the act, and indeed its plain terms. Such a discrimination is invidious, and cannot be upheld.

As the entire act applies only to the aliens subjected to its provisions and excludes all other aliens from its provisions, by reason of the language in subdivision (a), section 1, the entire act is invalid.

United States vs. Reese, 92 U. S. 214; *The Trademark Cases*, 100 U. S. 82; *United States vs. Harris*, 106 U. S. 629; *Baldwin vs. Franks*, 120 U. S. 678; *James vs. Bowman*, 190 U. S. 127; *United States vs. Ju Toy*, 198 U. S. 253; *Illinois Central Ry. Co. vs. McKendree*, 203 U. S. 514; *Butts vs. Merchants and Miners' Transportation Co.*, 230 U. S. 126; *McFarland vs. American Sugar Refining Co.*, 241 U. S. 79.

IV.

THE IMPOSSIBILITY OF COMPLIANCE WITH THE ACT UNDER CONSIDERATION BY A JAPANESE FREES HIM FROM THE OBLIGATION TO COMPLY.

The principle invoked is illustrated in the rules established with respect to conveyances and wills. Where an estate vests, to which is attached the obligation of the performance of a condition subsequent, and such performance becomes impossible without fault on the part of the grantee or devisee, the estate is freed from the condition.

8 R. C. L., p. 1107, sec. 167; 28 R. C. L., p. 320, sec. 308.

The condition in the act under consideration, requiring a Japanese to declare his intention to become a citizen of the United States, is the requiring of an impossible condition, and, therefore, the Japanese is by law freed from the obligation to comply.

Endlich on Interpretation of Statutes, sec. 441.

"A command which cannot be obeyed is not law. Therefore, possible obedience is an inseparable element in every law, without which it cannot exist. So that, though a command should be such as could in general be carried out, if in a particular instance it becomes impossible, it would not be law for that instance."

Bishop's Non-Contract Law, sec. 156.

"Upon another question, also, the authorities agree, namely, that when the law creates a contract or otherwise casts on one a duty, he is excused if the thing becomes, in the absolute sense we are considering, impossible."

Bishop on Contracts, sec. 595.

The act under consideration, by requiring Japanese, in order to escape its penalties and forfeiture of their estates, to do the impossible, while requiring of all European aliens only compliance with the possible, conflicts with the Fourteenth Amendment to the Constitution of the United States and is void.

In re Ah Chong, 2 Fed. 733; *In re Tiburcio Parrott*, 1 Fed. 481.

V.

THE ACT IS CONTRARY TO ARTICLE I OF THE EXISTING TREATY BETWEEN THE UNITED STATES AND THE EMPIRE OF JAPAN, IN THAT IT PROHIBITS JAPANESE SUBJECTS, RESIDENT IN THE STATE OF WASHINGTON, FROM CARRYING ON THEREIN TRADE, WHOLESALE AND RETAIL, FROM LEASING LAND FOR COMMERCIAL PURPOSES AND FROM DOING THE THINGS NECESSARY OR INCIDENT TO TRADE UPON THE SAME TERMS AS NATIVE CITIZENS OR SUBJECTS.

VIOLATION OF THE TREATY.

The alien Japanese appellant is entitled by the treaty between the United States and Japan, dated February 21, 1911, proclaimed April 5, 1911, United States Statutes at Large, volume 37, pages 1504-9, to protection against the enforcement of the act of the State of Washington making an invidious discrimination against him and his race because of race, color and place of nativity, not made by the act against other aliens who are "free white persons" or "aliens of African nativity" or "persons of African descent".

It is true that the act does not in words mention race, color or place of nativity, but the standard prescribed by the act to be complied with in order to escape the stigma of being "an alien" as defined by the act and the consequent disabilities flowing from such statutory alienage, renders it as impossible for Japanese born elsewhere than in Africa to escape such stigma and disability as though the act read: "Alien does not include an alien who has in good faith declared his intention to become a citizen of the United States who is a free white person or an alien of African nativity or a person of African descent, but does include all other aliens."

The act might just as well have been so worded. On its face compliance is optional. As to those of certain races and colors compliance is optional. As to the Japanese, compliance is only not optional, but on account of their race, color and place of nativity, is impossible. The question then is whether the treaty between the United States and Japan, either in letter or spirit, renders invalid the statute of the State of Washington subsequently enacted containing an invidious discrimination against Japanese because of their race, color and place of nativity.

It is not necessary either to assert or establish the proposition that the treaty affirmatively confers upon Japanese the right to acquire or lease property in the State of Washington.

It is only necessary to show that the prohibition in the state statute is one which expressly or impliedly violates the letter or spirit of the treaty.

Is it possible to suppose that the treaty of 1911 would have been entered into by Japan if it had contained a provision that the separate states of the United States should be free to thereafter enact penal laws punishing as a class resident alien Japanese for purchasing or leasing real estate in the state while expressly permitting such purchase or lease by aliens of races, colors and places of nativity other than Japanese?

INTERPRETATION AND CONSIDERATION OF TREATY.

The terms of the treaty of 1894 between the two countries was approaching expiration. The opening sentence of the treaty of 1911 is significant.

"The President of the United States of America and His Majesty, the Emperor of Japan, being desirous of strengthening the relations of amity and good understanding which happily exist between the two nations * * * have resolved to conclude a treaty of commerce and navigation for that purpose."

Nowhere in the treaty is there color for the suggestion that a Japanese alien resident in any state could be subjected to any disability or discrimination to which any other alien would not be subjected. There are only two standards of treatment prescribed:

1. The same treatment "as native citizens or subjects."
2. "Most favored nation treatment in the territories of the other."

The latter standard of treatment governs even the coasting trade, "which is excepted from the provisions of the present treaty" (article 13).

Is it reasonable then to suppose that where the treaty so carefully protected the citizens and subjects of both the high contracting parties by according in certain respects the same treatment as of native citizens and subjects and in certain other respects "most favored nation treatment," it nevertheless did not in spirit and impliedly prohibit the subsequent enactment of a state statute changing the existing law and invidiously discriminating against resident alien Japanese because of their race, color and nativity as compared with other resident aliens of different race, color and place of nativity.

The fact that the control of the emigration of Japanese laborers to the

United States was not made a matter of treaty but was left to the honor of the empire is sufficient to demonstrate that invidious discrimination against Japanese under state statutes to be enacted in the future were prohibited by a treaty entered into 'to strengthen the relations of amity and good understanding which happily exist between the two nations.'

INTERPRETATION AND CONSTRUCTION OF TREATY.

Japan in entering into the treaty was entitled to understand that it prohibited an invidious discrimination against Japanese whereby they were singled out from European and African aliens and subjected to penalties and disabilities to which such other aliens were not subjected when the discrimination was one which the diplomatic history of the United States shows the United States would not have permitted any state or nation to have made against a citizen of the United States.

In March, 1882, the American legation at Madrid reported overtures by the Liberian minister, resident at Madrid, looking to a concerted remonstrance of the diplomatic representatives at that capital against a Spanish law or regulation prohibiting the landing of foreign negroes in Cuba unless on the condition of depositing one thousand dollars. The department of state had never had a case presented where the rights of an American citizen became involved, but the department of state advised the legation that if a case should be brought to its notice it would remonstrate against it "as imposing a race discrimination not foreseen by treaty or recognizable under the amended Constitution." (International Law Digest, Moore, vol. 4, sec. 552.)

In 1873 a controversy arose between the United States and Russia. A license had been refused to a Jewish American citizen in Russia. The United States took the position that an American citizen could not be discriminated against because of his religious belief. Mr. Fish, secretary of state, commenting on Mr. Jewell's presentation of the case, remarked that the withholding of the license from Rosenstrauss "on account, as it is understood, of his being a Hebrew of foreign birth," seemed to be in direct violation of the treaty the purpose of which was to place all citizens of the United States in Russia "on the same footing as native Russians." (International Law Digest, Moore, vol. 4, p. 113.)

It certainly was not within the contemplation of the parties to the treaty of 1911 that Japanese should be put on a lower footing than that of other aliens resident in the State of Washington.

In 1885 the United States had a controversy with Turkey in reference to a Hebrew-American citizen. International Law Digest, Moore, sections 555, states:

"In an instruction of August 29, 1885, to the American minister at Constantinople the department of state observed that the rights of American citizens in Turkey under treaties were to be measured in a certain degree by the rights conceded to other foreigners of the most favored nation and for this reason the minister was to be 'careful to make no untenable demand *as of right*.' Friendship and comity, however, entitle the United States, said Mr. Bayard, 'to ask and expect that no race or class distinction shall be made as regards American citizens abroad.'"

In 1879 a question arose between the United States and Mexico concerning a law of Mexico of 1863, which provided that natural-born and naturalized citizens of nations adjoining the republic could not acquire public lands in the states bordering such nations. The United States took the position that a citizen of the United States was invidiously discriminated against in contravention of the treaty between the United States and Mexico by the law of 1863.

A communication from the United States to Mexico contains the following language:

"The discrimination in this respect between those citizens and other foreigners is still believed to be invidious, unnecessary, at variance with the treaty, and quite incompatible with those friendly relations which the obvious interest of both countries requires should be maintained between them. * * * The Mexican law of 1863 is especially invidious towards citizens of our border states because it practically discriminates against them by name and thereby stigmatizes them as unworthy to have the privilege of holding real estate. This stigma cannot be acquired in by this government which does not admit the right of any foreign power to discriminate between citizens of different states of this Union who can only be known abroad as citizens of the United States. It may be that the treaty of 1831 does not expressly confer upon citizens of the parties the right to hold real estate in their respective territories nor does it provide for an equality of rights in that respect between Mexicans and our own citizens, although the equality between citizens of the United States and other foreigners in Mexico is by the second and third articles of the treaty literally restricted to matters of commerce and navigation. It may also fairly be construed to include a like equality in the privilege of acquiring and holding real estate.

"It cannot be doubted that if the construction now claimed had been anticipated it would have been thwarted by an explicit provision. There is believed to be no such discrimination against Mexican citizens in any law in this country." (International Digest, Moore, vol. 6, p. 702.)

The Mexican Government did not yield to the protest of the United States. On the other hand, the United States did not withdraw its protest. Was the United States acting in good faith in making its protest to Mexico? Certainly no American would for one moment contemplate the thought that the United States was trying to force a weaker power to yield to a view of the law which the United States believed was unfounded. It must be assumed that the United States in good faith believed that the Mexican law constituted an invidious discrimination against a certain class of citizens of the United States. This controversy with Mexico arose long before the United States and Japan entered into the treaty of 1911. Was Japan justified or not in assuming that an invidious discrimination between Japanese and other aliens resident in one of the states of the United States was not forbidden by the treaty, when the United States in its controversy with Mexico had taken the position that a very much less objectionable discrimination had been made by the Mexican law against a certain class of citizens of the United States. Certainly good faith would have required the United States to have notified Japan that it no longer believed that the protest which the United States had made to Mexico was well founded in law. It is certain that had the United States inserted in the treaty with Japan a provision that Japanese might be discriminated against so that they would not, under the law of certain states of the United States, have the same privileges as aliens of other nationalities, the treaty would not have been entered into by Japan, and it is equally certain that if it had been contemplated by Japan that the treaty as written permitted such discrimination the treaty either would not have been made or else there would have been a provision inserted in it thwarting such interpretation.

After the treaty of 1911 had been ratified by the respective countries, the President of United States proclaimed its ratification in the following language:

"Now, therefore, be it known, that I, William Howard Taft, President of the United States of America, have caused the said treaty as amended and the said understanding to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof."

As the opening of the treaty states: It was entered into for the purpose of "strengthening the relations of amity and good understanding which happily existed between the two nations." It is inconceivable that the treaty contemplated the right of a state to enact a law which might cause a breach of international relations between the two countries when the breach would be brought about by a state of the Union making a discrimination which was more invidious than the discrimination which had been the cause of a protest by the United States to Mexico prior to the enactment of the treaty of 1911.

HOW SHOULD A TREATY BE INTERPRETED OR CONSTRUED?

"We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention being operative upon both powers and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purposes. * * * As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done, without the sacrifice of individual rights of those principles of personal liberty which lie at the foundation of our jurisprudence." *Tucker vs. Alexandroff*, 183 U. S. 424, 437.

"It is a general principle of construction with respect to treaties that they shall be liberally construed so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning as understood in the public law of nations and not in any artificial or special sense impressed upon them by local law unless such restricted sense is clearly intended, and it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Geoffrey vs. Riggs*, 133 U. S. 258-271.

"Is it necessary in an enlightening age to say that mental reservations cannot be admitted into treaties? This is manifest since by the very nature of the treaty the parties are bound to express themselves in such a manner that they may mutually understand each other. There is scarcely an individual now to be found who would not be ashamed of building upon mental reservation. What can be the use of such an artifice unless to lull the opposite party into a false security under the vain appearance of a contract?"

Vattel's Law of Nations, p. 284.

Is it for one moment to be supposed that in the treaty of 1911 the United States expected Japan to understand that it would be permissible for one of the states of the Union to enact a law in the future which would impose upon Japanese subjects resident in such states the disability in purchasing and leasing real estate which was not imposed upon other aliens in the same state? If not, then the upholding of such a right on the part of the state would be to charge the United States with entertaining the thought of such a mental reservation.

There remains the question of the construction of the terms of the treaty. Article I of the said treaty is as follows:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

"They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions."

Where a treaty admits of two constructions, one restrictive of rights which may be claimed under it, and the other liberal, the latter is to be preferred. *Shanks vs. Dupont*, 3 Pet. 242; *United States vs. Reynes*, 9 How. 126; *Hauenstein vs. Lynham*, 100 U. S. 473; *Chew Hocng vs. United States*, 112 U. S. 536; *Geoffrey vs. Riggs*, 133 U. S. 258; *United States vs. Texas*, 162 U. S. 1, *Tucker vs. Alexandroff*, 183 U. S. 424; *Sullivan vs. Kidd*, 254 U. S. 433.

In re Stierude's Estate, 58 Wash. 353, the supreme court of the State of Washington said:

"This construction of the terms of the treaty finds additional support when we call to our aid the general rule of liberal construction applied by the courts, both state and federal, in such cases."

In *Geoffrey vs. Riggs*, *supra*, at page 271, Justice Field said:

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of the rights that may be claimed under it and the other favorable to them, the latter is to be preferred. (*Hauenstein vs. Lynham*, 100 U. S. 483, 487.)"

See, also, 28 Am. & Eng. Ency. of Law (2d ed.), 490; Devlin, Treaty Power, secs. 116, 125b.

In that case the supreme court of Washington held that the words "goods and effects" in article VI of the Treaty of Amity and Commerce of 1783, as revived by article XVII of Treaty of Commerce and Navigation of 1827 between Norway and Sweden and United States, permitting the subjects of

the contracting parties in the respective states to freely dispose of their goods and effects either by testament, donation, or otherwise, included real as well as personal property, and cited in support of that conclusion the following cases: *Adams vs. Akerlund*, 168 Ill. 632; *University vs. Miller*, 3 Dev. (N. C.) 188; 1 Bouvier's Law Dictionary (Rawle's Rev.), 635.

Attention may be called to the fact that the Terraces have the right to urge and rely on the provisions of the treaty as fully as their alien complainant. *Buchanan vs. Warley*, 245 U. S. 60, 73.

The question then is what is meant by the phrases "commercial purposes" and "incident to or necessary for trade," as used in article I of the treaty. In order to give effect to all portions of the article, pursuant to a familiar rule, it is necessary to ascertain what rights have been granted by that portion of the article preceding the quoted phrases. First, express right is given to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail. Giving the word "trade" its most limited meaning, namely, buying and selling commodities, it follows, of course, that the grant of that right includes the right to take and deliver possession thereof, and to pay therefor on purchase and receive and collect the purchase price of the same when sold. Even if the right to resort to the courts and to the remedies provided by law for the enforcement of contracts or the rights accruing on a breach thereof, be not implied in the right to carry on trade, it is a constitutional right which the legislature could not deny to the alien. Having the right to buy and take possession, there is implied the right to retain possession during the interim between purchase and sale. Next, there is an express grant of the right "to own or lease and occupy houses, manufactories, warehouses and shops," which, for present purposes, we construe as intended merely for the purpose of carrying on trade, limited as above suggested, and that the right to own or lease so given applies only to the buildings as distinguished from the real estate on which they may be situated. It will be seen from the foregoing that every possible thing necessary for trade, limited as above suggested, is granted in express terms or by necessary implication and that no effect follows the grant of the right "to do anything incident to or necessary for trade" if the term trade be limited as above suggested. Therefore, in order to give effect to all parts of the article, the word trade must be given a broader meaning. Consequently we must consider what was intended to be granted by the right to lease land for commercial purposes, when read in connection with the right to do anything incident to or necessary for trade. Suppose an alien corporation, as defined by the act, should be engaged in an extensive wholesale hardware business, and that it bought from manufacturers all of the articles dealt in, except one small line, which it manufactures itself; suppose, further, it should lease a building with the real estate on which the same was situated for the purpose of a factory in which to manufacture that one small line of articles. Clearly the manufacture of that limited line of articles would be incident to its wholesale hardware business, and equally clearly would the leasing of the building and real estate be incident to or necessary for its wholesale hardware business, and would be for "commercial purposes." Suppose the number of articles manufactured by it for its wholesale hardware business should be increased; the manufacture and leasing would be equally as clearly necessary for or incidental to trade, and would be for "commercial purposes." No reason appears why it could not increase its manufacture to include the substantial part or all of the articles sold by it in its wholesale hardware business. The same thing would be equally true were the company engaged in wholesale trade in any other commodity or

commodities, and it is submitted that, in this respect, there can be no distinction between farm products and any other commodities. In view of the fact that the two terms in question can have no effect unless the term "trade" is given the broader signification which we suggest, it seems perfectly clear that such broader meaning was intended by the parties to the treaty. Clearly the right which we contend under the treaty is not a frivolous claim, and pursuant to the rule laid down by this court, that construction of the article urged by us should be adopted.

We call attention to the fact that in the bill of complaint it is alleged that Nakatsuka is engaged in the business of trading, wholesale and retail, in farm products, and, instead of purchasing such farm products, he has produced and desires to produce his products for the purpose of selling them in wholesale and retail trade. If he is prevented from leasing land for the purpose of producing said farm products for such trade, he will be prevented from engaging in trade and the incidents to trade he is authorized to do under the treaty. On similar principles those allegations stand admitted by the motion to dismiss. Being engaged in wholesale and retail trade in farm products, it is submitted that producing the said farm products is a commercial purpose and is incident to or necessary for trade therein.

Again, the term trade is not generally given the limited meaning first above suggested. In *Schooner Nymph*, 1 Summ. (U. S.) 517, in interpreting the word trade as used in a statute declaring that if any licensed vessel or ship "shall be employed in any other trade than that for which she is licensed," she shall be forfeited, Storey, J., said:

"The word 'trade' is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Whenever any occupation, employment or business is carried on for the purpose of profit or gain or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade."

In that case codfishing was held to be a trade.

In the case of *May vs. Rice*, 101 U. S. 231, 237, the following appears:

"The word 'trade,' in the broadest signification, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, for commerce and traffic 'generally.'"

In the case of *Colby vs. Dean*, 70 N. H. 591, the court held that, where the beneficiaries of a will, both male and female, one of whom was a school teacher at the time of making the will, were to take only on condition that they had some useful trade, the shares of those failing to go to those complying with the conditions, the term "trade" was used in the broad sense of occupation or profession, rather than of mechanical employment; and beneficiaries who were bookkeepers, typewriters, and school teachers complied with the condition.

In *Jackson vs. Town of Union*, 82 Conn. 266, it was held that "to trade" is to engage in the purchase or sale of goods, wares and merchandise, and that a firm engaging in the business of buying standing timber in large quantities and cutting the same, and selling the lumber is engaged in a trading business within Gen. St. 1902, section 2342, providing for the assessment for taxation of the property of any trading business.

In the case of *State vs. North*, 160 N. C. 1010, the court had under consideration the case of a statute authorizing taxation of trades, professions, franchises and incomes, and during the course of an opinion said trade comprehends

"Not only all who are engaged in buying and selling merchandise, but all whose occupation or business it is to manufacture and sell the products

of their plants. It includes in this sense any employment or business embarked in for gain or for profit."

In the case of *Smith vs. Cooley*, 65 Cal. 46, the court held that the working of a mine under a bare mining right has uniformly been construed by the courts as a species of trade.

In the case of *Finnegan vs. Knights of Labor Building Assn.*, 52 Minn. 239, the court, considering a co-operative act permitting the formation of corporations, among other things, "to trade," said:

"Giving a reasonably liberal meaning to the word 'trade' in the act, it would include the buying, selling of real estate," * * *

These authorities show that the term "trade" is not always given a narrow meaning, but that its meaning is determined according to the apparent intention of the parties to the instrument in which it is used. As we have shown heretofore, if the limited meaning suggested is given the word, then the phrase "incident to or necessary for trade" is surplusage and creates no right whatever.

Respectfully submitted,

JAMES B. HOWE,

E. H. GUIE and

DALLAS V. HALVERSTADT,

Solicitors for Appellants.

2. BRIEF OF APPELLEE, BY L. L. THOMPSON, ATTORNEY-GENERAL, STATE OF WASHINGTON.

STATEMENT.

The detailed facts in this action are correctly stated by appellants, and a repetition thereof would be superfluous. Stated concretely, the abstract question is whether the State of Washington may constitutionally prohibit the leasing of a tract of land to an alien Japanese for a term of five years, the lessee proposing to use the land for the purpose of raising agricultural products, such products to be sold by him, both at wholesale and retail, and also shipped in commerce, intrastate, interstate and foreign. The statute (ch. 50, L. of Washington 1921), which is set forth as an appendix to this brief, in addition to prohibiting the alien ownership of real property, likewise prohibits the acquiring of any right or benefit to the use, enjoyment, rents, issues or profits thereof, which would perhaps include the transfer of interests which would technically not constitute a leasehold interest. Section 11 of the act, however, provides:

"If any section or provision of this act shall be adjudged to be invalid or unconstitutional, such adjudication shall not affect the validity of the act as a whole or any section, provision, or part thereof not adjudged invalid or unconstitutional."

Since it does not appear that appellants propose to do anything concerning which the statute is material other than to execute an agricultural lease, the present inquiry is properly restricted to that situation and cannot extend to other questions which might possibly arise under the broad terms of the act.

ARGUMENT.

I.

THE JURISDICTION.

It may well be doubted whether the allegations of the bill sufficiently show any justification for equitable relief, even if the statute be considered

unconstitutional. The case involves but a single proposed transaction between the appellants, Frank and Elizabeth Terrace and N. Nakatsuka. So far as civil proceedings are concerned, the only remedy which the state has after the lease is executed is to bring an escheat proceeding. That proceeding would finally test and determine the validity of the act in the state courts, with the right of a writ of error to this court. In so far as any possibly criminal features are concerned, the only actions which could be instituted would be under section 7 of the act. This would make the appellants Terrace liable to criminal prosecution should they make the conveyance, but would not make the appellant Nakatsuka liable unless he should fail to disclose the fact that he holds such an interest in the prosecuting attorney or the attorney-general under the provisions of subdivision (c) of section 7. An acquittal in a criminal proceeding would bar further prosecution, because the offense is not a continuing one, and section 1 of article I of the state constitution of Washington provides that no person shall be twice put in jeopardy for the same offense. Appellants do not sue in behalf of others similarly situated; neither does the case involve interference with a series of acts necessary to the conduct of a business, and therefore present a case for the intervention of equity to prevent multiplicity of actions. It simply involves the right of the state to prevent an isolated transaction, the legality of which may be finally determined in the state courts. It is submitted, therefore, that there is no jurisdiction in equity under the following decisions of this court: *Boise Artesian Water Co. vs. Boise City*, 213 U. S. 276; *Singer Sewing Machine Co. vs. Benedict*, 229 U. S. 481; *Dalton Adding Machine Co. vs. Virginia*, 236 U. S. 699; *Cavanaugh vs. Looney*, 248 U. S. 453.

Neither can the jurisdiction be sustained on account of the severity of the penalty, under the rule announced in *Ex parte Young*, 209 U. S. 123. The penalty in this case is the same as that prescribed in the trading stamp act of Washington, which was sustained by this court in *Tanner vs. Little*, 240 U. S. 269. In effect, this is merely a test suit to obtain the opinion of this court upon an abstract question of law. There is a complete and ample remedy to the appellants in the state courts, and no necessity for the exercise of equity jurisdiction.

II.

THE STATE CONSTITUTION.

It is contended that under the provisions of section 33, article II, of the constitution of Washington, the state has no power to prohibit leases of this character. Section 33, article II, of that instrument provides:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: Provided, That the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition."

This section was held by the supreme court of Washington to prohibit a lease of realty to an alien for ninety-nine years (*State ex rel. Winston vs. Morrison*, 18 Wash. 664), and also one for forty-nine years (*State ex rel.*

Winston vs. Hudson Land Co., 19 Wash. 35). In the first case the Washington court, more or less by way of dictum, said that "a lease of lands in this state to an alien for a reasonable term might be upheld." There is no reported case, however, in which the Washington court has indicated the line of demarkation between a lease for a reasonable term which *might* be upheld, and one for an unreasonable term which will be held void. Neither has that court ever held that the legislature of Washington has no power to impose limitations upon the right of aliens to hold real property more restrictive than those contained in section 33 of article II of the state constitution. Appellants quote at length from the case of *Abrams vs. State*, 45 Wash. 327, in which case the court merely held that the constitution did not prohibit an alien from acquiring an estate in fee simple by inheritance, a question obviously not material to the present contention.

The contention involves the construction and application of the constitution of Washington. This court, therefore, is bound to accept the construction adopted by the highest court of that state as to the effect of this constitutional provision, whatever may be its own views with respect to the correctness of the conclusion reached.

Quong Ham Wah Co. vs. Ind. Comm., 255 U. S. 445-448, and cases cited therein.

The supreme court of Washington, upon October 22, 1922, in the case of *State vs. O'Connell*, sustained this act as not in conflict with either the state or the federal constitutions. The decision has not been officially reported, and for that reason we are printing the opinion as an appendix to this brief. The O'Connell case involved the validity of a trust agreement by the terms of which certain land was deeded to two citizens of the State of Washington under a trust agreement which directed the trustees within twenty years to sell the land and distribute the proceeds in equal shares to a citizen and an alien beneficiary. It was argued in support of this agreement that its effect was to work an equitable conversion of the land into money under the doctrine announced by this court in the case of *Craig vs. Leslie*, 3 Wheaton 563, and that consequently it was not a conveyance of real property under the constitution, nor of an interest therein under the statute. The Washington court held the act applicable, even though it be conceded that an equitable conversion was worked. Referring to the constitution, it said:

"Our constitution provides that the ownership of lands by aliens * * * is prohibited in this state * * *." It was entirely within the province of the state legislature to determine by legislation what are lands, and when one becomes an owner thereof, within the meaning of the constitutional provision. In so doing, it has declared that 'land' 'does not include lands containing valuable mineral deposits,' etc., 'but does include every other kind of land and every interest therein and the right to the control, possession, use, enjoyment, rents, issues or profits thereof * * *' and it has said that ownership includes 'the right to any benefit of' lands."

In other words, the Washington court has held that the legislature of Washington may legally declare that the constitution includes the right to any benefit from realty. Obviously, it cannot be contended that the lessee does not possess such a right.

However, even if the question be considered as an original one, the same conclusion must follow. The only thing which section 33 of article II, *supra*, does, is to prohibit the alien ownership of real property except in certain cases. Constitutional limitations upon legislative power are not to be implied. The only limitation which section 33 creates is the limitation that the legis-

lature shall never thereafter permit the alien ownership of realty, except in the instances expressly described. The language of the section is prohibitory, and under ordinary rules of constitutional construction there is nothing upon its face which indicates an intent to prohibit the ordinary exercise of legislative power in cases not covered by the express prohibitions of the constitution. In an attempt to meet this obvious conclusion, appellants argue "that the Washington constitution is not drawn on the theory of being a limitation of legislative power, but that it is a mandatory direction, in a large part, to the legislature to take affirmative action." This argument is ingenious, but the difficulty with it is that it is not in accord with the announced views of the supreme court of Washington, which is the final arbiter of the question. The best statement by that court is found in *State vs. Ide*, 35 Wash. 576-584, where that court, in affirming the power of the legislature to impose a poll tax without express constitutional authority, said:

"Our constitution does not expressly mention such taxation, and, *as that instrument is not a grant of power, but a limitation of power inherent in the state, independent of that instrument*, it follows that this tax must be declared valid, unless the legislature was indirectly and by necessary implication prohibited from authorizing it to be levied by some provision of the constitution." (Italics ours.)

This quotation is set forth by the same court and approved in the recent case of *Nipges vs. Thornton*, 206 Pac. 17, decided on April 8, 1922, where a similar conclusion upon similar facts was reached. See also *State vs. Clark*, 30 Wash. 439-441.

The suggestion is also made that since the common law prohibits the alien ownership of real estate, section 33 is a nullity unless it be considered as abrogating the common law in instances not covered by express prohibitions contained therein.

The fallacy of this suggestion is apparent. Common law rules are observed by the courts in the absence of legislative action, and are subject to modification or complete abrogation by the legislative power. Without section 33, it would have been competent for the legislature of Washington to have entirely abrogated the common law relating to the alien ownership of realty by permitting such ownership. Section 33 prevented such action to the extent indicated, but it neither abrogated nor modified the common law nor curbed the legislative power except as it might thereafter seek to liberalized the common law in certain particulars.

The reason for the amendment will be found in an historical consideration of the situation which existed when the constitution of Washington was adopted. Section 8775, Rem. 1915 Code of Washington, provides:

"Any alien, except such as by the laws of the United States are incapable of becoming citizens of the United States, may acquire and hold lands, or any right thereto or interest therein, by purchase, devise, or descent, and he may convey, mortgage, and devise the same, and if he shall die intestate, the same shall descend to his heirs; and in all cases such lands shall be held conveyed, mortgaged, or devised, or shall descend, in a like manner and with like effect as if such alien were a citizen of this state or of the United States."

This section was originally passed by the territorial assembly of Washington in 1864. Its effect as to aliens capable of becoming citizens was to entirely abrogate the common law in advance of naturalization. Section 33, *supra*, was evidently passed with the express purpose of repealing this

section, in part, and not with the purpose of perpetuating the part left unrepealed as a part of the organic law of Washington.

III.

DUE PROCESS OF LAW.

It is argued by appellants that this transaction cannot be prohibited under the due process clause of the Federal Constitution.

This argument assumes the case to be determined entirely by the general rules which obtain in ordinary police power cases. Even though that assumption be accepted, we think the legislative action under consideration is sustainable. Appellant's argument is based upon a supposed analogy between the situation of an alien who labors for wages in an ordinary occupation and one who, under a lease, obtains full dominion and control over a piece of realty for a limited period of time. It is said that if the right to engage in an ordinary gainful occupation cannot be denied to an alien, as was held in *Truax vs. Raich*, 239 U. S. 33, that therefore he must also have a constitutional right to take a lease of land, since the taking of such a lease might be the means by which an alien gains his livelihood. This contention is elaborated by a number of imaginary situations in which aliens might desire to make arrangements of different kinds to work for farmers under various conditions of employment somewhat analogous in principle to the ordinary contract between master and servant.

The vice of the argument is two-fold: (1) it fails to distinguish between the particular thing here involved and the average occupation in which an alien might desire to engage, and (2) it is based upon too broad a conception of the scope of the due process clause with reference to aliens as applied in the *Truax* case, *supra*. That opinion clearly recognizes the fact that there are limitations upon the rule, and that where there is some relation between the public welfare and a special restriction sought to be imposed upon an alien, the rule will not apply. The decision very carefully limits the effect of the rule. After referring to the decisions of the courts relating to the distribution of national resources in which special restrictions as to aliens had been sustained, Mr. Justice Hughes continued:

"The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein vs. Lynham*, 100 U. S. 483; *Blythe vs. Hinckley*, 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged in public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of *ordinary private enterprise*." (Italics ours.)

It will be observed that cases relating to the devolution of real property are expressly exempted and also that the court restricts the decision to the conduct of *ordinary private enterprises*. The same restriction appears upon page 41 of the decision, where it is said that the authority of the state to enact police power measures does not make it possible for the state to deny to aliens "the *ordinary means of earning a livelihood*." (Italics ours.) Again, the reservation is noted that there may be means of livelihood denied to aliens which citizens are permitted to follow. The thought is again repeated in the last paragraph of the opinion where it is said:

"No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates to *every sort*." (Italics ours.)

The validity of the particular restriction now before the court, therefore, if the act be considered as an ordinary police power measure, depends upon its relation to the public welfare and is not determined by any announced

conclusions of this court with respect to the rights of aliens to follow other and different occupations. Concretely, the question is whether the court can say that the public welfare may not be injuriously affected by the leasing of real property to persons who owe to the state and nation no obligations of allegiance. Unless it can do so, this statute, in so far as this action is concerned, must be sustained.

Unlike many exercises of the police power, this prohibition is not the result of new and heretofore unknown economic or industrial conditions concerning which the court is compelled to judge by the exercise of its judicial knowledge, unaided by judicial precedent. While the common law cannot justify the denial of a constitutional right, the fact that both the common law and the statute are in accord affords a cognate reason why the statute should be sustained where the alleged constitutional prohibition is not specific.

The public policy of prohibiting the alien ownership of real property, except in very limited cases, has been an outstanding principle of the common law almost since its inception. Lord Coke, in Book 1-2b of Coke Upon Littleton (Hargrave & Butler Ed.), states the rule as follows:

"If an alien Christian or infidel purchase houses, lands, tenements, or hereditaments to him and his heires, albeit he can have no heires, yet he is of capacitie to take a fee simple (1) but not to hold (2). For upon an office found, the king shall have it by his prerogative (3), of whomsoever the land is holden (4). And so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king (5). If an alien purchase any estate of freehold in houses, lands, tenements or hereditaments, the king upon office found shall have them."

Blackstone has the following to say with respect to the same subject:

"An alien born may purchase lands, or other estates; but not for his own use; for the king is thereupon entitled to them. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconsistent with that which he owes to his own natural liege lord: besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences." (1 Blackstone's Commentaries, p. 372.)

See also: 2 Kent's Comm. (14th ed.) 53-64; Kerr, Real Property, 215 *et seq.*; Tiffany, Real Property, 2350; 1 Stimson's Am. St. Law, 6013; Stephens Comm. on Law of England, vol. 1, pp. 330-376; Sedgwick, Trial of Title, 226; 1 Washburn, Real Property, 131.

In the case of *Halter vs. Nebraska*, 205 U. S. 34-39, this court said:

"The importance of the questions of constitutional law thus raised will be recognized when it is remembered that more than half of the states of the Union have enacted statutes substantially similar, in their general scope, to the Nebraska statute. The fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the states have, in their legislation, violated the Constitution of the United States."

Similarly in *Purity Extract & Tonic Co. vs. Lynch*, 226 U. S. 192-204, it was said:

"That the opinion is extensively held that a general prohibition of the sale of malt liquors, whether intoxicating or not, is a necessary means to the suppression of trade in intoxicants, sufficiently appears from the legislation of other states and the decisions of the courts in its construction" (citing authorities). "We cannot say that there is no basis for this widespread conviction."

See also: *German Alliance Insurance Co. vs. Lewis*, 233 U. S. 389; *Central Lumber Co. vs. So. Dakota*, 226 U. S. 157-160; *Noble State Bank vs. Haskell*, 219 U. S. 104; *Jacobsen vs. Mass.*, 197 U. S. 11-34.

The application of this rule to the question of the desirability of allowing aliens to possess dominion over the soil will show that the preponderant public opinion of the country has always been opposed to this and that this opinion has been particularly intensified in recent years. At an early period in our history, when there was a large amount of vacant public domain, there appears to have been a difference of legislative opinion with respect to the wisdom of imposing special restrictions upon aliens in this regard. According to a note appended to the Fifth Edition of Wheaton on International Law, page 138, in 1873, Ohio, Michigan and Illinois imposed no such restrictions; Vermont, North and South Carolina required residence and the taking of the oath of allegiance, while in Connecticut, Maine, Delaware, Maryland, Virginia, Tennessee, Arkansas, Indiana and Missouri the filing of a declaration of intention was required before title to realty could be held by an alien. The other states appear to have been content to follow the common law, which, as we have already shown, prohibited alien ownership. In recent years, however, many states have, by express statutory or constitutional enactment, expressly imposed these restrictions. We have already adverted to the constitution of Washington, which was adopted in 1889. In 1913 California adopted chapter 113, Laws of 1913, which prohibited ownership but permitted leases for terms of three years. This appears to have been found insufficient by the people of California, and consequently, in 1920, initiative measure No. 2 was adopted by a popular vote of 668,483 in favor of the measure and 222,086 opposed thereto. An illustration of the trend of the times is found on an examination of the action taken by the various states in the year 1921. In that year the States of Washington, Arizona, Delaware and Texas all enacted laws relating to this same general subject. (Chap. 50, Laws of Washington of 1921; chap. 29, Laws of Arizona of 1921; chap. 188, Laws of Delaware of 1921; chap. 134, General Laws of Texas of 1921.)

In addition to this, during that year preliminary steps were taken to submit to the people of Colorado, Louisiana, Nevada and New Mexico the question of whether constitutional amendments should not be adopted to place aliens under disabilities similar to those imposed by chapter 50, *supra*. (Laws of Colorado for 1921, p. 172; Substitute Ordinance No. 452 of Louisiana, approved by the Constitutional Convention of 1921; Laws of Nevada, 1920-21, p. 416; Joint Resolution of New Mexico Legislature of November 9, 1921.) The following states by statute have also adopted the rule of the common law to a more or less extent: Illinois, Cahill's Revised Statutes 1921, chap. 6; Indiana, 2 Burns' Statutes 1914, secs. 3943-44; Nebraska, Compiled Statutes, sec. 5687.

Congress has also recognized the necessity for some regulation, although not to as great an extent as have the states. Section 2289 of the Revised Statutes, since its original enactment in the Act of May 20, 1862 (sec. 4530, U. S. Comp. Stat., 1916), has always limited the right to appropriate the unoccupied public domain to citizens or to persons who have filed declarations of intention to become such. The Act of March 2, 1897 (29 Stats. 618), relating to the ownership of land in the territories, permitted bona fide resident aliens to hold realty, but prohibited its ownership by all other aliens, and further provided that the removal of a resident alien should subject his realty to escheat by the government if not sold within ten years after the date of such removal.

The Act of April 30, 1900 (31 Stats. 154), providing for the organization of

the government of the territory of Hawaii, prohibited the conveyance of any interest in realty in the public domain of Hawaii to aliens who had not filed declarations of intention.

It might be noted in this connection that according to Mr. J. E. DeBecker, an authority quite widely known, in his "Annotated Civil Code of Japan," volume I, pages 7, 238 and 242, aliens are not permitted to own real property in Japan, and neither are they permitted to lease for agricultural purposes, although Mr. DeBecker adds that an imperfect act modifying the restrictions was recently passed by the Japanese parliament, but has not been promulgated by the emperor.

This course of legislation indicates a uniform popular view that the public welfare is directly affected by the alien ownership of realty. It is particularly noteworthy that the most drastic action in this regard has been taken by those states in which there are found large bodies of aliens who are not permitted by congress to become naturalized. Presumably this legislation is the result of experience and of a more intimate knowledge of local conditions than the court can obtain by the exercise of its judicial knowledge. The language of this court in the case of *Fallbrook Irrigation District vs. Bradley*, 164 U. S. 112-160, while addressed to a different question, seems to be peculiarly applicable to a consideration of the view announced by the people of California when they voted upon the initiative measure heretofore referred to. In that case this court said:

"The people of California and the members of her legislature must, in the nature of things, be more familiar with the facts and circumstances which surround the subject and with the necessities and the occasion for the irrigation of lands than can anyone who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of facts which surround the subject in their own state. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that state on this question."

While this court does not appear to have even expressly considered the question of whether the Fourteenth Amendment abrogates the common law rule, it has consistently recognized the existence of the power of the various states in a considerable number of cases, a procedure necessarily inconsistent with the view that the Constitution in any way operates to curb the state police power upon the subject. The leading case is curiously the first case. We refer to the decision in *Fairfax vs. Hunter's Lessee*, 7 Cranch. 603. In that case it was held that a devise made to an alien was good until office found by the state. The court, however, in an elaborate opinion, approved the proposition that an alien could take neither by a devise, inheritance nor purchase against the sovereign power. We quote from page 619:

"It is clear by the common law that an alien can take lands by purchase, though not by descent; or in other words, he cannot take by the act of law, but he may by the act of the party. This principle has been settled in the year books, and has been uniformly recognized as sound law from that time. (11 Hen. 4, 26; 14 Hen. 4, 20; Co. Litt. 2 b.) Nor is there any distinction whether the purchase be by grant or by devise. In either case the estate vests in the alien (Pow. Dev. 316, etc.; Park Rep. 144; Co. Litt. 2 b), not for his own benefit, but for the benefit of the state; or, in the language of the ancient law, the alien has the capacity to take, but not hold, lands, and

they may be seized into the hands of the sovereign. (11 H. 4, 26; 14 H. 4, 20.) But until the lands are so seized the alien has complete dominion over the same. He is a good tenant of the freehold in a precipe on a common recovery. (Goldsb. 102; 10 Mod. 128.) And may convey the same to a purchaser. (*Sheafe vs. O'Neile*, 1 Mass. Rep. 256.) Though Co. Lit. 52 b seems to the contrary, yet it must probably mean that he can convey a defeasible estate only, which an office found will divest. It seems, indeed, to have been held that an alien cannot maintain a real action for the recovery of lands (Co. Litt. 129 b; Thel. Dig., ch. 6; Dyer, 2 b), but it does not then follow that he may not defend, in a real action, his title to the lands against all persons but the sovereign."

Although this case was decided before the adoption of the Fourteenth Amendment, it was cited several times with express approval after 1870, as will hereafter appear.

In *Chirac vs. Chirac*, 2 Wheat. 259, decided in 1817, this court held that a treaty with France gave an alien the right to inherit certain real property, but at the same time it accepted without dissent the point made by the plaintiff in error that in the absence of a treaty the property of the deceased went to the state "because it was acquired before he became a citizen of the United States".

In *Orr vs. Hodgson*, 4 Wheat. 452-463, it was held that the heirs of an alien could not inherit real property in the absence of treaty provisions by reason of the common law.

In *Hauenstein vs. Lynham*, 100 U. S. 483, the question was re-examined, and the *Fairfax* case, *supra*, expressly affirmed in the following language:

"The common law as to aliens, except so far as it has been modified by her legislature, is the local law of Virginia. (2 Tucker's Blackst. App., Note C.) By that law 'aliens are incapable of taking by descent or inheritance, for they are not allowed to have any inheritable blood in them.' (2 Bla. Com. 249.) But they may take by grant or devise though not by descent. In other words, they may take by the act of a party, but not by operation of law; and they may convey or devise to another, *but such title is always liable to be divested at the pleasure of the sovereign by office found*. In such cases the sovereign, until entitled by office found or its equivalent, cannot pass the title to a grantee. In these respects there is no difference between an alien friend and an alien enemy. (*Fairfax's Devisee vs. Hunter's Lessee*, 7 Cranch. 603.)

"The law of nations recognizes the liberty of every government to give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede. (Vattel, book 2, c. 8, sec. 114.) In our country this authority is primarily in the states where the property is situated." (Italics ours.)

In *Atlantic and Pacific Ry. Co. vs. Mingus*, 165 U. S. 413-432, the *Fairfax* case was cited as sustaining the power of the sovereign by legislative act to declare a forfeiture instead of by the common law procedure of office found. The same conclusion was reached in *Taylor vs. Benham*, 5 Howard 232-270. Likewise in *United States vs. Repentigny*, 72 U. S. 211, it was stated that Congress might, by a general act, divest aliens of any rights which they might have in real property instead of requiring judicial proceedings. We quote from page 268:

"A legislative act directing the possession and appropriation of land is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation or by taking possession directly, under

the authority of the government, without these preliminary proceedings. (*Fairfax vs. Hunter*, 7 Cranch. 603.)"

In *Blythe vs. Hinckley*, 180 U. S. 333, the same doctrine was announced. In *Truax vs. Raich*, 239 U. S. 33, this court, in declaring unconstitutional an Arizona law prohibiting the employment of aliens at the same time observed that the case was not within the decisions relating to the devolution of real property, and finally, in the case of *Sullivan vs. Kidd*, 254 U. S. 433, it was said:

"Primarily the devolution of the estate, it being situated in the State of Kansas, would be determined by the laws of that state."

See also: *Geoffrey vs. Riggs*, 133 U. S. 258; *Donaldson vs. State*, 101 N. E. 485; 22 R. C. L. 83; 2 C. J. 1048; *Jones vs. Jones*, 234 U. S. 615.

The common law rule was likewise in accord with the law of nations as recognized by all civilized countries. In Wheaton's International Law, 5th ed., page 132, the author quotes the following from Foelix, *Droit International Prive*, section 9:

"Every state possesses the power of regulating the conditions on which the real or personal property within its territory may be held or transmitted, and of determining the state and capacity of all persons therein, as well as the validity of the contracts and other acts which arise there, and the rights and obligations which result from them * * *."

Vattel, in his *Law of Nations* (Chitty's Edition), at page 177, thus states the rule:

"Every state has the liberty of granting or refusing to foreigners the power of possession of *lands* or other immovable property within her territory. (117) If she grants them that privilege, all such property possessed by aliens remains subject to the jurisdiction and laws of the country, and to the same taxes as other property of the same kind. The authority of the sovereign extends over the whole territory; and it would be absurd to except some parts of it, on account of their being possessed by foreigners. If the sovereign does not permit aliens to possess immovable property, nobody has a right to complain of such prohibition; for, he may have very good reasons for acting in this manner; and, as foreigners cannot claim any right in his territories (sec. 79), they ought not to take it amiss that he makes use of his power and of his rights in the manner which he thinks most for the advantage of the state. And, as the sovereign may refuse to foreigners the privilege of possession of immovable property, he is doubtless at liberty to forbear granting it except with certain conditions annexed."

While it is true that none of these cases specifically cover leases, nevertheless the distinction seems to be immaterial. The cases are premised upon the rule of the common law. That rule is stated in Book 1-2b of *Coke Upon Littleton*, as follows:

"But as to a lease for yeares, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods and the like. For if he take a lease for yeares of lands, meadows, etc., upon office found, the king shall have it (6). But of a house for habitation he may take a lease for yeares, as incident to commerce; for without habitation he cannot merchandize or trade (7). But if he depart, or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it, but the king (8); for he had it only for habitation as necessary to his trade or traffique and not for benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for

yeares, albeit it were for his habitation (9); and so it is if he be an alien enimie. And all this was so resolved by the judges assembled together for that purpose in the case of Sir James Croft, Pasch. 29, of the raigne of queene Elizabeth."

Blackstone reaches the same conclusion in this language:

"For he may purchase anything; but after purchase he can hold nothing except a lease for years of a house for convenience of merchandise, in case he be an alien friend; all other purchases (when bound by an inquest of office) being immediately forfeited to the king." (1 Blackstone's Commentaries, Cooley's Ed., p. 669.)

It seems apparent that if the power to prohibit the holding of the fee simple title by an alien rests in the police power, then the same rule would, of course, apply to leases, because a lease does not differ from a conveyance in fee except in the length of tenure and the power of disposition.

Aside from precedent, however, the reasons for the restriction are not difficult to suppose. Some of them were well stated by the trial court, where it said:

"It is obvious that one who is not a citizen and cannot become one lacks an interest in and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a Tower of Babel from which the tenants in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged.

"This is no new thing. Tribal laws of the progenitors of the Anglo-Saxons, while still upon the continent, made an estate in lands, similar to a freehold, a prerequisite to a voice in the tribal government. The 'free-necked-man,' or 'freeman,' was synonymous with 'freeholder.' They were interdependent. A freeman had a vote in determining tribal policies and no one was a freeman without an estate in lands. (Green's History of the English People, book 1, chap. 1, subhead 'The Land.') The recognition of this principle has run throughout the history of our race and its governments." (Rec., 21.)

Substantially all human activities are carried on upon the earth and since, in the language of Vattel, "nations or states are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength," the same thing may be said of states. The prosperity of the state, however, cannot rest entirely upon obligations imposed by criminal statutes or mandatory legislative commands, but must also rest upon moral and unwritten obligations which are the incidents of citizenship and national allegiance. The possession of the soil by persons who recognize no such obligations, but who are bound only by specific statutory mandates, and even as to some of these, the rules of international law relieve them, thus has a direct and obvious relation to the public welfare. This must be so because the welfare of the state directly depends upon the way in which the land from which it draws its very existence is used. The importance of this is more marked in a nation whose governmental power is restricted by constitutional limitations than in an autocratic community, because in such a nation the possession of the soil by the individual carries with it the certain rights

of immunity from governmental action which can be claimed to the possible detriment of the state. The fact that there is no relation between the employment of aliens in ordinary transitory occupations and the public welfare by no means compels the same conclusion where there is involved sovereignty over the soil, a thing upon which our political existence may well depend. The contention that because the situations have a surface similarity and that therefore the Fourteenth Amendment operates in the same degree in both instances is simply another one of the oft-repeated attempts to define and limit the police power by specific definition and limitation. This court has always consistently refused to do this since its decision in *Munn vs. Illinois*, 94 U. S. 113, but has always decided each case upon its own particular facts.

Neither has it restricted the police power to emergency regulations, such as health measures, but it has extended it to include measures designed to subserve the public welfare and prosperity. *Barbier vs. Connolly*, 113 U. S. 27; *C. B. & Q. R. R. vs. Ill.*, 200 U. S. 561; *Central Lumber Co. vs. So. Dak.*, 226 U. S. 157.

The intimate relation between the ownership of soil and the public welfare and prosperity of the people of the state is not hard to see. The entire political and economic fabric of the state is finally dependent upon the soil, and particularly that portion which is used for agriculture, which is the question herein involved. The ownership of large parcels of realty by aliens may be dangerous to the public welfare of a state for many possible reasons. Some of them may be suggested:

1. It diverts from local use and local enjoyment a large part of the net revenues of the land which would otherwise accrue to the benefit of the people of the state and future generations;

2. It promotes racial dissension and thereby menaces the public safety;

3. It permits the land upon which the state depends to be used in such a manner as to impair its use for future generations, because presumably the alien tenant or proprietor has no interest in the perpetuity of the state;

4. It exposes the citizen owners of land to competition which they are often unable to meet, to the consequent detriment of the state, since the true prosperity of the state always depends upon the prosperity of its citizens;

5. It places the consuming public at the mercy of alien races who are apt in times of international disturbance to return to the country of their origin and thus interrupt and paralyze the entire industrial and social life of the state; and

6. It may well deprive the state of important and necessary aid and assistance in time of war.

It is not necessary for the court to conclude that all or any of these things will actually occur if restrictions are not imposed. Unless it can see that some or all of them may not, in fact, occur, the legislative action must be sustained, because the legislature, and not the court, is the judge of the necessity of regulation under the police power unless the court can judicially know that there could, under no possibility, be any occasion for that exercise.

Munn vs. Illinois, 94 U. S. 113-132; *Otis & Gassman vs. Parker*, 187 U. S. 606-609; *Atkin vs. Kansas*, 191 U. S. 207-222; *Railway Co. vs. May*, 194 U. S. 267-269; *McLean vs. Arkansas*, 211 U. S. 539-548.

It will probably be said in response to this that some of these reasons, such as the economic competition of foreign labor, might have been urged in support of the act declared invalid in *Truax vs. Raich*, *supra*. We think that possibility would not dispose of the question. Once within our borders,

an alien cannot be deprived of the right to live, and to live he must labor or be supported by the charity of others. An interference with that right under the police power is, therefore, subject to certain limitations, the exact nature of which need not be specifically designated. The Arizona statute applied to all occupations, irrespective of their nature. The practical effect of this, as was pointed out in the opinion, was to exclude aliens from the state, a subject entrusted to Congress. The opinion did not hold that within certain limits the police power might not be exerted for the purpose of protecting the citizens of a state from the economic competition of races who have a standard of living inconsistent with American ideals, or to conserve our natural resources for our descendants. Obviously, such a conclusion would be difficult to reconcile with the oft-repeated statement of this court that the police power extends to the promotion of the general public welfare and prosperity.

Neither is the possible effect of such a condition restricted to the persons with whom the alien may come in competition. The so-called Japanese problem illustrates this quite fully. We need quote no authority to the point that in the field of agriculture the American and the Oriental cannot compete. This is so because their standards of living are incomparably different. The Oriental works his wife and his family in the fields practically during the hours of daylight, and his standard of living could not be adopted by an American. The possible result of such a condition would be that in the course of time, in certain sections of the country, at least, all lands might pass into the hands of these classes of aliens. The people of the state would then be entirely dependent for their very existence upon alien races who recognize to the state or nation no other obligations than those forcibly imposed. A change in a foreign government, a war in distant portions of the earth, and these people—as some of them have in fact done since the last war—would return to the country of their origin. The disastrous effect upon the whole economic fabric of a state of such a possibility is not hard to foresee. This possibility is in addition to the equally detrimental effect of driving American farmers from the occupations to which they have been accustomed into other and different businesses. Surely these are possibilities which the Fourteenth Amendment does not prohibit the state from guarding against.

Appellants do not directly controvert the foregoing, but seek to avoid its effect by a considerable discussion of the question of whether, under the laws of Washington, a lease creates an interest in real estate, contending that it does not. We are unable to see the materiality of this discussion. If the case is to be determined in the light of the police power cases, then the statute must stand or fall, as the court may determine its necessity with respect to the public welfare. In such event it can make no difference whether a lease be viewed as an interest in realty or as personal property, any more than the legality of a tax, claimed to constitute a burden upon interstate commerce, is determined by the view of a state court with respect to its being an excise tax or a tax on property. *Standard Oil Co. vs. Graves*, 249 U. S. 389, 394.

In so far as the Federal Constitution is concerned, the law is tested by what is done and not by what the local law may regard it for other purposes.

In any event, however, appellants are mistaken in their view of the nature of a lease of realty under the laws of Washington, because such leases have always been regarded in that state as constituting the conveyance of an interest in land. Appellants' position is predicated upon the case of

Tibbals vs. Iffland, 10 Wash. 451, in which case it was held that under the community property law of Washington a wife does not have to join in an assignment of a lease of a store-room. In reaching the conclusion which it did, the Washington court distinguished between an assignment of a lease and the making of such a lease, because at page 455 of the opinion it said:

"Leases of real estate for more than one year, *being incumbrances upon the property demised*, must under our statutes, be created by deed and with the usual formalities of deeds." (Italics ours.)

There are two factors by which we may determine the nature of a lease in Washington: (1) the statute of frauds, and (2) the application of the rule of community property. Section 8745, Rem. 1915 Code, provides:

"All conveyances of real estate, or of any interest therein, and all contracts creating or evidencing any incumbrance upon real estate, shall be by deed."

Section 5918, Rem. 1915 Code, provides, in part:

"The husband * * * shall not sell, convey, or incumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or incumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife."

Construing section 8745, *supra*, the Washington court has consistently held that a lease, being an incumbrance, on real estate, is within the statute.

In *Richards vs. Redelsheimer*, 36 Wash. 325, this conclusion was reached in the following language:

"It is apparent from the provisions of section 4517 (8745) that the common law has been modified to the extent of providing that all conveyances of real estate, or of any interest therein, or contract evidencing any incumbrance thereon, shall be by deed."

See also: *Watkins vs. Balch*, 41 Wash. 310; *Dorman vs. Plowman*, 41 Wash. 477.

In *American Savings Bank and Trust Co. vs. Mafridge*, 60 Wash. 180, it was held that a contract for a lease was within the statute, but that an assignment of the lease was not so included. From these decisions it is apparent that the Tibbals case was not decided upon the theory that a lease does not create an interest in real property, but simply upon the peculiar provisions of the statute relating to community property.

In *Hoover vs. Chambers*, 3 Wash. Ter. 235, a lease on land was held to constitute an incumbrance within the meaning of the community property statute, and that therefore a contract by a married man to make a lease upon community real estate without the joinder of his wife was invalid. This question was again considered in *Spreitzer vs. Miller*, 98 Wash. 601, in which case it was held that where the wife fails to join in the execution of a lease the lease cannot be sustained. The same view was announced in *Mustar vs. Russell*, 20 Wash. Dec. 199-203, in which it was said:

"It will not be contended that a contract to erect a building upon real property and make a lease thereof for a period of ten years is valid under the statute of frauds unless it be in writing."

Since the statute of frauds of Washington is restricted to real estate or any interest therein, or incumbrance thereon, and the community property statute refers to the sale, conveyance or incumbrance of real property, and since both statutes have been held applicable to leases of realty, it cannot be denied that the local law of Washington establishes the fact that a leasehold interest is an interest in land. This conclusion is in accord with

the views of this court in the following cases: *Freeman vs. Dawson*, 110 U. S. 264-272; *Insurance Company vs. Haven*, 95 U. S. 242.

We have discussed this question as though it were an ordinary police power case. While we think that it can be sustained as such, it is nevertheless submitted that in any event the power which has been exercised here and validity of which is attacked, is a broader power than exists where there is involved merely the right of a citizen to follow the ordinary pursuits of life in which the state has no special interest. The power to prevent alien domination of our soil is the necessary result of our political existence. It need not be justified by concrete instances of apprehended dangers, as we have attempted to do in an excess of caution, but should simply be recognized as one of the necessary incidents of governmental existence. Every writer on the law of nations and all civilized countries have recognized its existence since the beginning of history. It is a part of the sovereignty of a state, and of a kind, we submit, never intended to be taken away by the Fourteenth Amendment.

IV.

EQUAL PROTECTION OF THE LAWS.

An elaborate argument is made by appellants with respect to the alleged discriminatory features of this statute which the simplicity of the question seems to make in a large part unnecessary. The act classifies all persons into two classes: (1) Citizens, and aliens who have in good faith declared their intention of becoming citizens, and (2) unnaturalized aliens and those whose declarations of intention have not been made in good faith. Persons belonging to the second class are prohibited from holding land or any right to the rents, issues and profits thereof.

It is said that because section 2169, Revised Statutes, (18 Stats. 316) restricts the right of naturalization to aliens who are free white persons and persons of African nativity or African descent, that therefore the act unlawfully discriminates against the members of those races who are excluded from the privilege of naturalization by the section.

A consideration of a classification based upon the police power always involves two inquiries: (1) Is the act within the police power? and (2) If so, does it so discriminate with respect to persons affected thereby as to deny the equal protection of the laws to those included? We have already considered the statute from the standpoint of the police power. The decisions of this court to which we have referred sustain beyond question the power of a state to prohibit the alien ownership of real property. These decisions can only be supported upon the theory that the public welfare demands that persons who are not at least morally bound by the obligations of citizenship shall not be permitted to exercise privileges which have so intimate a connection with the public weal. The mere statement of the cause for the exercise of the power in this instance would seem to prevent any question of classification from arising because the statute includes the entire field which occasioned the exercise of the power. Apparently conceding the general power of the state to classify all aliens in this particular way, the appellants seek to avoid the application of the rule by adverting to the fact that section 2169 discriminates against certain races, and it is claimed that the result, in so far as the state statute is concerned, is therefore that aliens, who may possess the same characteristics which make for as good citizenship as those to whom the privilege is extended, are denied the equal protection of the laws.

This may be easily answered, both by precedent and upon principle. From the passage of the Act of March 26, 1790 (1 Stats. 103), to the Act of July 14, 1870 (16 Stats. 254), the privilege of naturalization was restricted to free white persons. In 1870 this privilege was extended to the negro, but the members of the Mongolian and Malay races have always been excluded from naturalization from 1790 to the present time. *Ozawa vs. U. S.*, U. S. Sup. (not yet reported); *In re Saito*, 62 Fed. 126; *In re Kumagai*, 163 Fed. 922; *In re Knight*, 171 Fed. 299; *In re Young*, 195 Fed. 645; *In re Ozawa*, 4 Hawaii Dist. 643.

While the decisions of this court with respect to the alien ownership of real property heretofore referred to do not refer to the classification then existing under the naturalization laws, the same alleged discrimination did, in fact, exist, and the statements made therein were all erroneous if appellants' view be adopted.

Considered from the standpoint of principle, the error in the argument lies in the failure of appellants to correctly understand the reason for the rule. The justification for the act under the police power does not rest upon the racial characteristics of various races or upon the idea that the excluded classes may not be law abiding and industrious, as seems to be assumed by the appellants. If this were so, the contention might merit serious consideration. The regulation is occasioned by the legislative view that persons who are not at least morally bound by obligations of citizenship should not be permitted to obtain control of a thing so vital to the political existence of a state as is the land. The question of whether certain persons should be permitted to assume those obligations is entirely legislative, and consequently immaterial here. It is sufficient that congress has refused to extend those privileges to certain races. It is no reflection upon the members of those races to say that having so acted, we cannot reasonably expect from them anything more than obedience to the letter of the law. In so far as the public welfare is concerned, however, it can make no difference whether their refusal to recognize those obligations is occasioned by deficiencies in their character or by an act of Congress. The result is the same in either case in so far as the public welfare of the state is concerned; that is to say, a thing upon which the state depends for its existence passes into the hands of persons who recognize no voluntary obligations to it.

The police power of the state extends to all subjects which affect the public welfare, and the alleged fact that if the National Government had acted differently the occasion for the exercise of the power would not have arisen is of no relevancy. This factor marks the distinction between the case of *Truax vs. Raich*, *supra*, *Yick Wo vs. Hopkins*, 118 U. S. 356, and various decisions of state and lower federal courts holding invalid attempts to deprive aliens of the right to engage in various occupations and the case at bar. The case of *Yick Wo vs. Hopkins*, *supra*, is illustrative of this difference. In that case it was made to appear that an ordinance, prohibiting the maintenance of hand laundries in wooden buildings without the consent of certain municipal officers, had been construed as permitting those officers to refuse permits to Chinese, while at the same time giving them to all other persons similarly situated. This action was clearly discriminatory, because there is nothing in the business of maintaining a hand laundry in a wooden building which, of itself, has any relation to the public welfare. The only basis for classification there was the method of carrying on the occupation, a circumstance not related to citizenship.

In the present case, the necessity for the state action is occasioned by

the very thing upon which the classification is based, which is quite a different question. Similarly, the statute considered in *Truax vs. Raich* was discriminatory, because it sought by a classification based upon citizenship to establish a prohibition with respect to occupations in which the presence of aliens could have no relation to the public welfare. A review of all the decisions cited by appellants upon this point would serve no useful purpose. They either merely involve the application of general principles to different situations, or else are cases involving general occupations in which the participation of aliens could not possibly be detrimental to the public welfare. We have already shown that such is not the situation with respect to the present statute.

It is also argued that, in any event, an arbitrary classification is made because aliens who have in good faith declared their intention to become citizens are permitted to hold real estate, whereas the same privilege is denied to all other aliens. The fallacy of this argument is apparent if the grounds for the classification which we have heretofore suggested be accepted. Declarants in good faith are included in the same class as are citizens, because they have taken the preliminary steps looking to citizenship and presumably will, in due course, attain that citizenship. The danger to the public welfare incident to the ownership of real property by persons of this class may therefore be reasonably said to be less than in the case of those aliens who have taken no steps looking to the abandonment of their obligations of allegiance to other governments. The fact that to a more or less extent the same danger may be common to two classes of persons would not for that reason render a regulation directed at one class only void, under the numerous decisions of this court. The case of *Patson vs. Pennsylvania*, 232 U. S. 138, is peculiarly applicable. A statute of Pennsylvania made it lawful for "unnaturalized foreign born alien residents" to possess certain weapons, but did not apply to nonresident aliens. Answering the contention that this was an unlawful discrimination, this court said:

"The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. (*Lindsley vs. National Carbonic Gas Co.*, 220 U. S. 61, 80, 81.) The state 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.'"

Similarly, in *Central Lumber Co. vs. South Dakota*, 226 U. S. 157-160, this court said:

"If the legislature shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists *without covering the whole field* of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed." (Italics ours.)

In *Miller vs. Wilson*, 236 U. S. 373, this court in sustaining a statute of California which provided for an eight-hour day for women, but exempted from its operation women employed in certain industries, said:

"The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. (*Patson vs. Pennsylvania*, 232 U. S. 138, 144, 58 L. Ed. 539, 543, 34 Sup. Ct. Rep. 281.) It is free to recognize degrees of harm, *and it may confine its restrictions to those classes of cases where the need is deemed to be clearest*. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.' (*Carroll vs. Greenwich Ins. Co.*, 199 U. S. 401, 50 L. Ed. 246, 250, 26 Sup. Ct. Rep. 66.) If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. (*Koeke Consol. Coke Co. vs. Taylor*, 234 U. S. 224, 227, 58 L. Ed. 1288, 1289, 34 Sup. Ct. Rep. 856.)" (Italics ours.)

In *Koeke Coke Co. vs. Taylor*, 234 U. S. 224, a statute which prohibited certain businesses from issuing store orders to employees but which did not apply to all employments, was held not discriminatory in the following language:

"But while there are differences of opinion as to the degree and kind of discrimination permitted by the Fourteenth Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating *other instances to which it might have been applied equally well*, so far as the court can see. That is for the legislature to judge unless the case is very clear." (Italics ours.)

See also: *International Harvester Co. vs. Missouri*, 234 U. S. 199.

Under these authorities it seems apparent that if the reason for the existence of this power which we have suggested be accepted, then there can be no substantial question with respect to classification. This is so because there is an obvious difference between the service to the state to be expected from a person who has been permitted in a formal way to declare his intention to abandon his allegiance to another nation and one who has not taken that step. As we have heretofore pointed out, the fact that his failure to take the step may be occasioned by the action of the national government would not in any wise affect the question, and indeed, might, by the creation of a feeling of resentment, make the necessity for the restriction more urgent.

In brief, the position taken by appellants, if correct, modifies all restrictions in all the states of the United States upon the alien ownership of real property so long as congress does not see fit to extend to all aliens the right of naturalization. This conclusion would necessitate a reversal of a long and uniform line of decisions by this court in which the power to make this restriction has been consistently affirmed, and to impute to the framers of the Fourteenth Amendment an intent to impose upon governmental sovereignty a restriction never recognized by any civilized nation.

V.

THE TREATY.

Article I of the Treaty of Commerce and Navigation with Japan (37 Stats. 1504), provides:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incidental to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

It is claimed that the application of this statute to the situation described in the bill of complaint is violative of this treaty. The bill shows that the land involved is agricultural land, and that the appellant Nakatsuka is a farmer who desires to use the land for the purpose of raising agricultural products to be sold by him both at wholesale and retail, and also that he is engaged in trading in farm products, both at wholesale and retail. Disregarding for a minute the alleged fact that Nakatsuka is both a farmer and a produce dealer, and considering the treaty as applied to the right to lease lands for agricultural purposes, the non-application of that instrument is at once apparent. The treaty deals specifically with the matter of leases. It gives to the subjects of the contracting parties the right "to lease land for residential and commercial purposes." Clearly, therefore, it was not the view of the signatories to that instrument that the matter of leasing was included within any other article, nor was it the intention to permit the leasing for all purposes, else the treaty would have so provided, instead of specifically designating the purposes for which leases might be made. The bill concedes that the land is not proposed to be leased for residential purposes. If an agricultural lease is included, therefore, it must be included upon the theory that the raising of agricultural products is commerce. If this be true, then it is difficult to imagine any purpose which would not be included, save perhaps leases to eleemosynary institutions or for charitable purposes, a violent construction indeed. While it is true that treaties should be liberally construed in order to effectuate the intention of the parties, it is also true "that in their construction words are to be taken in their ordinary meaning." (*Geoffrey vs. Riggs*, 133 U. S. 258.) Agriculture and trade and commerce have always been understood as constituting separate and distinct occupations. This popular conception has been expressed in instances too numerous to enumerate. Congress has recognized the distinction by the creation of the department of commerce and labor and the department of agriculture. Many of the state governments have likewise created separate departments regulating agriculture. Legislation, both state and federal, has uniformly treated the two occupations as distinct. It is unnecessary, however, to cite individual instances, because the question has already been determined by this court. Whatever may be the degree of liberality which should be exercised in the construction of treaties, it certainly is not any greater than is applied in the consideration of the powers of Congress under the commercial clause. *Atlantic Coast Line R. Co. vs. Riverside Mills*, 219 U. S. 186; *Addyston Pipe & Steel Co. vs. U. S.*, 175 U. S. 211; *Texas & P. Ry. Co. vs. Riggsby*, 241 U. S. 33.

This court has uniformly held that the power delegated to congress to regulate interstate commerce does not include the right to regulate the manufacture of commodities, although intended for subsequent transportation

in interstate commerce, either by direct regulation or by the prohibition of movements in interstate commerce.

In *Kidd vs. Pearson*, 128 U. S. 1, it was declared that the manufacture of intoxicating liquor was not commerce, although intended to be subsequently moved in that commerce. It was there said:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term as given by this court in *County of Mobile vs. Kimball*, 102 U. S. 691, 702 (26: 238, 241), is as follows: 'Commerce with foreign nations and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in congress and denied to the states, it would follow as an inevitable result that the duty would devolve on congress to regulate all of these delicate, multifarious, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management."

In *United States vs. Knight*, 156 U. S. 1, this court held that the Sherman Anti-Trust Act did not apply to a combination formed by a number of sugar refining companies to restrain competition in the production of sugar for the reason that the manufacture of sugar was not commerce. It was said in the opinion:

"Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it."

Consequently, in *Capital Dairy Co. vs. Ohio*, 183 U. S. 238-245, it was held that a state statute which prohibited the manufacture of oleomargarine did not controvert the commerce clause.

In *Hammer vs. Dagenhart*, 247 U. S. 251-272, this court declared void an act of congress which sought to restrain the movement in interstate commerce of manufactured articles produced under certain conditions. Mr. Justice Hughes there said:

"The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof."

See also: *Delaware L. & W. Ry. Co. vs. Yurkonis*, 238 U. S. 439; *Crescent Cotton Oil Co. vs. Miss.*, 66 L. Ed. 55-57.

No good reason can be perceived why these cases are not equally applicable to the present situation. The preamble of the treaty recites that it is a "treaty of commerce and navigation." The phrase "commercial purposes," would naturally, therefore, be construed as of or pertaining to commerce. A judicial definition of the word "commerce," as used in the Constitution, which is changeable only by amendment to the organic law, cannot be said to be narrow or illiberal when applied to a treaty which is subject to repeal by either party or modification by joint agreement. The view of this court in these cases was not based upon any particular use of the word "commerce" in the Constitution or on legislative history, but, as was stated in *Kidd vs. Pearson*, *supra*, it was the understanding which the court found to be conveyed to the common mind by the word as "clearly expressed in economic and political literature."

Appellants do not make the direct contention that the word "commercial" includes agriculture. They call attention, however, to that portion of article I which gives to the subjects of the two nations the right "to do anything incident to or necessary for trade," and they seek by definitions of the word "trade" to include agriculture. There might be some plausibility to the contention were it not for the fact that the preceding portion of the article treats specifically with the matter of leases. If it had been the intention of the parties to permit leasing by the clause relating to the doing of things necessary for trade, then there would have been no occasion or necessity for an express provision in regard to leases which it will be noted is restrictive. Reading the phrase "commercial purposes" and the clause relating to the doing of things incidental to trade together, it must be concluded that the word "trade" refers to commerce, and commerce, as we have already shown, does not include agriculture. In any event, the legislative history of this treaty, to which we shall hereinafter refer, shows quite conclusively that it was understood by both parties that the treaty did not cover the leasing of realty for purposes of agriculture by subjects of either.

The application of the doctrine announced in these cases is also sought to be avoided in the bill by the allegation that the appellant Nakatsuka, in addition to being a farmer, is also a dealer in farm products which he sells at wholesale and retail, and that he intends to sell the products to be raised on this land in the course of such business. We are unable to see how the fact that Nakatsuka may be engaged in an occupation which comes within the treaty could affect his rights to carry on another business not protected by that instrument. Sale is a necessary incident to agriculture and manufacture; yet it has been held that this fact does not make the manufacturer a farmer or a trader. It was said in *Kidd vs. Pearson*, 128 U. S. 1-21:

"If it be held that the term (commerce) includes the regulation of all such manufactures as are intended to be subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, fisheries, mining—in short, every branch of human industry."

In *Diamond Glue Co. vs. U. S. Glue Co.*, 187 U. S. 611, 616, it was said that the imposition of a tax and certain other requirements upon a manufacturing corporation which shipped its products in interstate commerce did not burden that commerce. This contention was stated as follows:

"The superintendence and manufacture had to come before sale. The

small requirements of this act before allowing plaintiff to do business in the state, if good as to the business taken by itself, are not made bad by the presence in the contract of an ulterior term which the plaintiff might or did intend to carry out by transporting the products of the business elsewhere."

Under these authorities the fact that Nakatsuka sells his product is immaterial. This being so, we fail to see how the fact that as a trader, he at the same time sells the products of another in a commercial sense, changes the situation. Suppose that it had been alleged that Nakatsuka, in addition to being a farmer, was also a dealer in automobiles. We apprehend that appellants would not contend that for that reason his rights as a farmer under the treaty would be any greater than those of his countrymen whose status was purely agricultural. We have already shown that the sale of farm products is merely a necessary incident to trade and commerce, and not a part thereof. Since that sale is the only connecting link between his activities as a trader and as a farmer, its rejection as a part of trade and commerce makes the situation the same as it would be in the case which we have supposed.

Any other conclusion would, in its practical effect, make the treaty extend to all forms of realty proposed to be used for purposes of profit. For instance, if the effect of the law may thus be evaded, then, by the same logic any dealer could appoint a farmer as his agent for the purpose of raising these products for the same alleged commercial purposes, with a consequent result that the treaty would permit leases for all agricultural purposes.

An elaborate argument is made by appellants in support of the contention that the treaty prohibits any act which works any discrimination against the Japanese as compared with other races. No portion of the treaty is cited which is susceptible of such a construction, the entire argument being based upon the rule of liberality which it is said ought to obtain in the construction of treaties. Aside from the treaty itself, there is a sufficient and cognate reason for the instant rejection of this argument. In the case of *Sullivan vs. Kidd*, 254 U. S. 433, this court said:

"While the question of the construction of treaties is judicial in its nature, and courts, when called upon to act, should be careful to see that international obligations are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the executive department of the government, charged with the supervision of our foreign relations, should be given much weight."

After which the court proceeded to quote from an unpublished letter of the secretary of state construing the particular treaty there before the court.

This treaty has been the subject of diplomatic negotiations between the state department and Japan, and the state department has already announced a construction inconsistent with that contended for by appellants. This correspondence will be found in a printed document in the Library of Congress, entitled: "Resume of the Controversy Between Japan and the United States Arising Out of the California Question, Class JV 6888, Book C2J4." Upon the flyleaf of this book is a printed sticker of the department of state, bureau of rolls and libraries, with the following notation:

"This is said to be an official Japanese publication printed at Tokio."

We have been informed by the attorney-general of California that this correspondence also appears at pages 632 to 652 of "Papers Relating to Foreign Relations of the United States, 1913, Department of State, United States of America." We have not been able to verify this latter citation, however. We assume that there is no doubt concerning the authenticity of

this correspondence, since it was referred to by the district court and its correctness is not attacked in the briefs of appellant.

From this correspondence it appears that upon the passage of the California Alien Land Act of 1913, which provided restrictions upon alien ownership not dissimilar to those imposed in the act in the case at bar, the Japanese government officially protested against the act upon the ground that in some of its features it violated the treaty. In passing, it is worthy of comment, however, that it apparently acquiesced in the proposition that agricultural leases did not come within the terms of the treaty, although the act restricted agricultural leases to terms of three years. For instance, upon page 2 of this document the statement appears:

"It is true that under the law, Japanese are granted the right to lease agricultural lands for a short term—a right which is not expressly secured by the treaty—but they are denied the right to acquire, possess and inherit land, whereas that right is freely granted to other aliens." (Italics ours.)

Upon page 8 there is an account of an audience had between the President of the United States and the Japanese ambassador. The Japanese ambassador read a memorandum relating to the California act and the treaty, and in reply the President stated:

"That if on further study the law should be found to be in conflict with the treaty provisions, the administration would be prepared to seek a judicial remedy, and that, even in case a suit should not be instituted, means would be sought to compensate Japanese for any loss which they might have actually sustained."

We regard this statement as quite pertinent with respect to the executive construction of this treaty, since, in so far as we are informed, the government never made any effort to seek a judicial remedy in behalf of the Japanese affected by the California act or to compensate them, although it appears that the President had undertaken to do this if he should become convinced that the act was in conflict with the treaty. The correspondence set forth in this document is particularly material. Included therein is a letter from Viscount Chinda to Secretary of State Bryan, written under date of May 9, 1913. In this letter the ambassador protested against the California act upon various grounds not here involved, but at the same time he did not controvert the proposition that agricultural leases are not protected by the treaty. This appears from his statement upon page 3 of this document, where he said:

"Moreover, in its relation to *house property*, the legislation appears to be, in a much wider sense, repugnant to the provisions of the first clause of the same article, by which Japanese subjects are granted, in reciprocity, and upon the same terms as American citizens, the right to own houses, manufactories, warehouses and shops."

Letter No. 6 consists of the memorandum prepared by the legal adviser to the Japanese ambassador under date of July 3, 1913. This memorandum makes various objections to the California act but does not deny the proposition that agricultural leases are not included. The view of the state department is made conclusive by letter No. 7, which appears upon page 15 of the appendix, and is a letter of Secretary of State Bryan to Viscount Chinda, written under date of July 16, 1913. Without reviewing this letter in detail it may be said that the conclusion which the state department reached was that the California act did not violate the treaty. Mr. Bryan, in referring to the particular provisions of article I which are relied on by these plaintiffs, said:

"This treaty was based upon a draft presented by the imperial government. In article I of this draft there is found the following clause:

"3. They (the citizens or subjects of the contracting parties) shall be permitted to own or hire and occupy the houses, manufactories, warehouses, shops and premises which may be necessary for them, and to lease land for residential, commercial, industrial, manufacturing and other lawful purposes.'

"It will be observed that in this clause, which was intended to deal with the subject of real property, there is no reference to the ownership of land. The reason of this omission is understood to be that the imperial government desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation.

"In the treaty as signed the rights of the citizens and subjects of the contracting parties with reference to real property were specifically dealt with (art. I) in the stipulation that they should have liberty 'to own or lease and occupy houses, manufactories, warehouses and shops,' and 'to lease land for residential and commercial purposes.' It thus appears that the reciprocal right to lease land was confined to 'residential and commercial purposes' and that the phrases 'industrial' and 'other lawful purposes,' which would have included the leasing of agricultural lands were omitted.

"The question of the ownership of land was, in pursuance of the desire of the Japanese Government, dealt with by an exchange of notes in which it was acknowledged and agreed that this question should be regulated in each country by the local law and that the law applicable in the United States in this regard was that of the respective states. This clearly appears from the note of Baron Uchida to Mr. Knox of February 21, 1911, in which, in reply to an inquiry of the latter on the subject Baron Uchida said:

"In return for the rights of land ownership which are granted Japanese by the laws of the various states of the United States (of which, I may observe, there are now about thirty) the imperial government will by liberal interpretation of the law be prepared to grant ownership to *American citizens from all the states, reserving for the future, however, the right of maintaining the condition of reciprocity with respect to the separate states.*' (Italics Mr. Bryan's.)

"In quoting the foregoing passage I have italicized the last clause for the purpose of calling special attention to the fact that the contracting parties distinctly understood that, in conformity with the express declaration of the imperial Japanese ambassador, the right was reserved to maintain as to land ownership the condition of reciprocity in the sense that citizens of the United States, coming from states in which Japanese might not be permitted to own land, were to be excluded from the reciprocal privilege in Japan.

"From what has been pointed out it appears to result, first, that the California statute, in extending to aliens not eligible to citizenship of the United States the right to lease lands in that state for agricultural purposes for a term not exceeding three years, may be held to go beyond the measure of privilege established in the treaty *which does not grant the right to lease agricultural lands at all*; and, secondly, that, so far as the statute may abridge the right of such aliens to own lands within the states, the right has been reserved by the Imperial Government to act upon the principle of exact reciprocity with respect to citizens of the individual states. In a word, the measure of privilege and the measure of satisfaction for its denial were perfectly understood and accepted."

The court will therefore observe that it was the view of Mr. Bryan that the Act of 1913 was not in conflict with the treaty. Attached to the letter

of Mr. Bryan is a document apparently prepared by the legal adviser to the state department, which answers the points raised by the legal adviser to the Japanese ambassador, and in which the conclusion is reached that the California act does not violate the treaty. It is interesting to observe that this document, although prepared immediately after the enactment of the treaty, also meets the objection raised by appellants with respect to alleged discrimination. The California act permitted aliens eligible to citizenship to hold real property, but denied this privilege to those ineligible except where conferred by express treaty. The Japanese Government raised exactly the same claim with respect to discrimination as have appellants in the case at bar. The legal adviser of the state department simply answered this with the statement that "the statute contains no discrimination against Japanese as such, but applies equally to all aliens not eligible to citizenship."

We desire particularly to emphasize the fact pointed out by Mr. Bryan in his letter of July 16, 1913, that the treaty as originally drafted by the Japanese Government included the right to lease land for "industrial, manufacturing and other lawful purposes," but that this clause was thereafter withdrawn for the reason that the Japanese Government "desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation."

Attention is likewise directed to the further fact that when the California Act of 1913 was pending in the legislature of California, Secretary of State Bryan made a trip to California to prevent its enactment. (Congressional Record, 66th Cong. 3d sess., vol. 60, p. 4148.) There is no record, however, that it was ever claimed by the state department that the contemplated act violated the treaty.

Since it thus appears that Mr. Bryan was opposed in principle to legislation of this character, his view as to the meaning and scope of the treaty is for that reason entitled to the greater consideration. It is submitted that there is nothing in the treaty which prevents a state from prohibiting the leasing of realty to Japanese aliens. The question of whether or not there are other features of the act which might come in conflict with the treaty is not before the court, because it will be presumed that whenever such a conflict arises, the state authorities of Washington will give due and proper regard to the terms of the treaty.

The judgment of the trial court was correct, and should be affirmed.

Respectfully submitted,

L. L. THOMPSON,
Attorney-General, State of Washington,
Solicitor for Appellee.

E. W. ANDERSON,
of Counsel.

3. DECISION OF THE COURT.

(November 12, 1923.)

Mr. Justice Butler delivered the opinion of the court.

Appellants brought this suit to enjoin the attorney-general of Washington from enforcing the Anti-Alien Land Law of that state, chapter 50, laws 1921, on the grounds that it is in conflict with the due process and equal protection clauses of the Fourteenth Amendment; with the treaty between the United States and Japan, and with certain provisions of the constitution of the state.

The appellants are residents of Washington. The Terraces are citizens of the United States and of Washington. Nakatsuka was born in Japan of Japanese parents and is a subject of the Emperor of Japan. The Terraces are the owners of a tract of land in King County which is particularly adapted to raising vegetables, and which for a number of years had been devoted to that and other agricultural purposes. The complaint alleges that Nakatsuka is a capable farmer and will be a desirable tenant of the land; that the Terraces desire to lease their land to him for the period of five years; that he desires to accept such lease, and that the lease would be made but for the act complained of. And it is alleged that the defendant, as attorney-general, has threatened to and will take steps to enforce the act against the appellants if they enter into such lease, and will treat the leasehold interest as forfeited to the state, and will prosecute the appellants criminally for violation of the act; that the act is so drastic and the penalties attached to its violation are so great that neither of the appellants may make the lease even to test the constitutionality of the act, and that, unless the court shall determine its validity in this suit, the appellants will be compelled to submit to it, whether valid or invalid, and thereby will be deprived of their property without due process of law and denied the equal protection of the laws.

The attorney-general made a motion to dismiss the amended complaint upon the ground that it did not state any matters of equity or facts sufficient to entitle the appellants to relief. The district court granted the motion and entered a decree of dismissal on the merits. The case is here on appeal from that decree.

Section 33 of article II of the constitution of Washington prohibits the ownership of land by aliens other than those who in good faith have declared intention to become citizens of the United States, except in certain instances not here involved. The act provides in substance that any such alien shall not own, take, have or hold the legal or equitable title, or right to any benefit of any land as defined in the act, and that land conveyed to or for the use of aliens in violation of the state constitution or of the act shall thereby be forfeited to the state. And it is made a gross misdemeanor, punishable by fine or imprisonment or both, knowingly to transfer land or the right to the control, possession or use of land to such an alien. It is also made a gross misdemeanor for any such alien having title to such land or the control, possession or use thereof, to refuse to disclose to the attorney-general or the prosecuting attorney the nature and extent of his interest in the land. The attorney-general and the prosecuting attorneys of the several counties are charged with the enforcement of the act.

1. The attorney-general questions the jurisdiction of the court to grant equitable relief even if the statute be unconstitutional. He contends that the appellants have a plain, adequate and speedy remedy at law; that the case involves but a single transaction, and that, if the proposed lease is made, the only remedy which the state has, so far as civil proceedings are concerned, is an escheat proceeding in which the validity of the law complained of may be finally determined; that an acquittal of the Terraces of the criminal offense created by the statute would protect them from further prosecution, and that Nakatsuka is liable criminally only upon his failure to disclose the fact that he holds an interest in the land.

The unconstitutionality of a state law is not of itself ground for equitable relief in the courts of the United States. That a suit in equity does not lie where there is a plain, adequate and complete remedy at law is so well understood as not to require the citation of authorities. But the legal

remedy must be as complete, practical and efficient as that which equity could afford. (*Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, 281; *Walla Walla City vs. Walla Walla Water Co.*, 172 U. S. 1, 11, 12.) Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the state is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity.

Cavanaugh vs. Looney, 248 U. S. 453, 456; *Truax vs. Raich*, 239 U. S. 33, 37, 38. See also *Ex parte Young*, 209 U. S. 123, 155, 162; *Adams vs. Tanner*, 244 U. S. 590, 592; *Greene vs. Louisville & Interurban Railroad Co.*, id. 499, 506; *Home Telephone & Telegraph Co. vs. Los Angeles*, 227 U. S. 278, 293; *Philadelphia Co. vs. Stimson*, 223 U. S. 605, 621; *Western Union Telegraph Co. vs. Andrews*, 216 U. S. 165; *Dobbins vs. Los Angeles*, 195 U. S. 223, 241; *Davis & Farnum Manufacturing Co. vs. Los Angeles*, 189 U. S. 207, 217.

The Terraces' property rights in the land include the right to use, lease and dispose of it for lawful purposes (*Buchanan vs. Warley*, 245 U. S. 60, 74), and the Constitution protects these essential attributes of property (*Holden vs. Hardy*, 169 U. S. 366, 391), and also protects Nakatsuka in his right to earn a livelihood by following the ordinary occupations of life. (*Truax vs. Raich*, *supra*; *Meyer vs. State of Nebraska*, 261 U. S. —). If, as claimed, the state act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants, as to which they have no remedy at law which is as practical, efficient or adequate as the remedy in equity. And assuming, as suggested by the attorney-general, that after the making of the lease the validity of the law might be determined in proceedings to declare a forfeiture of the property to the state or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consummation of the proposed lease. The threatened enforcement of the law deters them. In order to obtain a remedy at law, the owners, even if they would take the risk of fine, imprisonment and loss of property, must continue to suffer deprivation of their right to dispose of or lease their land to any alien until one is found who will join them in violating the terms of the enactment and take the risk of forfeiture. Similarly Nakatsuka must continue to be deprived of his right to follow his occupation as farmer until the landowner is found who is willing to make a forbidden transfer of land and take the risk of punishment. The owners have an interest in the freedom of the alien, and he has an interest in their freedom, to make the lease. The state act purports to operate directly upon the consummation of the proposed transaction between them, and the threat and purpose of the attorney-general to enforce the punishments and forfeiture prescribed prevents each from dealing with the other. (*Truax vs. Raich*, *supra*.) They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights. The complaint presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution.

2. Is the act repugnant to the due process clause or the equal protection clause of the Fourteenth Amendment?

Appellants contend that the act contravenes the due process clause in that it prohibits the owners from making lawful disposition or use of their land, and makes it a criminal offense for them to lease it to the alien, and prohibits him from following the occupation of farmer; and they contend that it is repugnant to the equal protection clause in that aliens are divided into two classes—those who may and those who may not become citizens, one class being permitted, while the other is forbidden, to own land as defined.

Alien inhabitants of a state, as well as all other persons within its jurisdiction, may invoke the protection of these clauses. (*Yick Wo vs. Hopkins*, 118 U. S. 356, 369; *Truax vs. Raich*, *supra*, 39.) The Fourteenth Amendment, as against the arbitrary and capricious or unjustly discriminatory action of the state, protects the owners in their right to lease and dispose of their land for lawful purposes and the alien resident in his right to earn a living by following ordinary occupations of the community, but it does not take away from the state those powers of police that were reserved at the time of the adoption of the Constitution. (*Barbier vs. Connolly*, 113 U. S. 27, 31; *Mugler vs. Kansas*, 123 U. S. 623, 663; *Powell vs. Pennsylvania*, 127 U. S. 678, 683; *In re Kemmler*, 136 U. S. 438, 449; *Lawton vs. Steel*, 152 U. S. 133, 136; *Phillips vs. Mobile*, 208 U. S. 472, 479; *Hendrick vs. Maryland*, 235 U. S. 610, 622, 623.) And in the exercise of such powers the state has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people.

And while Congress has exclusive jurisdiction over immigration, naturalization and the disposal of the public domain, each state, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders. (*Hauenstein vs. Lynham*, 100 U. S. 483, 484, 488; *Blythe vs. Hinckley*, 180 U. S. 333, 340.) Mr. Justice Field, speaking for this court (*Phillips vs. Moore*, 100 U. S. 208), said (p. 212):

“By the common law, an alien cannot acquire real property by operation of law, but may take it by act of the grantor, and hold it until office found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government.”

State legislation, applying alike and equally to all aliens withholding from them the right to own land, cannot be said to be capricious or to amount to an arbitrary deprivation of liberty or property, or to transgress the due process clause.

This brings us to a consideration of appellants' contention that the act contravenes the equal protection clause. That clause secures equal protection to all in the enjoyment of their rights under like circumstances. (*In re Kemmler*, *supra*; *Giozza vs. Tiernan*, 148 U. S. 657, 662.) But this does not forbid every distinction in the law of a state between citizens and aliens resident therein. In *Truax vs. Corrigan* (257 U. S. 312) this court said (p. 337):

“In adjusting legislation to the need of the people of a state the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary. * * * Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and

real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand."

The rights, privileges and duties of aliens differ widely from those of citizens; and those of alien declarants differ substantially from those of nondeclarants. Formerly in many of the states the right to vote and hold office was extended to declarants, and many important offices have been held by them. But these rights have not been granted to nondeclarants. By various acts of Congress declarants have been made liable to military duty, but no act has imposed that duty on nondeclarants. The fourth paragraph of article I of the treaty, invoked by the appellants, provides that the citizens or subjects of each shall be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; also from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions. The alien's formally declared *bona fide* intention to renounce forever all allegiance and fidelity to the sovereignty to which he lately has been a subject, and to become a citizen of the United States and permanently to reside therein, markedly distinguishes him from an ineligible alien or an eligible alien who has not so declared.

By the statute in question all aliens who have not in good faith declared intention to become citizens of the United States, as specified in section 1 (a), are called "aliens", and it is provided that they shall not "own" "land", as defined in clauses (d) and (b) of section 1, respectively. The class so created includes all, but is not limited to, aliens not eligible to become citizens. Eligible aliens who have not declared their intention to become citizens are included, and the act provides that unless declarants be admitted to citizenship within seven years after the declaration is made, bad faith will be presumed. This leaves the class permitted so to own land made up of citizens and aliens who may, and who intend to become citizens, and who in good faith have made the declaration required by the naturalization laws. The inclusion of good faith declarants in the same class with citizens does not unjustly discriminate against aliens who are ineligible or against eligible aliens who have failed to declare their intention. The classification is based on eligibility and purpose to naturalize. Eligible aliens are free white persons and persons of African nativity or descent. Congress is not trammelled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. The state properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not. Appellants' contention that the state act discriminates arbitrarily against Nakatsuka and other ineligible aliens because of their race and color is without foundation. All persons of whatever color or race who have not declared their intention in good faith to become citizens are prohibited from so owning agricultural lands. Two classes of aliens inevitably result from the naturalization laws—those who may and those who may not become citizens. The rule established by congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act. We agree with the court below (274 Fed. 841, 849) that:

"It is obvious that one who is not a citizen and cannot become one

lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens." And we think it is clearly within the power of the state to include nondeclarant eligible aliens and ineligible aliens in the same prohibited class. Reasons supporting discrimination against aliens who may but who will not naturalize are obvious.

Truax vs. Raich, *supra*, does not support the appellants' contention. In that case the court held to be repugnant to the Fourteenth Amendment an act of the legislature of Arizona making it a criminal offense for an employer of more than five workers at any time, regardless of kind or class of work, or sex of workers, to employ less than eighty per cent qualified electors or native-born citizens of the United States. In the opinion it was pointed out that the legislation there in question did not relate to the devolution of real property, but that the discrimination was imposed upon the conduct of ordinary private enterprise covering the entire field of industry with the exception of enterprises that were relatively very small. It was said that the right to work for a living in the common occupations of the community is a part of the freedom which it was the purpose of the Fourteenth Amendment to secure.

In the case before us the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the state. The quality of allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself.

The Terraces, who are citizens, have no right safeguarded by the Fourteenth Amendment to lease their land to aliens lawfully forbidden to take or have such lease. The state act is not repugnant to the equal protection clause and does not contravene the Fourteenth Amendment.

3. The state act, in our opinion, is not in conflict with the treaty between the United States and Japan. The preamble declares it to be "a treaty of commerce and navigation," and indicates that it was entered into for the purpose of establishing the rules to govern commercial intercourse between the countries.

The only provision that relates to owning or leasing land is in the first paragraph of article I, which is as follows:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

For the purpose of bringing Nakatsuka within the protection of the treaty, the amended complaint alleges that, in addition to being a capable farmer, he is engaged in the business of trading, wholesale and retail, in farm products and shipping the same in intrastate, interstate and foreign commerce, and, instead of purchasing such farm products, he has produced, and desires to continue to produce, his own farm products for the purpose

of selling them in such wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing farm products for such trade he will be prevented from engaging in trade and the incidents to trade, as he is authorized to do under the treaty.

To prevail on this point, appellants must show conflict between the state act and the treaty. Each state, in the absence of any treaty provision conferring the right, may enact laws prohibiting aliens from owning land within its borders. Unless the right to own or lease land is given by the treaty, no question of conflict can arise. We think that the treaty not only contains no provision giving Japanese the right to own or lease land for agricultural purposes, but, when viewed in the light of the negotiations leading up to its consummation, the language shows that the high contracting parties respectively intended to withhold a treaty grant of that right to the citizens or subjects of either in the territories of the other. The right to "carry on trade" or "to own or lease and occupy houses, manufactories, warehouses and shops," or "to lease land for residential and commercial purposes," or "to do anything incident to or necessary for trade" cannot be said to include the right to own or lease or to have any title to or interest in land for agricultural purposes. The enumeration of rights to own or lease for other specified purposes impliedly negatives the right to own or lease land for these purposes. A careful reading of the treaty suffices in our opinion to negative the claim asserted by appellants that it conflicts with the state act.

But if the language left the meaning of its provisions doubtful or obscure, the circumstances of the making of the treaty, as set forth in the opinion of the district court (*supra*, 844, 845), would resolve all doubts against the appellants' contention. The letter of Secretary of State Bryan to Viscount Chinda, July 16, 1913, shows that, in accordance with the desire of Japan, the right to own land was not conferred. And it appears that the right to lease land for other than residential and commercial purposes was deliberately withheld by substituting the words of the treaty, "to lease land for residential purposes" for a more comprehensive clause contained in an earlier draft of the instrument, namely, "to lease land for residential, commercial, industrial, manufacturing and other lawful purposes."

4. The act complained of is not repugnant to section 33 of article II of the state constitution.

That section provides that "the ownership of lands by aliens * * * is prohibited in this state. * * *" Appellants assert that the proposed lease of farm land for five years is not "ownership," and is not prohibited by that clause of the state constitution and cannot be forbidden by the state legislature. That position is untenable. In *State vs. O'Connell*, 121 Wash. 542, a suit for the purpose of escheating to the state an undivided one-half interest in land, or the proceeds thereof, held in trust for the benefit of an alien, a subject of the British Empire, decided since this appeal was taken, the supreme court of Washington held that the statute in question did not contravene this provision of the constitution of that state. The question whether or not a state statute conflicts with the constitution of the state is settled by the decision of its highest court. (*Carstairs vs. Cochran*, 193 U. S. 10, 16.) This court "is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state." (*Quong Ham Wah Co. vs. Industrial Commission*, 255 U. S. 445, 448, and cases cited.)

The decree of the district court is affirmed.

Mr. Justice McReynolds and Mr. Justice Brandeis think there is no jus-

tlicable question involved and that the case should have been dismissed on that ground.

Mr. Justice Sutherland took no part in the consideration or decision of this case.

A true copy.

CHAPTER II.—O'BRIEN CASE.

J. J. O'BRIEN and J. INOUE vs. U. S. WEBB as Attorney-General of the State of California and C. C. COOLIDGE as District Attorney of Santa Clara County, State of California.

1. ALIEN LAND LAW OF CALIFORNIA OF 1920.

An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith.

Submitted by the initiative and approved by electors November 2, 1920.
In effect December 9, 1920.

The People of the State of California do enact as follows:

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Sec. 3. Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in section one of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy and convey real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise. Hereafter all aliens other than those specified in section one hereof may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Sec. 4. Hereafter no alien mentioned in section two hereof and no company, association or corporation mentioned in section three hereof, may be appointed guardian of that portion of the estate of a minor which consists of property which such alien or such company, association or corporation is inhibited from acquiring, possessing, enjoying or transferring

by reason of the provisions of this act. The public administrator of the proper county, or any other competent person or corporation, may be appointed guardian of the estate of a minor citizen whose parents are ineligible to appointment under the provision of this section.

On such notice to the guardian as the court may require, the superior court may remove the guardian of such an estate whenever it appears to the satisfaction of the court:

(a) That the guardian has failed to file the report required by the provisions of section five hereof; or

(b) That the property of the ward has not been or is not being administered with due regard to the primary interest of the ward; or

(c) That facts exist which would make the guardian ineligible to appointment in the first instance; or

(d) That facts establishing any other legal ground for removal exist.

Sec. 5. (a) The term "trustee" as used in this section means any person, company, association or corporation that as guardian, trustee, attorney-in-fact or agent, or in any other capacity has the title, custody or control of property, or some interest therein, belonging to an alien mentioned in section two hereof, or to the minor child of such an alien, if the property is of such a character that such alien is inhibited from acquiring, possessing, enjoying or transferring it.

(b) Annually on or before the thirty-first day of January every such trustee must file in the office of the secretary of state of California and in the office of the county clerk of each county in which any of the property is situated, a verified written report showing:

(1) The property, real or personal, held by him for or on behalf of such an alien or minor;

(2) A statement showing the date when each item of such property came into his possession or control;

(3) An itemized account of all expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof.

(c) Any person, company, association or corporation that violates any provision in this section is guilty of a misdemeanor and shall be punished by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

(d) The provisions of this section are cumulative and are not intended to change the jurisdiction or the rules of practice of courts of justice.

Sec. 6. Whenever it appears to the court in any probate proceeding that by reason of the provisions of this act any heir or devisee cannot take real property in this state or membership or shares of stock in a company, association or corporation which, but for said provisions, said heir or devisee would take as such, the court, instead of ordering a distribution of such property to such heir or devisee, shall order a sale of said property to be made in the manner provided by law for probate sales of property and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such property.

Sec. 7. Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to, and become and remain the property of the State of California. The attorney-general or district attorney of the proper county

shall institute proceedings to have the escheat of such real property adjudged and enforced in the manner provided by section four hundred seventy-four of the Political Code and title eight, part three, of the Code of Civil Procedure. Upon the entry of final judgment in such proceedings, the title to such real property shall pass to the State of California. The provisions of this section and of sections two and three of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon, or interest in such property, so long as such real property so acquired shall remain the property of the alien, company, association or corporation acquiring the same in such manner. No alien, company, association or corporation mentioned in section two or section three hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt.

Sec. 8. Any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to the State of California. The attorney-general or district attorney of the proper county shall institute proceedings to have such escheat adjudged and enforced as provided in section seven of this act. In such proceedings the court shall determine and adjudge the value of such leasehold or other interest in such real property, and enter judgment for the state for the amount thereof together with costs. Thereupon the court shall order a sale of the real property covered by such leasehold, or other interest, in the manner provided by section twelve hundred seventy-one of the Code of Civil Procedure. Out of the proceeds arising from such sale, the amount of the judgment rendered for the state shall be paid into the state treasury and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein. Any share of stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section three of this act shall escheat to the State of California. Such escheat shall be adjudged and enforced in the same manner as provided in this section for the escheat of a leasehold or other interest in real property less than the fee.

Sec. 9. Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section two hereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

A prima facie presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:

(a) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof;

(b) The taking of the property in the name of a company, association or corporation, if the memberships or shares of stock therein held by aliens mentioned in section two hereof, together with the memberships or shares of stock held by others but paid for or agreed or understood to be paid for by such aliens, would amount to a majority of the membership or the issued capital stock of such company, association or corporation;

(c) The execution of a mortgage in favor of an alien mentioned in sec-

tion two hereof if said mortgage is given possession, control or management of the property.

The enumeration in this section of certain presumptions shall not be so construed as to preclude other presumptions or inferences that reasonably may be made as to the existence of intent to prevent, evade or avoid escheat as provided for herein.

Sec. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both.

Sec. 11. Nothing in this act shall be construed as a limitation upon the power of the state to enact laws with respect to the acquisition, holding or disposal by aliens of real property in this state.

Sec. 12. All acts and parts of acts inconsistent or in conflict with the provisions hereof are hereby repealed; provided, that—

(a) This act shall not affect pending actions or proceedings, but the same may be prosecuted and defended with the same effect as if this act had not been adopted;

(b) No cause of action arising under any law of this state shall be affected by reason of the adoption of this act whether an action or proceeding has been instituted thereon at the time of the taking effect of this act or not and actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as if this act had not been adopted;

(c) This act in so far as it does not add to, take from or alter an existing law shall be construed as a continuation thereof.

Sec. 13. The legislature may amend this act in furtherance of its purpose and to facilitate its operation.

Sec. 14. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The people hereby declare that they would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.

IN THE UNITED STATES DISTRICT COURT, NORTHERN CALIFORNIA.

No. 654.

1. BILL OF COMPLAINT.

To the Honorable Judges of the District Court of the United States, Northern District of California, sitting in equity:

J. J. O'Brien, a citizen of the United States and the State of California and a resident of the said Northern District of California, southern division, and J. Inouye, a subject of the Emperor of Japan, and a resident of the said Northern District of California, southern division, bring their bill of complaint against U. S. Webb, as attorney-general of the State of California, and C. C. Coolidge, as district attorney of the County of Santa Clara, State of California, and show unto your Honors as follows:

I.

That plaintiffs suing on behalf of themselves and others similarly situated bring this bill of complaint against said U. S. Webb as the duly elected,

qualified and acting attorney-general of the State of California, and against C. C. Coolidge, the elected, qualified and acting district attorney of the County of Santa Clara in the State of California.

II.

That the value of the matter in dispute herein between each plaintiff and the defendants is in excess of the sum of three thousand (\$3,000.00) dollars, exclusive of interest and costs.

III.

That this suit is a suit in equity and arises under the Constitution and laws of the United States as will hereafter more particularly appear. Among other things, this suit is brought to repress and prevent the deprivation under color of a certain statute of the State of California and of certain rights and immunities secured to the complainants by the Constitution of the United States, that is, a right to have and enjoy their property without being deprived thereof without due process of law and without being denied the equal protection of the law, and this suit, among other things, involves the question as to whether or not a certain cropping agreement which complainants proposed to execute is contrary to the said statute of the State of California and whether or not the said statute if it prevents the execution of said cropping contract is not contrary to the Constitution of the United States and whether or not the defendants in threatening to enforce the provisions of said statute against complainants are not depriving the complainant J. Inouye of his right freely to earn a livelihood.

This suit is brought to repress and prevent the defendants from proceeding under and by virtue of the provisions of the statutes of California, hereinafter referred to, from illegally and unlawfully threatening complainants with arrest and imprisonment under the color of said statute.

IV.

That the plaintiff J. J. O'Brien is now and for a number of years last past has been the owner of the following described real property situated, lying and being in the County of Santa Clara, State of California, and more particularly described as

The south half (S. $\frac{1}{2}$) of lot number seven (7) in the Coleman Younger Tract as per map on file in the county recorder's office of said Santa Clara County, amounting to about ten (10) acres.

V.

That the said real property is agricultural in character and is particularly adapted to the raising of strawberries, loganberries, raspberries and vegetables, and for a number of years has been and now is being devoted to that and kindred agricultural purposes.

That the plaintiff J. Inouye is a capable farmer and is in all respects a desirable and competent person to farm said real property and to enter into a cropping contract for the growing of crops upon said property.

That the plaintiff J. J. O'Brien wishes to execute a cropping contract with the plaintiff J. Inouye, who wishes to execute such a contract with the plaintiff J. J. O'Brien and both of said parties wish to enter into a cropping contract substantially in the form of the contract hereto annexed, marked "Exhibit A", referred to herein and made a part hereof.

That except for the threats and acts of the defendants hereinafter referred to the plaintiffs would execute said cropping contract, Exhibit A, and that the plaintiff J. Inouye wishes to enter into the employ of the plaintiff J. J. O'Brien in accordance with the terms as set forth in said Exhibit A and

the execution of said contract is necessary, as plaintiffs allege and believe, in order that the above described land may be farmed to the best advantage and in order that the plaintiff J. J. O'Brien may secure the largest return therefrom and in order that the plaintiff J. Inouye may receive compensation therefrom and that if the said plaintiffs are prevented from entering into said contract Exhibit A or any cropping contract substantially in the form of Exhibit A, the said plaintiff J. Inouye will thereby be deprived of his right to earn a living in the business for which he is best fitted and which he understands or he will be seriously embarrassed in his efforts to earn such a living for himself.

That if the said plaintiff J. J. O'Brien is prevented from entering into the said contract, Exhibit A, or a cropping contract in substantially the same form, with plaintiff J. Inouye, the said plaintiff J. J. O'Brien will be seriously obstructed and interfered with to his great damage in the management and control of his property.

That both said plaintiffs are law abiding and wish to conform in every way to all proper laws, but that in view of the threats of the defendant U. S. Webb, as attorney-general of the State of California, the plaintiffs fear to enter into the contract Exhibit A and plaintiffs will be prevented from entering into said contract unless they are protected from the threats and acts of the defendants under and in pursuance of the statute of California hereinafter referred to, and under color of which defendants are making said threats.

VI.

That there was enacted by the electors of the State of California at the general election, November 2, 1920, an act entitled

"An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith." (Submitted by the initiative and approved by electors November 2, 1920. In effect December 9, 1920.)

VII.

That the defendant U. S. Webb, as the attorney-general of the State of California, and the defendant C. C. Coolidge, as district attorney of the County of Santa Clara, have threatened to and will enforce said act in each and all of its terms, and the whole thereof, and particularly against these plaintiffs in the event that they execute the cropping contract for the purposes and upon the terms substantially as set forth in Exhibit A and will forfeit or attempt to forfeit the said real property by escheat proceedings to the State of California, and will prosecute these plaintiffs criminally for an alleged violation of said act above mentioned if they enter into any cropping contract in the form substantially as set forth in Exhibit A.

That the said act is in its terms so drastic and the penalties attached to the violation of the terms thereof are so great that neither of these plaintiffs may make or execute such cropping contract, Exhibit A, even for the purpose of testing the constitutionality and validity of the said act above mentioned or the application of said act to such a contract as the said Exhibit A and unless this court shall determine the validity of this act in this proceeding and the application of said act to said proposed contract, Exhibit A, said plaintiffs will be compelled to submit to said act, whether the same be

valid or invalid and will be compelled to submit to the defendants' interpretation of said act and the threats of the defendant U. S. Webb, as attorney-general in connection therewith, and will thereby be deprived of their property without due process of law and will be denied the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States, and the plaintiffs have no adequate remedy at law and are relievable only in a court of equity.

That the said defendant U. S. Webb, as the attorney-general of the State of California, has written various letters which have been published in the newspapers of the State of California, threatening prosecution of all persons who enter into any cropping contract involving agricultural lands substantially similar to the contract herein referred to as Exhibit A and has instructed all the district attorneys of the various counties of the state to proceed with the prosecution of all persons entering into cropping contracts with aliens ineligible to citizenship and that as a result of the public threats of the said defendant U. S. Webb plaintiffs as hereinbefore alleged are prevented from entering into any cropping contract substantially like Exhibit A until their right to enter into such contract shall have been determined by this court.

VIII.

That the said act is in contravention of section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiffs of property without due process of law and denies to them and each of them the equal protection of the law; and protection of said section 1 of the Fourteenth Amendment to the Constitution of the United States is hereby specially invoked by the plaintiffs and each of them.

IX.

That if plaintiffs are not permitted to execute a cropping contract involving the said real property as aforesaid and on substantially the terms above mentioned a large and irreparable loss will occur to them and each of them and the plaintiffs have no adequate remedy at law, but are relievable only in a court of equity and that the loss to each of said plaintiffs would be in excess of three thousand (\$3,000.00) dollars, exclusive of interest and costs.

X.

Inasmuch as plaintiffs and each of them have no adequate remedy in the premises by the strict rule of law and can obtain relief only in a court of equity where matters and things of the kind and character hereinbefore stated are perfectly cognizable and relievable, and to the end that they and each of them may have relief which they and each of them can only obtain in a court of equity, they and each of them pray:

1. That U. S. Webb, as attorney-general of the State of California, and C. C. Coolidge, as district attorney for the County of Santa Clara, California, be enjoined and restrained, provisionally, preliminarily and perpetually by the order and injunction of this court from bringing, directly or indirectly, and from permitting to be brought directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said act of the legislature of the State of California above mentioned against these plaintiffs, or either of them, upon their executing or attempting to execute a cropping contract substantially as above set forth and substantially for the above mentioned term, or any other person, similarly situated, and from causing the plaintiffs, or either of them, or any other person similarly situated, to be arrested for violating the terms and provisions of said act, and from taking any other

action in any other manner to prevent or interfere with the complainants, or either of them, from executing and delivering such contract on such real estate, and that an order to show cause issue herein upon application of the plaintiffs herein directed to the above named defendants, requiring them to show cause why a temporary injunction should not issue as prayed for herein, and that a temporary restraining order may be issued pending the hearing of said show cause order.

2. That upon the hearing the aforesaid act of the State of California be declared to be unconstitutional, illegal and void and that a perpetual injunction be issued restraining the enforcement thereof as hereinabove prayed for.

3. That a writ of subpoena may issue to defendants requiring them to answer this bill of complaint fully and truthfully, but not on oath, an oath being hereby waived, and that further and general relief be granted as the nature of plaintiffs' case may require or to equity may seem meet.

ALBERT H. ELLIOT and
GUY C. CALDEN,
Solicitors for Complainants.

2. MOTION FOR TEMPORARY INJUNCTION (MEMORANDUM OF POINTS AND AUTHORITIES).

STATEMENT OF THE CASE.

This action in equity involves the right of the attorney-general of the State of California and the district attorney of the County of Santa Clara to deprive plaintiffs of rights, privileges, and immunities secured by the Constitution and laws of the United States under the color of a statute of the State of California.

For the convenience of the court, we are attaching to this memorandum of points and authorities a copy of the said act, which we have called "Exhibit B", and which shall be hereafter referred to as "Anti-Alien Act Exhibit B."

The affidavit of J. J. O'Brien, one of the plaintiffs, sets forth that U. S. Webb, as attorney-general of the State of California, has threatened to prosecute all citizens who execute what is known as a cropping contract with aliens ineligible to citizenship under the said Anti-Alien Act Exhibit B. The bill of complaint and the affidavit set forth that the plaintiff J. J. O'Brien and the plaintiff J. Inouye are prevented from entering into a cropping contract substantially like the cropping contract attached to the bill and called "Exhibit A", because of fear that if they do execute such a contract the attorney-general and the district attorney of Santa Clara County will proceed to subject them to both civil and criminal action. A preliminary injunction is sought by plaintiffs to prevent the defendants from carrying out the threat referred to and also to permit plaintiffs to execute such a contract as the cropping contract, "Exhibit A."

LAW OF THE CASE.

The defendants should be enjoined from preventing plaintiffs and those similarly situated from executing any cropping contract in substance like the cropping contract "Exhibit A" attached to the bill of complaint, because

First: The said cropping contract and any contract in substantially the terms of said cropping contract is not within the provisions of the said Anti-Alien Act Exhibit B and therefore the defendants' threats of prosecution are unlawful and should be prohibited.

Second: If a cropping contract in substantially the form of "Exhibit A" is prohibited by the terms of the said Anti-Alien Act Exhibit B, then to that extent the said Anti-Alien Act Exhibit B is contrary to section I of the Fourteenth Amendment to the Constitution of the United States because (a) it deprives the plaintiffs of their property without due process of law, and (b) it deprives both plaintiffs of the equal protection of the law, and (c) it deprives the plaintiff J. Inouye, an alien subject of Japan, a lawful resident of the State of California, of the right to earn his living in said state at one of the common occupations of the community.

Third: If the cropping contract in substantially the terms of said cropping contract Exhibit A is prohibited by the provisions of said Anti-Alien Act Exhibit B, then the said act is in conflict with the treaty between Japan and the United States proclaimed April 5th, 1921, and especially the third paragraph of article I thereof, and so far as the plaintiff J. Inouye is concerned the said act is void in that regard.

Section 3932, U. S. Compiled Statutes 1916 (R. S. sec. 1979), reads as follows:

"Civil action for deprivation of rights.—Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Under the fourteenth subdivision of section 24 of the Judicial Code the jurisdiction of the district court to issue an injunction seems to be well established. We quote said subdivision as follows:

"Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

The so-called cropping contract is not included within the provisions of the so-called Anti-Alien Land Act Exhibit B, therefore the defendants should be enjoined from prosecuting plaintiffs under the color of said act.

In both section I and section 10 of the said Anti-Alien Act Exhibit B it will be observed that the prohibitions of the act extend only to a transfer or conspiracy to transfer "real property, or of an interest therein."

A cropping contract like the cropping contract Exhibit A is a contract of employment pure and simple and does not affect directly or indirectly a transfer of real property or any interest therein, nor does it in a legal sense accomplish the acquisition, possession, enjoyment and transfer of real property.

The cropping contract may be defined as a contract wherein a person called a "cropper" agrees with the owner of land to perform services and labor in making the crop and to be compensated by a share of the produce. Such a contract gives the cropper no legal possession of the premises further than as a hireling. (*Wanamaker vs. Buchanan*, 33 Pa. Sup. Ct. 138, 140.)

A cropper farms the land and is paid for his work in a part of the crop, but he is not a tenant of the land and holds no estate therein. (*Hansen vs. Hansen*, 129 N. W. 982.)

"The distinction between a 'tenant' and a 'cropper' is that a tenant has an estate in the land for a given time, and a right of property in the crops, and hence makes the division thereof between himself and the landlord in case of an agreement upon shares, while a cropper has no estate in the land, nor ownership of the crops, but is merely a servant, and receives his share of the crops from the landlord, in whom the title is." (*Taylor vs. Donohoe*, 103 N. W. 1099, 1100, 125 Wis. 513.)

We refer to the following cases in California, which are instructive as showing the various distinctions between leases and cropping contracts and a reading of those cases will prove that these distinctions are quite clearly defined:

Adams vs. Thornton, 7 Cal. Unrep. 219; *Bernal vs. Hovious*, 17 Cal. 541; *Knox vs. Marshall*, 19 Cal. 617; *Smyth vs. Tennison*, 24 Cal. App. 519; *Wells vs. Preston*, 25 Cal. 59; *Rudesphol vs. Liberty Hill etc. Co.*, 80 Cal. 553.

Various definitions of cropping contracts and croppers are as follows:

"Cropper. One who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor. (2 Rawle, 11.)

"The difference between a tenant and a cropper is: A tenant has an estate in the land for the term, and, consequently, he has a right of property in the crops. Until division, the right of property and of possession in the whole is the tenant's. A cropper has no estate in the land; and, although he has in some sense the possession of the crop, it is the possession of a servant only, and is, in law, that of the landlord, who must divide off to the cropper his share. (71 N. C. 7.)"

"A laborer receiving pay in a share of the crop." (*Harrison vs. Ricks*, 71 N. C. 7, 11.)

"One hired to work land and to be compensated by a share of the produce." (*Steel vs. Frick*, 56 Pa. St. 172, 175. See also *Adams vs. McKesson*, 53 Pa. St. 81, 81 Am. Dec. 183; *Fry vs. Jones*, 2 Rawle [Pa.] 11.)

"A person hired by the landowner to cultivate the land, receiving for his compensation a portion of the crops raised." (*Wood vs. Garrison*, 62 S. W. 728, 729, 23 Ky. L. Rep. 295.)

"One who raises a crop upon land of another under a contract to raise the crop for a particular part of it." (*Burgie vs. Davis*, 34 Ark. 179.)

A cropper's contract is "one in which one agrees to work the land of another for a share of the crop, without obtaining any interest in the land or ownership in the crop before division." (*Gray vs. Robinson* [Ariz. 1593], 33 Pac. 712, 713.)

"The difference between a tenant and a cropper is clear. A tenant has an estate in the land for the term, and consequently he has a right of property in the crops. If he pays a share of the crop for rent, it is he that divides off to the landlord his share, and until such division the right of property and the possession in the whole is his. * * * A cropper has no estate in the land; that remains in the landlord. Consequently, although he has, in some sense, the possession of a servant, and is in law that of the landlord, the landlord must divide off to the cropper his share."

Harrison vs. Ricks, 71 N. C. 583, 584, where it is said: "There is an obvious distinction between a cropper and a tenant. One has a possession of the premises, exclusive of the landlord; the other has not. *The one has a right for a fixed time*; the other has only a right to go on the land to plant, work and gather the crop. The possession of the land is with the owner as against the cropper. This is not so of the tenant."

See, also, *Denton vs. Strickland*, 48 N. C. 61; *Brazier vs. Ansley*, 33 N. C. 12, 51 Am. Dec. 408; *McNeely vs. Hart*, 32 N. C. 63, 51 Am. Dec. 377.

Fourth: Aliens are within the equal protection clause of the first section of the Fourteenth Amendment to the Constitution of the United States and are fully protected thereby as citizens.

Yick Wo vs. Hopkins, 118 U. S. 356, 369, 30 L. Ed. 220-26; *Wong Wing vs. United States*, 163 U. S. 228, 242, 41 L. Ed. 140-45; *United States vs. Wong Kim Ark*, 169 U. S. 649, 495, 42 L. Ed. 890, 907; *Truax vs. Raich*, 239 U. S. 33, 39, 60 L. Ed. 131, 134.

The right to work for a living in the common occupation of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to the Constitution of the United States to secure.

Butchers' Union, etc., Co. vs. Crescent City, etc., 11 U. S. 746, 762, 28 L. Ed. 585, 588; *Barbier vs. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923-24; *Yick Wo vs. Hopkins*, 118 U. S. 356, 369, 30 L. Ed. 220-26; *Allgeyer vs. Louisiana*, 165 U. S. 578-89-90, 41 L. Ed. 832-35; *Cippage vs. Kansas*, 236 U. S. 1 and 14, 59 L. Ed. 441; *Truax vs. Raich*, 239 U. S. 33, 41, 60 L. Ed. 131, 135.

Fifth: Article I of the treaty between the United States and Japan, proclaimed April 5, 1911, reads as follows: (Omitted.)

The right to work at any of the common occupations of the community is a property right and the Anti-Alien Act, Exhibit B, as constituted, deprives plaintiff J. Inouye of the right to enter into a cropping contract or contract of employment and is in conflict with the above quoted article of the treaty. (See *Truax vs. Raich*, 239 U. S. 33; also *Truax vs. Raich*, 219 Fed. 219.)

Discriminations in any state legislation against aliens based upon race or color are contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. (*Barbier vs. Connolly*, 113 U. S. 27, vol. 12 C. J., section 16, Cal. J. P., vol. 1-16.)

The Fourteenth Amendment—Brannon, pp. 318-319-320-321-322-324-327-330-340-341 342-351-352.

Vol. 6, R. C. L., pp. 371-375; *State vs. Montgomery*, 90 Me. 192; *Southern Railway vs. Green*, 216 U. S. 400; *Templar vs. State Board of Examiners*, 131 Mich. 254; *In re Ah Chung*, 2 Fed. 733; *Ex parte Kuback*, 85 Cal. 275; *In re Teburcio Parrott*, First Fed. 481; *Yick Wo vs. Hopkins*, 118 U. S. 356; *R. Kowah vs. Nunan*, 5 Sawyer 562.

An attempted classification amongst aliens between those ineligible and those eligible to citizenship is artificial, is arbitrary, and, in principle, opposed to the Fourteenth Amendment to the Constitution of the United States.

Grainger vs. Douglas Park Jockey Club, 148 Fed. Rep. 513; *Van Winkle vs. State of Delaware*, 91 Atl. 385; *State vs. Shedroi*, 98 A. S. R. 825; *Travis vs. Yalin Towne Co.*, 252 U. S. 60; *Eliasberg Bros. Mercantile Co. vs. Grimes*, 86 So. 56.

An attempted classification of aliens into those eligible and those ineligible for the purpose of adverse and hostile legislation does not fall within the so-called police powers of the state and offends against the Fourteenth Amendment to the Constitution of the United States.

Freud, Police Power, sec. 25, 706; Brannon, Police Powers of the State, pp. 167-168-169-171-172-175-177-179-200-201-210; Bierly, Police Power and Taxa-

tion, pp. 8-18; *Los Angeles vs. Los Angeles Independent Gas Co.*, 150 Cal. 765; *Brannon vs. City of Titusville* (S. S. C. Rep. Ed. 289, 308); *People vs. Holder*, 199 Pac. 832; *Buchanan vs. Warley*, 245 U. S. 60.

Respectfully submitted,

ALBERT H. ELLIOT and
GUY C. CALDEN,
Solicitors for Plaintiffs.

3. DECISION OF THE COURT.

ON APPLICATION FOR A PRELIMINARY INJUNCTION.

Before Hon. Wm. H. Hunt, circuit judge, and Hon. Benj. F. Bledsoe and Hon. M. T. Dooling, district judges.

Albert Elliot, Esq., and Guy C. Calden, Esq., solicitors for plaintiffs.

U. S. Webb, Esq., attorney-general of the State of California, and Frank English, Esq., deputy attorney-general of the State of California, attorneys for defendant U. S. Webb.

C. C. Coolidge, Esq., district attorney, County of Santa Clara, State of California, attorney for defendant C. C. Coolidge.

Dooling, District Judge. This action is brought by plaintiffs O'Brien, a citizen of the United States, and Inouye, a subject of the Emperor of Japan, lawfully residing in the State of California, to restrain the defendants U. S. Webb, attorney-general, and C. C. Coolidge, district attorney, from attempting to enforce as against them the California Alien Land Law, if they enter, as they desire to do, into a certain contract, a copy of which, designated a cropping contract, is attached to the bill. It is claimed by plaintiffs that the act in question violates certain provisions of the Constitution of the United States, and is in conflict with treaty stipulations and with certain named sections of the Revised Statutes. It is further claimed that, even if the act itself be held to be valid, yet the contract, which plaintiffs desire to make is not prohibited thereby, although this fact will not deter defendants from prosecuting them if such contract be made.

The act in question provides:

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

"Sec. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

We have held in the case of *Porterfield and Mizuno vs. Webb et al.*, involving a lease, and submitted with the present action on motion for a preliminary injunction that the act itself contravenes no constitutional pro-

vision, violates no treaty stipulation, and conflicts with no statutory enactment.

The real question for determination then is whether or not the contract in question is one the execution of which is prohibited by the act.

The contract provides:

That the owner (O'Brien) of a certain tract of land wishes to "employ cropper (Inouye) for a period of four years as an employee for the purpose of planting, cultivating and harvesting crops to be grown on owner's land" under the terms thereafter set forth. By the terms the "owner" agrees to "employ" the cropper and not to interfere with him in the planting, cultivating and harvesting of the crop and to protect cropper during the existence of the contract against interference by any person, "the general possession of the land above described being reserved to owner". Owner agrees to provide and maintain housing accommodations for cropper; also to furnish necessary implements, tractors and gasoline for the operation of the tractors, to furnish horses and feed for planting, cultivating and harvesting the crops provided for, to furnish all things necessary for the proper farming of the land, and also to haul the crop when properly prepared by cropper for hauling and shipping to the packing house or station; to "permit" cropper to work the land on the conditions set forth provided "cropper shall have no interest or estate whatsoever in the land described herein"; to give to cropper fifty per cent of all crops grown during the period of the agreement "as compensation for the services and labor of the cropper as herein set forth." Also, "to grant to the cropper his right to a division of the crop after it is harvested and before its removal from the land, provided that the cropper exercises his option thereunto". And in the event of the exercise of such option, to grant to cropper the right to remove from the land his share of the crops within a reasonable time, even though said time should extend beyond the term of cropper's employment. Also, to grant to cropper the right to carry out the terms of his agreement by employing such agents or employees as he sees fit and to give them free ingress or egress over the property, and the right to live thereon without let or hindrance. The cropper agrees to plant, cultivate and harvest strawberries, raspberries, loganberries and vegetables in good farmerlike manner; to maintain and keep up the personal property and return to the owner implements which may have been supplied to him in good condition; to keep the irrigation ditches and levees in good order and prevent loss of irrigation water; to harvest all crops when ripe, and to pack and prepare the same for shipping and transportation if necessary. It is mutually agreed that if the land is sold during the agreement the owner may terminate the agreement by paying the cropper for his services at the rate of \$100 per month from the beginning of the calendar year in which the agreement is terminated, together with moneys expended by the cropper, for labor and material furnished for planting and cultivating. Further mutual agreement is that in case of breach on the part of the owner, or in case of any hindrance with or prevention of farming upon any part of said land, owner agrees to pay the cropper for money expended by cropper for planting and cultivation of the then growing crops, together with twenty per cent of the moneys expended by the cropper as liquidated damages for the cancellation of the agreement.

In a cropping contract the cropper has no estate in the land. He may be physically upon the land, and have possession of the crops, yet such possession is that of a servant who receives his pay in a certain propor-

tion of the crop. Whether an agreement for the occupation of farming land is a lease or a crop contract depends on the intention of the parties as gathered from the words of the agreement when it has been reduced to writing. In the contract under consideration nothing is said about leasing or letting the premises or of paying anything as rent, and so far as the language used aids us it is merely an agreement to till the land on shares and divide the crop, which would make the parties tenants in common of the crop while growing and when matured. (*Connell vs. Richmond*, 55 Conn. 401, 11 At. 852.)

The length of the term may be considered, but it is not a determining factor. (*Walker vs. Fitts*, 24 Pickering 191; *Guest vs. Opdyke*, 31 N. J. L. 552; *Aiken vs. Smith*, 21 Vt. 172.)

In the last case the court held there was no tenancy, although the letting for crop rent was to continue for five years, yet the contract contained technical words appropriate to a lease, i. e., the words "agree to let".

Under the instrument under consideration the cropper has no interest in the land, merely receiving his share of the crop as the price of his labor. The "general possession of the land" is expressly reserved to the owner, and he alone could maintain trespass. (*Adams vs. McKesson*, 53 Penn. St. 81; *Williams vs. Clever*, 4 Houston [Del.] 453.)

The duty of the owner is to divide off to the cropper his share of the crop. And until the cropper exercises his right to a division of the crop after it is harvested and before removal, the whole title remains in the owner of the land. (*McNeeley vs. Hart*, 10 Iredell [N. C.] 63; *Brasier vs. Ansley*, 11 Iredell [N. C.] 12.)

An agreement by which the one party is to furnish the land and the stock and the other to do the work, the crop to be divided equally between them, is one of hiring, and not of landlord and tenant. (*Hunt vs. Mathews*, 132 Ala. 286, 31 So. 613.)

In *Hudgins vs. Wood*, 72 N. C. 256, the agreement referred to services and the landowner agreed to supply house and teams and to give one-half of the crops in pay for services. It was held there was no tenancy.

In *Taylor vs. Donahoe* (Wis.), 103 N. W. 1099, there was a written agreement for the cultivation of certain lands owned and controlled by Donahoe, whereby Finnegan was to cultivate, do all work of raising crops and marketing during his term of service, to furnish certain stock, seeds, etc. There were stipulations regarding sharing expenses and Donahoe was to pay Finnegan "in full compensation for his services one-third of the crops". The agreement was characterized as a personal agreement. Finnegan was to have the use of the dwelling house on the lands, except parts which Donahoe reserved for his own use. Chief Justice Winslow said: "The distinction between a tenant and a cropper is that a tenant has an estate in the land for a given time and a right of property in the crops, and hence makes the division thereof between himself and the landlord in case of an agreement upon shares, while a cropper has no estate in the land nor ownership of the crops, but is merely a servant and receives his share of the crops from the landlord in whom the title is. It is always a question of construction of the agreement under which the parties are acting. The agreement in question here seems to us to be very clear and definite upon the subject. It nowhere refers to Finnegan as a tenant, but specifically refers to his work as 'service' and expressly provides that Donahoe shall pay him for his services by certain shares of the crop, and

that the possession of the land and ownership of the crops are to remain in Donahoe, and that Finnegan is merely to be an employee in the tilling of the land and caring for the stock. Language could hardly be plainer or more appropriate for the purpose of creating a cropper arrangement."

In *Williams vs. Clever* (Del.), 4 Houston 458 (*supra*), the statute of the state was recognized as providing that any contract or consent pursuant to which the tenant should enter into or continue in possession of lands under an agreement to pay rent should be a demise, but where there was no agreement between the owner and him who entered into possession that the latter was to pay rent for use and occupation, and the right of tilling and cropping, in that event though he were let into possession for that purpose, it would not be a demise or a renting within the meaning and definition of the statute. The court saying: "But, if he was not in possession as before stated, under an agreement to pay rent to the defendant, but only as a cropper to be paid for his services as such in one-third of the produce, he would not be entitled to maintain the action of trespass."

In *Currey vs. Davis*, 1 Houston (Del.) 598, there was a verbal agreement between the owner and a man whereby the latter should till and cultivate for a proportion of the crop. The court held that the facts did not establish a demise of the premises so as to establish the legal relation of landlord and tenant, but that the agreement was nothing more than, and should be considered only as, an agreement for raising at their mutual expense and labor a crop of wheat on shares between them. In the agreement itself nothing was said about leasing or letting or about rent. "And this would constitute them owners or tenants in common of the crop while growing and when matured until it was severed and so apportioned between them, etc."

Bernal vs. Hovious, 17 Cal. 541, was a case where the Bernal agreement in relation to use and cultivation between the parties was called a lease by the parties. Under its terms Vasques was to furnish the seed, two teams and sacks, and Bernal was to do the work and to give him for the use of the land one-third of the grain raised. Field, C. J., held that although the parties designated the agreement as a lease it was not one, but was a contract for the working of the farm upon shares, and cited *Putnam vs. Wise*, 1 Hill (N. Y.) 235, and *Caswell vs. Districh*, 15 Wendell 379, to the effect that Vasques and Bernal were tenants in common of the grain to be divided.

Clark & Kane vs. Cobb, 121 Cal. 595, referred to *Bernal vs. Hovious* as containing facts different from those presented in the case under consideration, and regarded the case then at bar as presenting a relationship of landlord and tenant rather than as a cropping contract. But in that case the land was, by provision of the contract "*demised and let for a term of years.*"

In *Walls vs. Preston*, 25 Cal. 59, plaintiffs, intestate, "*demised, leased and to farm, let*" the premises "*to have and to hold*" for two years. Preston covenanted not "to under-let" the premises "or yield the possession thereof to any but Vera." The court, recognizing that parties could make a lease or an agreement constituting them tenants in common of the crops and at the same time provide that the owner or occupant might hold possession, or that both might be tenants in common of the land during the term mentioned in the agreement, held, however, that in that instance the parties intended to make a lease and that the instrument was a lease.

In *State vs. Jewell, Collector*, N. J. L., vol. 34, p. 259, there was an agreement whereby one Price cultivated and received for his labor and services as farmer a certain share of the products, and he lived in a small house on a part of the farm. The court said a contract between the owner

of lands and a third person that the latter shall work the farm on shares, the products to be divided between them, is not a lease. "Such an arrangement does not create the relation of landlord and tenant. The occupier by virtue of an agreement of this kind becomes simply a tenant in common with the other contracting party, of the growing crops, and this joint interest continues until it is severed by a division. An agreement between the owner and A that the latter shall manage the farm for a stipulated sum per week and be allowed to reside in and have the use of a dwelling house and furniture therein free of rent, is not a demise of the house, the occupation of it being a mere remuneration in part for services."

In *Guest vs. Opdyke*, 31 N. J. L. 552, there was a verbal agreement to the effect that one party should work the farm on shares with right of occupancy of part of the house and provision for division of part of the crops. The court held that the position that one of the parties was the tenant of the other was not tenable. That the arrangement, strictly speaking, was not a lease, nor did it constitute the defendant a tenant. "The opposite doctrine would be attended with much inconvenience if not positive mischief. Landlords are induced to put out their farms in this mode to tenants who are poor, relying as they imagine on the certainty that their share of the produce cannot be diverted or in anywise encumbered. Whereas, if these agreements are complete leases, the title to the crops produced vests in the occupiers, and the landlord would have no claim upon them until a division should have been made, and then his share would come to him as a *reditus* or rent. Such is not the light in which the law regards this species of contract. On the contrary, the true construction is that by virtue of such agreements the occupier becomes simply a tenant in common, with the other contracting party, of the growing crop and that this joint interest continues until it is severed by a division."

In *Aiken vs. Smith*, 21 Vt. 172, *supra*, the court said that under the facts it was difficult to determine with precision what was the exact relationship of the parties, but it is to be observed that in that case Smith agreed to let his farm for five years, Austin to take certain produce and to do certain repairs. The court held, however, that although Austin had an interest in the land and was not merely the servant and did not occupy for hire, but had a right to occupy, it was yet quite apparent that the intention of the parties was not to constitute a lease and that while certain words were used which were apt to make a lease, the court would not treat it as such but would regard Austin as not the occupant for a certain term, but as a quasi-occupant at will, so long as the parties should agree and be satisfied, not exceeding five years.

Caswell vs. Districh, N. Y., 15 Wendell 379, and referred to in cases above cited, seems to run through the books as a leading one. There plaintiff, as executrix, brought an action of *assumpsit* against Districh for rent. Relying upon an agreement whereby testator agreed to let the defendant have his farm for one year, Districh to farm it and give one-third of the crops, defendant insisted that the instrument was an agreement to work on shares and not a lease securing rent, and that an action for rent would not lie. The trial court granted a nonsuit and the supreme court held the agreement was a letting upon shares and technically not a lease; that there was nothing to indicate that the stipulation for appropriation of the crops was by way of rent, and that it was material that this view should be maintained "unless otherwise clearly expressed" for then the landlord would have an interest to the extent of his share in the crops. Whereas, if it is deemed rent the whole interest belongs to the tenant until a division,

"Where a farm is let for a year upon shares, the landlord looks to his interest in the crops as his security, and thereby is enabled to accommodate tenants who otherwise would not be trusted for the rent."

In Jones on Landlord and Tenant, section 49, the author lays it down that if one be hired to work land, receiving for his compensation part of the produce, he is a cropper and not a tenant, having no interest in the land but receiving his share as the price of his labor. "The possession is still in the owner of the land, who alone can maintain trespass, nor can he distrain for he does not maintain the relation of landlord and tenant."

In Warvelle on Ejectment, section 26, the author says that it is common for persons to enter into agreements for the cultivation of land on shares, one person contributing the use of land while another plants and cultivates the crop which, when harvested, is divided between them. "It is well settled that such an agreement does not create a tenancy of any kind on the part of the cultivator. At best he is only a tenant in common of the crop, which is generally regarded as personalty, and the legal possession of the land is in the owner."

Taylor, Landlord and Tenant, volume 1, section 24a, says that while the tendency of the later cases is to construe the agreement as a lease wherever rent as such is reserved or apt terms of demise are employed, or the intention to create a lease is clearly to be inferred from the words, yet if there appears no agreement for rent, demise or occupation, but merely for services to be paid for by part of the crop, the occupant for purposes of cultivation is merely a cropper, having no interest in the crops until division.

In *Pearson vs. Lafferton* (Mo.), 193 S. W. 40, the supreme court referred to the divergencies of opinion, as to the ownership of the crops, but said the trend is to hold that a contract whereby one is allowed the use of land to cultivate, the owner to have a share of the produce for its use, will in general at least create a tenancy in common in the growing crop, and that this is so whether the agreement operates as a lease or a mere cropping contract. The contract there considered was regarded as a cropper's contract.

From this general resume of cases and consideration of the contract under investigation, it appears that the intention of the parties, as far as it can be gathered from the instrument itself, is to make a cropper's contract and not a lease. There is nothing to prevent an owner and a farmer from agreeing to a cropper's contract to extend over a period of years and where, as here, both enter into it with the knowledge that the one party, under the law of the state in which the contract is made, have no interest in the realty and can make no lease of the realty, a forced construction should not be put upon the contract in order to bring it within the prohibition of the law.

It would be indeed a strain to say that an alien may not enter into a contract for agricultural purposes; unless, of course, the law is very clear and unambiguous in preventing him from doing so. Being lawfully within the United States and lawfully an inhabitant of the State of California, his right to the ordinary pursuits of agriculture is not to be deemed curtailed, provided always he does not acquire an interest in the land which he is cultivating. That being so, and both he and O'Brien having the right to enter into a cropper's contract carrying no interest in the land, and there being nothing in the agreement under consideration which on its face shows fraud or bad faith, and nothing which indicates that the parties intend to make a lease, the court should not say that the agreement is other than

what it purports to be, that is, an agreement for cropping, with general possession and ownership in O'Brien, and with the kind of crops specified that the alien shall raise, his share of which is to be granted to him by the owner, after the crop is harvested. If such contract had been entered into in California before the adoption of the Alien Land Law, it is very doubtful whether any court would ever have been asked to declare it other than a cropper's agreement. The great purpose of the statute of California was apparently to prevent ownership and legal interest in farming lands from passing to aliens who never could become citizens. And there is nothing from which it can be legitimately inferred that the design of the law is to prevent an alien from entering into a cropping agreement whereby he gives his labor for a share in the crops to be raised.

Assuming for the instant that the state has power to inhibit an alien inadmissible to citizenship from making a contract to farm on shares, it seems quite clear that the statute under consideration has not attempted to make such a contract unlawful. Rather does it seem that by expressing only prohibition against transferring land or an interest therein the framers of the statute meant to go no farther and not to prevent cropping agreements whereby the labor by the alien may not be interfered with. Such agreements in this state are, and have been for years, well known, and, if it were intended to include them within the statute, it would have been a very simple matter to have embraced them within the expressed provisions of the law. The most that can be conceded to the position of the state authorities is that it is very doubtful whether the contract under consideration pertains to a transfer of an interest in land, and under such circumstances, landowners and aliens should not be subjected to numerous and state-wide prosecutions for entering into similar contracts until it has been determined by the appellate tribunals that such contracts are prohibited. That may readily be determined in this action without a multiplicity of prosecutions. If such contracts are ultimately held to be unlawful it means only that prosecution of those who have made them has been for a short time postponed. If they are ultimately held to be lawful it means that individuals who have broken no law shall have been spared harassing trials, and the state futile and, it may be, expensive prosecutions.

Holding these views, we are of the opinion that the preliminary injunction prayed for should be granted, and it is so ordered.

CONCURRING OPINION.

Bledsoe, District Judge. (Concurring.) The court in the companion case brought in the Southern District of California, *Porterfield and Mizuno vs. Webb*, as Attorney-General, having held the Alien Land Law constitutional and valid, the proper construction of the so-called croppers contract herein, with a view to determine whether it violates such law, is really a local, as opposed to a Federal, question. Its decision, however, by this specially constituted tribunal, under the circumstances, seems proper. (*L. & N. R. R. Co. vs. Garret*, 231 U. S. 298; *Silver vs. L. & N. R. R. Co.*, 213 U. S. 175.)

The contract here, in my judgment, is not to be measured by the usual yardstick—the intent of the parties as gathered from the language used. It was not entered into in the ordinary course of business by men dealing at arm's length. To my mind it exhibits a subtle attempt to save the substance through the sacrifice of the form. Read in the light of the surrounding circumstances—the attack on the constitutionality of the law and the numerous sorts of farming contracts recited in the complaint as having been passed upon adversely by the attorney-general—it indicates a studied effort

on the part of the signatories to negotiate a contract which, while according to the alien all the substantial privileges of the lease, yet, through the efficacy of mere words, would protect him and his landlord against a violation of the law in question.

If the contract is one merely of employment—a cropping contract—why did the parties find it necessary to agree that the owner of the land should not “interfere with him (the cropper) in the planting, cultivating and harvesting of the crop—in any way” and that he should “protect the cropper during the existence of this contract against interference by any person whatsoever”? Why also, if it was to be an ordinary cropping contract, did the owner specially agree to grant the cropper the right to carry out the terms of this agreement by employing such agents or employees as he shall see fit and give such agents or employees, free ingress or egress from said property, or the right to live thereon *without let or hindrance*? In the light of these positive specially noted covenants on the part of the owner of the land, how much substance is there to the formal reservation by him of “the *general* possession of the land”. (Italics supplied.)

The only question involved herein is whether the contract set out, if enforced, will serve to enable the alien Inocye “to acquire, possess or enjoy any interest in real property”. If it will, or if it will serve to effect a transfer of an interest in real property, even “though colorable in form” (sec. 9, Cal. Alien Land Law), it is prohibited by the law. In Words and Phrases, volume IV, page 3699, it is said that the word “interest” is the broadest term applicable to claims in or upon real estate, in its ordinary signification, among the men of all classes. “It is broad enough to include any right, title or estate in, or lien upon, real estate.” The supreme court of Massachusetts, in *Union Trust Co. vs. Reed*, 213 Mass. 199, said the word “interest” in common speech, in connection with land, includes all varieties of titles and rights and comprehends estates in fee, for life, and for years, mortgages, liens, easements, attachments and every kind of claim of land which can form the basis of a property right.

We have in this case actual possession, uninterfered with and unhindered, for a full period of four years, of a particularly described tract of agricultural land, being accorded to the alien and to his agents and employees, by a contract in writing, together with the further right, within a reasonable time after the termination of the contract, to return upon the land for the purpose of removing his half of the crops to be grown thereon. It seems clear to me, despite the actual words used to evidence the agreement, that alien, in pursuance of such contract, will be in enjoyment of an interest in—an enforceable right in and to—the land in question.

Surely the alien and his employees would be enabled to maintain an action for trespass (*Lightner Min. Co. vs. Lane*, 161 Cal. 689), a right under the circumstances possibly not open to the owner. (*Uttendorffer vs. Saegers*, 50 Cal. 496.) Tiffany in his work on Real Property, volume I, page 121, says: “If the effect of the arrangement is to give to the cultivator the possession of the land, the exclusive possession as it is frequently termed, a tenancy is created”. If the right of a cultivator of land to cultivate it without interference “in any way,” “by any person whatsoever,” and the right of his various employees to live on the land “without let or hindrance” for a period of years, does not involve an exclusive possession on his part, it is difficult to characterize the real nature of the arrangement.

The contract does contain, however, the following portentous language:

"Provided that the cropper shall have *no interest or estate whatsoever* in the land described herein." (Italics supplied.)

If this clause truly reflects the real nature of the arrangement entered into, and be not overcome in effect by other provisions inconsistent therewith, the contract is not invalidated because of the prohibitions of the Alien Land Law. Without attempting to construe the contract definitively, in the light of this and other provisions, I am persuaded that the clause quoted will operate as an estoppel, in favor of either party to the contract, no less than in favor of the state, in the event, under appropriate proceedings, a right in the land on the part of the alien should be asserted.

For this reason I concur in the judgment.

December 19, 1921.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922. No. 267.

1. BRIEF FOR APPELLANTS, BY U. S. WEBB.

STATEMENT OF FACTS.

This case involves the sole question whether entering into a so-called "cropping contract," which is set out at pages 6 to 9 of the transcript as "Exhibit A" annexed to the bill of complaint filed by plaintiffs in the district court of the United States for the Northern District of California, is a violation of the Alien Land Act of California adopted by the people in 1920. The said Alien Land Act is annexed as "Exhibit A" to this brief. This act prohibits the acquisition, possession and enjoyment of real property or any interest therein by aliens ineligible to citizenship, or the transferring of such real property or any interest therein to such ineligible aliens.

The United States district court construed the said statute as not prohibiting the entering into such a "cropping contract." The statute had theretofore never been construed by the state supreme court on this point, and therefore the United States district court found it necessary to itself construe the statute. The statute has not up to the time of the writing of this brief been construed by our state supreme court so far as this point is concerned. There is now pending before the California supreme court a case involving a cropping agreement very similar to the one here before the court, and we are urging the state court to construe the statute as prohibiting such contracts.

The petition filed in the United States district court recites that J. J. O'Brien, a citizen of the United States, and J. Inouye, a subject of the Emperor of Japan, bring their bill of complaint against the attorney-general of the state and the district attorney of the County of Santa Clara, California, to enjoin criminal proceedings and also escheat proceedings by said officials against plaintiffs on account of their having entered into the cropping agreement. O'Brien owned certain agricultural lands in the said County of Santa Clara adapted to the raising of strawberries, loganberries, raspberries and vegetables, and Inouye, an alien ineligible to citizenship in the United States, is described as a capable farmer qualified and competent to enter into the said "cropping contract" for the growing of crops upon this property. It is recited that O'Brien wishes to execute the said "cropping contract" with said Inouye for a period of four years, and Inouye wishes to enter into the agreement with O'Brien. The California act is described in the complaint as being in violation of the Constitution of the United States. We shall not discuss in this brief the question of the validity of the statute in its relation

either to the United States Constitution or to the existing treaty between the United States and Japan. That question will be discussed in the companion case which is set down for hearing before the supreme court at the same time as this case; that is, *Porterfield et al. vs. Webb; etc., et al.*, October term, 1922, No. 299.

In the case at bar the court, with the three judges sitting as required by statute, on application for a temporary injunction, granted a temporary injunction against appellants enjoining them from instituting proceedings either criminal or by way of escheat to the state of the real property involved. The sole ground for the court's decision was that the cropping contract did not violate the state statute, inasmuch as the contract did not vest in the cropper any interest in real property. The court was of the opinion that it made of him merely an employee of the landowner. We are prosecuting this appeal to the United States supreme court, from said decision.

In the *Porterfield* case the same court refused a temporary injunction to plaintiffs who attempted to enter into an admitted lease of agricultural land between a citizen landowner and an ineligible alien. The court held that the California statute prohibiting such a lease did not violate either the United States Constitution or the existing treaty between the United States and Japan. The complainants are appealing to the United States supreme court from the decision in the *Porterfield* case.

ASSIGNMENT OF ERRORS.

Appellants submit that the United States district court erred in granting plaintiffs' application for an interlocutory injunction for the reasons:

I.

That the act of the people of the State of California adopted by vote of the people on November 2, 1920, in effect December 9, 1920, and printed in the statutes of the State of California for 1921 at page lxxxiii, prohibits the act described in the bill of complaint in this action as being contemplated to be done by the said plaintiffs, to-wit, the making and entering into the so-called "cropping contract," which said "cropping contract" is so set forth as "Exhibit A" and so attached to the bill of complaint in this proceeding.

II.

The said United States district court erred in holding and finding that under the said "cropping contract" the said plaintiff and appellee, J. Inouye, an alien ineligible to citizenship in the United States, would not *acquire* real property in the State of California or any interest in said real property.

III.

The said United States district court erred in holding that under the said "cropping contract" the said plaintiff and appellee, J. Inouye, would not *possess* real property in the State of California or any interest in said real property.

IV.

The said United States district court erred in holding that under the said "cropping contract" the said plaintiff and appellee, J. Inouye, would not *enjoy* real property in the State of California or any interest in said real property.

V.

The said United States district court erred in holding that under the said "cropping contract" the said plaintiff and appellee, J. J. O'Brien, would

not *transfer* real property in the State of California or any interest in said real property to said plaintiff and appellee, J. Inouye.

ARGUMENT.

I.

THE LANGUAGE OF THE CALIFORNIA STATUTE AND OF THE "CROPPING CONTRACT" CONSIDERED, AS REVEALING THE ISSUE PRESENTED TO THE COURT.

The California statute adopted by vote of the people in 1920, in section 1 thereof, provides that "all aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transfer and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

Section 2 provides that "all aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent, and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Section 8 of the act provides that in the event of any interest in real property less than a fee being acquired in violation of the act by such an ineligible alien the property shall escheat to the State of California. It is made the duty of the attorney-general or district attorney of the proper county to institute proceedings to have such escheat adjudged and enforced.

Section 10 of the act provides for criminal prosecution against persons conspiring to effect a transfer of real property or any interest therein in violation of the provisions of the act.

The treaty of February 21, 1911, between the United States and Japan grants no right to the citizens or subjects of either of the high contracting parties to acquire any interest in lands in the other country for agricultural purposes. The only right given to acquire an interest in land is that described in article I of the treaty which grants to the citizens or subjects of each of the high contracting parties the right "to lease land for residential and commercial purposes."

The question to be determined by the court is whether there is in the cropper in this case any "interest in real property"; that is, whether he would "acquire" or "possess" or "enjoy" or have "transferred" to him any interest in real property in the State of California by reason of the cropping contract here being considered.

We shall throughout this brief refer to the defendant, J. Inouye, as a "cropper" and to the agreement proposed to be entered into as a "cropping contract." We shall go rather extensively into the distinctions that have been drawn by the courts between "leases" and "cropping contracts," but for our purposes we call this agreement a "cropping contract," and claim that, in fact, it would create such an interest in real property, in the ineligible alien, as is prohibited by the California statute.

The contract states that the owner wishes to employ "cropper" and that this employment shall be "for a period of four (4) years, being from the first day of December, 1921, to the first day of December, 1925, as an employee for the purpose of planting, cultivating and harvesting crops to be grown on owner's land above described, under the following terms and conditions:" (Trans., fol. 9.)

Here, while it is stated that the owner wishes to "employ" cropper, there is definitely fixed a period of four years, which period is a very important

element in this case. One of the incidents to an interest in real property as distinguished from a mere "employment" as a cropper is a term such as a lessee has. As distinguished from such a term, a mere employee is more commonly employed to cultivate and harvest some one crop, after which his employment ceases.

Then follows the most important term of the contract:

"Owner Agrees No Interference by Owner.

"A. To employ cropper and not to interfere with him in the planting, cultivating and harvesting of the crop in any way, and to protect cropper during the existence of this contract against interference by any person whatsoever, the general possession of the land above described being reserved to owner." (Trans., fol. 9.)

The obvious purpose of including the provision "the general possession of the land above described being reserved to owner," is to negative the idea of the cropper having any interest in the land. An ordinary employer has general possession. A lessee on the other hand would have general possession. It is here attempted by this use of language to support an argument that the owner having possession the cropper must be nothing more than an employee. But this can not be done by the mere recital that general possession is in the owner. We must read the contract as a whole, and the important language in this contract, so far as we have thus far quoted therefrom, is what immediately precedes this language as to general possession. This preceding language controls as to the real intention of the parties, and it is that intention which must govern, irrespective of any other expressions contained in the contract. The owner, it is stated, shall not interfere with the cropper in the planting, cultivating and harvesting of the crop, in any way, and he will protect the cropper during the existence of this contract against interference by any person whatsoever. No lessee can claim a greater right in land than this right thus given. This, in fact, is a covenant of quiet enjoyment.

The contract proceeds with reference to what the owner agrees to, as follows:

"Owner Hauls Crop to Delivery Point.

"D. To haul the said crop when properly prepared by cropper for hauling and shipping, to the packing house or nearby station."

"Cropper no Interest in Land.

"E. To permit the cropper to work the land upon the conditions herein set forth, provided that the cropper shall have no interest or estate whatsoever in the land described herein." (Trans., fol. 10.)

Here again an attempt is made by the use of this last quoted language to support an argument that the contract amounts to no more than one of employment. We are not, however, restricted to the use of any language in the contract. The mere stating that the cropper shall have no interest or estate whatsoever in the land is of no effect, if in fact a reading of the contract as a whole shows that the cropper has some interest in the land. We are here referring particularly to such an interest from the standpoint of the state in its sovereign capacity of controlling the agricultural lands of the state. We are not primarily concerned with the relations between the cropper and the landowner or their relations to third parties, such as creditors. We shall later point out that it is with reference to such relationship that the law of landlord and tenant has been developed. We shall also point out that we are here approaching a new subject, to-wit, the interest of the state in the control of the dominion, enjoyment and possession

of its agricultural lands, and that with reference to such interest of the state, the cropper in this case most decidedly has an interest in the land which the state has prohibited to him.

In "permitting the cropper to work the land upon the conditions herein set forth," the landowner does transfer a real interest in this land to the cropper, so far as the state's policy as enunciated in the Alien Land Act is concerned.

The contract continues as to the owner's agreement:

"Cropper's Compensation to Be a Percentage of Crop Grown.

"F. To give to cropper fifty (50%) per cent of all crops grown on the above described land during the period of this agreement, as compensation for the services and labor of the cropper, as herein set forth." (Trans., fol. 10.)

Here the parties refer to the 50 per cent of the crop to be retained by the cropper as "compensation for the services and labor of the cropper". It makes no difference, however, what they call this share of the crop to be retained by the cropper. The question is, does this interest that accrues in the shape of the product of the soil resulting from the cultivation thereof by the cropper amount to an interest in the land which is prohibited by the state statute?

The contract continues as to the owner's agreement:

"The Cropper's Right to Remove Share of Crop from the Land.

"G. To grant to the cropper his right to a division of the crop after it is harvested and before its removal from the land, provided that the cropper exercises his option thereunto, and in the event of the exercise of such option, to grant to cropper the right to remove from the land his share of the crops within a reasonable time, even though said time should extend beyond the term of cropper's employment as herein provided for." (Trans., fol. 10.)

No lessee could have a more tangible interest in land than is here granted to this cropper, to divide the product of the soil and to have the right to remove the same from the land within a reasonable time even though the said time should extend beyond the end of the four-year term granted by this contract.

The owner again agrees as follows:

"Cropper's Right to Employ Others with Right of Ingress and Egress.

"H. To grant to the cropper the right to carry out the terms of this agreement by employing such agents or employees as he shall see fit, and to give such agents or employees free ingress or egress from said property, or the right to live thereon, without let or hindrance." (Trans., fol. 10.)

No lessee ever had a greater right of absolutely controlling the method and manner of cultivating the soil and harvesting the crop than is here given by reason of the cropper's control over his own employees.

The contract continues to provide what the cropper agrees to do. First he agrees:

"Specification of Crops to Be Grown.

"I. After the execution and delivery of this agreement and at the proper time to plant, cultivate, and harvest the following specified crops: Strawberries, raspberries, loganberries and vegetables in a good and farmer-like manner." (Trans., fol. 11.)

It is to be noted that the cropper is given discretion as to any crops

to be planted and that no such discretion is given to the owner with the exception of the particular crops above specified.

The cropper again agrees as follows:

"Cropper to Maintain Personal Property and Return Same.

"J. To maintain and keep up the personal property and to return to owner, at the termination of this agreement, all farming tools, implements, tractors, horses and all other personal property of every kind and character, the use of which is herein granted, in as good condition as they were when delivered to cropper, reasonable wear and tear thereof excepted." (Trans., fol. 11.)

This is similar to usual covenants on the part of lessees to return property to the lessor in as good a condition as at the beginning of the lease, reasonable wear and tear thereof excepted.

The cropper again agrees as follows:

"Irrigation Ditches to Be Maintained.

"K. To keep the banks and bottoms of irrigation ditches on, adjacent to, and tributary to said land, free from weeds and foul growths; to repair and maintain all levees; to prevent losses of irrigation water, and in particular to prevent the overflow thereof into driveways and roads and to guard against fires of all kinds." (Trans., fol. 11.)

This agreement is characteristic of an ordinary lessee's obligations.

The cropper again agrees:

"Harvesting and Preparation of Crops for Shipment.

"L. To harvest all crops when ripe, to pack the same in accordance with best standards, to prepare the same for shipping or transportation if necessary." (Trans., fol. 11.)

This would be the usual and proper condition to include in a lease growing thereon." (Trans., fol. 12.)

This agreement that the owner may terminate the contract and compensate the cropper for his loss thereby resulting is the usual covenant which we find in leases where the landlord reserves the right to terminate.

The contract continues as follows:

"Damages to Be Paid by Owner to Cropper on Breach of Contract by Owner.

"It is further mutually understood and agreed by the parties hereto that in case of any breach of this contract on the part of owner or in case of any hindrance with or prevention of farming upon said or any part of said land owner agrees to pay to cropper, within thirty days of the date of where the agreement provided in terms that it was a lease and that the lessee would pay "rent" to his landlord in the form of a division of the crop.

The contract continues:

"Owner's Right to Terminate Contract on Sale of Land and Payment to Be Made Cropper in That Event.

"It is mutually understood and agreed by the parties hereto that in case of the land being sold, during the term of this agreement, the owner shall have the option to terminate this agreement by paying to cropper for his own services at the rate of \$100 per month from the beginning of the calendar year in which this agreement is to be terminated, together with all money expended or incurred by said cropper for and on account of labor and materials furnished for the planting and cultivation of the crop or crops then growing on the land, with interest at the rate of seven (7%) per cent per annum, or allow cropper to harvest the crop or crops then

such breach, all moneys expended or incurred by cropper for the planting and cultivation of the then growing crop or crops, and in addition thereto a sum equivalent to twenty per cent of such total amount so expended or incurred by cropper, as his liquidated damages for the cancellation of this agreement, provided, however, that cropper, at the date of such breach, shall have fully kept and performed all the covenants by him to be performed under this agreement." (Trans., fol. 12.)

The condition just preceding this provides for a right to terminate the lease by sale and for the measure of damages to be paid to the cropper in the event of such a termination.

The last quoted provision provides for the measure of damages in the event that the landowner terminates the contract in any other way. Such a condition may very properly be included within a lease. The landowner may lease his land for four years and reserve in the lease the right to terminate the same and the parties expressly agree as to the measure of damages in the event of such termination.

This last quoted provision does not affirmatively state that the "owner may dispossess the cropper". It is stated that "in case of any breach of this contract on the part of the owner" certain liquidated damages must be paid. We might well ask whether equity would permit of these concluding clauses of the contract being so enforced as to do irreparable injury to the tenant. In the event of the cropper assuming obligations and placing himself in a position where the fixed liquidated damages would not compensate for actual damages suffered, would equity permit of these concluding clauses of the contract being so enforced as to do irreparable injury to the cropper?

It might be urged by the cropper, in the event of such attempted termination, that the contract taken as a whole may be properly construed as giving to him the right to actually possess for the entire four-year period, and particularly might such an argument be made if the cropper could show irreparable injury.

The issue presented to the court is whether the interest of the cropper as described in the language above quoted amounts, from the standpoint of the State of California rather than from the standpoint of either the landowner or the cropper, to such an interest in, "possession" of or "enjoyment" of the real property as to come within the prohibition of the state statute.

II.

THE LAW OF LANDLORD AND TENANT AND THE DISTINCTION DRAWN BY THE COURTS BETWEEN THE TITLE OF A LESSEE AND THE MERE RIGHT TO COMPENSATION OF A CROPPER HAS DEVELOPED IN CONSIDERATION OF THE MUTUAL RIGHTS OF THE PARTIES TO THESE AGREEMENTS AND THE RIGHTS OF THIRD PARTIES OTHER THAN THE STATE. THE INTEREST OF THE STATE IN ITS CONTROL OF THE POSSESSION, DOMINION AND ENJOYMENT OF ITS LANDS HAS NEVER BEEN CONSIDERED IN CONNECTION WITH THIS DEVELOPMENT OF THE LAW.

We have made a painstaking effort to read every case in the books wherein the courts have dealt with crop contracts. We get no help from the common law on landlord and tenant because crop contracts were unknown to the common law. They are a development of our American law and came into being in the early years of our government, particularly in the Southern states, where contracts were entered into as for the growth of tobacco, the tobacco crop to be divided between the landowner and the cropper. In every case which we have read the question of title to the land or to the crops had to do with the relationship between the landowner

and the cropper or between some third person, as a creditor, and either the landowner or the cropper. In no single case has the question of the cropper's interest in the land been discussed by the court from the standpoint of the rights of the sovereign state. These rules developed in the law of landlord and tenant were, of course, intended to be a guide to parties, either owner, or cropper, or employer, or employee, or third persons such as creditors loaning money to the owner or to the cropper or to the employer or to the employee. It was seen that the question of title in any of these parties must be fixed and determined so that they all might deal one with another with a clear understanding of what their mutual rights are. From such a viewpoint the courts have said that certain croppers have no interests in the lands, but no court has said that such croppers have not such an interest in the land that the state could interest itself in and prohibit.

We find certain fundamental tests laid down to distinguish a so-called "lessee" from a so-called "cropper".

A lessee pays "rent"; a cropper receives "compensation".

A lessee ordinarily has the property for a certain "term". A cropper ordinarily would only have a right to possession for such time as to produce and harvest a certain crop.

A lessee has what is called "general possession" of the land. A cropper is not considered to have such "general possession". The landowner has it.

A lessee has complete title to the crop before division. A cropper sometimes by express agreement has no title to the crop until division. In the absence of such express agreement some jurisdictions hold that the cropper is a tenant in common to the crop with the landowner, prior to division. In other jurisdictions it is held that in the absence of an agreement the title to the crop is in the landowner only, prior to division.

A lessee would generally be required to keep the premises in repair, etc. In the case of a cropping agreement the more usual undertaking would be for the owner of the land to keep the premises in repair.

These rules which have been thus established for the guidance of persons entering into these different agreements and also for the guidance of third parties, have been expressed in many cases of which we will now give some typical examples.

A cropper cannot execute or create a lien on the crop before division in those jurisdictions where title to the crop is said to be in the landowner.

There can be no execution by a sheriff on a judgment against a cropper by seizing the crop prior to division, where by the agreement between the landowner and the cropper complete title to the crop was vested in the landowner until certain harvesting and other conditions had been complied with by the cropper.

Neither a cropper nor a landowner can maintain an action in detinue against the other, because in order to maintain such an action the plaintiff must have the right to immediate possession. So where by agreement or by the law of any particular state the cropper and the landowner were tenants in common to the crops, no such action in detinue could be maintained by the one against the other.

Some cases hold that a cropper has no such interest in the land as to entitle him to bring trespass against a third party.

In many cases the point involved was whether as between the owner and the cropper the relationship of landlord and tenant existed so as to permit a legal action of the one against the other, which could only be brought when this relationship of landlord and tenant existed. As an example: If a cropper desires to bring trespass against the landowner he

must show legal possession and right thereto in himself. If the owner had the right to enter, the cropper could not bring such an action in trespass.

A defendant in a suit for rent by the landowner plead a superior title to the land in a prior lessee. This prior lessee was a crop contractor. It was held that under such a plea the crop contractor was not such a lessee as to permit this plea to avail the defendant.

Title to the crop may be in the owner of land until certain advances paid by the owner have been repaid by the cropper. This, of course, would render ineffective as against the landowner any assignment or mortgage of the crop by the cropper to a third person before these advances had been repaid. And similarly such an assignment or mortgage might be ineffective until final division of the crop.

A landowner as plaintiff may sue in trover for the crop converted by a third person, the cropper not having fulfilled his contract and the title of the crop therefore still being in the landowner.

A cropper with no title until division has no lien on the crop for fertilizing ingredients sold by him to the landowner and used on the land.

After a division of the crop the cropper has title to his share, and so the owner of the land could not bring trover for it.

A cropper is guilty of a criminal offense in unlawfully removing the crop before division, such taking being a larceny, robbery or other offense, according to the circumstances of the case.

A defendant is guilty of an assault and battery if he forcibly removes a cropper from the premises which cropper had the right to enter in order to grow a crop thereon.

A landowner may have such exclusive title to the crop until he is reimbursed for advancements as to justify him, while collecting his advancements, on being assaulted by the cropper, in knocking him down, and may not therefore be held guilty of an assault and battery.

We are inclined to the view that the cropper in this case is sufficiently interested in the land, irrespective of the state's interest therein, to permit of his protecting himself by legal proceedings in the event of certain contingencies arising. As an example, we might assume that parties are threatening to destroy an irrigation ditch on this land while the landowner is in Europe. Would the tenant be in such a position of a mere employee as to bar him from bringing an action in his own name and for the benefit of himself and also the landowner to enjoin the threatened destruction?

However, the primary consideration is that the state in its paramount and sovereign right to declare the law of ownership, possession and enjoyment of its land is not interested in all of these questions between the landowner and the cropper and third parties. A cropper by reason of his agreement with the landowner or by reason of the law of the particular state where the land is located may have no such title to the land as would permit of an execution being levied against the crop or the land on a judgment being obtained against the cropper. But, on the other hand, he might have, in the judgment of the state, such an interest in, possession of and dominion over the land by reason of that identical agreement as to defeat the state's policy in its sovereign control of the agricultural lands of the state. The state in exercising this sovereignty is not interested in the right of the cropper's judgment creditor to seize upon a crop before division. But the state is vitally interested in another question, which has never been presented to the courts in these many decisions. That is, the possession and enjoyment of its agricultural lands by such a cropper.

III.

THE STATE'S INTEREST IN THE DOMINION AND POSSESSION OF ITS AGRICULTURAL LANDS.

Fundamental to this entire discussion is the right which from the time of the Year Books of the common law has been recognized as existing in all states to control the ownership and possession of the land of the state. This law is based upon the first of all laws, the law of self-preservation. It is this fundamental right to control ownership of and dominion over lands which will be discussed more particularly in the Porterfield brief. This right has been reserved throughout the years by all governments and is recognized in the different treaties between governments.

In the first instance, the state has complete title. No one is entitled to acquire title or to inherit lands without the permission of the state. The state is sovereign and may fix the conditions on which, as between the state and in this case ineligible aliens, such aliens may acquire any interest in the lands of the state. California, along with several of the Western states, has said that these ineligible aliens cannot acquire any interest in agricultural lands, treaty rights being recognized in all instances. The people of California adopted this act having in mind not the relationship between an ineligible alien and a citizen landowner or the relation between either of them and third parties. The state was considering only the relationship between the state itself and all of these parties, and solely from the standpoint of and for the benefit of the commonwealth. The law of landlord and tenant was developed not for the benefit of the state, but solely to fix rules of conduct to guide the relationship between individuals.

A cropper cannot convey title in a growing crop to a third person if the cropper has no title to the crop. A lessee can, subject to the landowner's right to his rent, which might be a division of the crop. But all of this relates only to the cropper, the lessee, the landlord, and the third person involved. It in no way affects the state's concern in an attempt to vest in an ineligible alien an interest in land, by giving to the alien actual possession and enjoyment thereof.

The State of California is not concerned with the rights that the law of real property may or may not give to such a cropper to assign the growing crop. The state is interested in preventing such a cropper, if he be an alien ineligible to citizenship, actually enjoying the possession and dominion of the land.

From this standpoint the state considers an employing farmer to be one who in fact conducts a farm. He is the manager. Upon his skill, prudence and foresight primarily depends the output of the farm. He may employ an ineligible alien to work for him. He and the alien have that right under the United States Constitution and under the treaty between the United States and the alien's country. This is the right to employ such labor to work out one's ideas as one may see fit.

But if the owner of the land gives the ineligible alien *carte blanche*; if he leaves to the so-called employee absolute discretion as to how he shall work, how long his hours shall be, what the conditions of that labor shall be, how the "employee" may employ his own family or other ineligible alien under him, that is another question.

Here we would have practical dominion of the soil by this particular ineligible alien. His interests would demand that he cultivate the soil according to his own theories and impose thereon such living environments as would be most conducive to his own advantage just as he would if he owned the land.

The influence, standard of living, agricultural ideas and economic theories of this alien would prevail. The knowledge of husbandry gained from this experience would redound to the benefit of this alien. In the case of regular "employment" the theories of the owner of the land would prevail and such an owner would be the gainer by reason of this experience.

The constitutional and treaty guarantees were never intended to permit of the legal refinements distinguishing a "lessee" and a "cropper" in their ordinary relationships, being urged when their relationship to the state is involved.

One important reason for the rule that we find in some states that a cropper has no interest in the land is to protect the owner of the land from the results that would follow, as a matter of law, if the arrangement is considered a lease, and complete title to the crop thus vested in the cropper as a lessee up to the time of the division of the crop.

As said by Chief Justice Beasley of the court of errors and appeals of New Jersey in *Guest vs. Opdyke*, 31 N. J. L. 552, at 554:

"Landlords are induced to put out their farms, in this mode, to tenants who are poor, relying, as they imagine, in the certainty that their share of the produce cannot be diverted, nor in any wise encumbered. Whereas, if these agreements are complete leases, the title to the crops produced vests in the occupier, and the landlord would have no claim upon them until a division should have been made, and then his share would come to him as a *reditus* or rent. Such is not the light in which the law regards this species of contracts. On the contrary, the true construction is that by virtue of such agreements the occupier becomes simply a tenant in common with the other contracting party of the growing crop, and that this joint interest continues until it is severed by a division."

In *Caswell vs. Districh*, 15 Wend. (N. Y.) 379, the court decided that a crop agreement was not a lease, and so, there could be no suit brought for "rent".

At page 381 the court said:

"It is very material to the landlord, and no injury to the tenant, that this view of the contract should be maintained, unless otherwise clearly expressed, for then the landlord has an interest to the extent of his share in the crops. If it is deemed rent, the whole interest belongs to the tenant until a division. Where a farm is let for a year upon shares, the landlord looks to his interest in the crop as his security, and thereby is enabled to accommodate tenants who otherwise would not be trusted for the rent."

Other cases hold against the theory of a lease so as to vest sufficient title to the crop in the owner of the land to permit of the owner joining as a plaintiff in actions brought to protect the crop. As we shall see, the rule established by the California supreme court permits of this joint interest in the crop with an additional interest by the cropper in the land, that is, the interest of a lessee. None of the results that should be avoided need happen in California if in this case it is determined that the cropper has such an interest in the land as to violate the California Alien Land Act. The owner of the land, O'Brien, could claim by reason of his contract such an interest in the land and in the crop as would forbid his tenants assigning or encumbering the crop to the injury of O'Brien, and at the same time the rights of the state in its well-defined policy of control over its agricultural lands might be upheld.

At common law title to the crop, the product of the soil, necessarily depended upon title to the soil itself. A lessee, having title to the soil during the term of his lease, also had title to the crop.

Crop contracts were not known to the common law. In America there has developed the history of crop contracts. In some states, in absence of an agreement to the contrary, the cropper and the landowner are tenants in common to the crop, though the title to the land is said to be in the landowner. This rule permits title in the product of the soil to be in one who is said to have no interest in the soil. In other states, where there is no agreement to the contrary, the entire title to the crop is said to be in the landowner. This follows the common law rule.

We shall see that the California rule is that even though the parties are tenants in common to the crop, the cropper may be said to have an interest in the land; that is, he may be a lessee.

In our case it is interesting to note that nothing is said in the cropping contract as to the title to the crop. It is agreed in one clause of the contract that title to the land shall remain in the landowner. This clause, however, must be read in connection with the entire contract and with the intention of the parties, as is clearly shown by a reading of the entire contract. If we assume that the title to the crop is in the landowner until division, this would result not from the fact that title to the land is in the landowner, but from the express agreement of the parties.

Such an agreement would be made in view of a body of law that has grown up to measure the rights between landlord and tenant and their rights as against third parties. This historical growth of the law has never recognized the other phase of the question with which we are here dealing. That other phase is the interest of the sovereign state in the actual conditions under which it will permit its agricultural lands to be cultivated and developed to fruition.

In *Johnson vs. Hoffman*, 53 Mo. 504, at 507. Judge Adams says:

"Contracts of this character, although unknown in England, are frequent in the United States. The authorities, however, are conflicting in the several states, as to whether they create the relation of landlord and tenant, or simply make them croppers on the shares. In my judgment no definite rule can be laid down on this subject. Each case must be determined by the words of the written agreement between the parties."

IV.

THE RULE ESTABLISHED BY THE CALIFORNIA SUPREME COURT ON CROPPING CONTRACTS IS THAT THE LANDOWNER AND THE CROPPER MAY BE TENANTS IN COMMON OF THE CROP AND AT THE SAME TIME THE CROPPER MAY HAVE AN INTEREST IN THE LAND. THIS IS A DIFFERENT RULE THAN THAT WHICH EXISTS IN SOME OTHER JURISDICTIONS.

The mere fact that a tenant is to receive compensation in the form of a share of the net proceeds from sale of the crops and that the owner has some title to the crop, as that of a tenant in common, does not in California prevent the tenant being considered as having an interest in the real property. The real test is the intention of the parties, and such expressions as "lessee", "leasing", "letting", "renting", or, on the other hand, "employee", "employment", "general possession", etc., do not necessarily control.

In the case of *Bernal vs. Hovious*, 17 Cal. 541, the owner of the land made an agreement with A, calling it a lease; A was to possess the land for three years; the owner was to furnish farming implements, horses, wagons, etc.; A to work the land and give the owner for the use thereof one-third of the grain that was raised. It was held by the court that this agreement was not a lease, though it was called such, but that it was a

contract for working the farm upon shares and that the parties were tenants in common of the grain until the division was made.

The supreme court of this state, however, in *Walls vs. Preston*, 25 Cal. 60, at page 64, says, referring to the case of *Bernal vs. Hovious*, and also to the New York decisions, that:

"In all the cases in New York affirming on this point *Putnam vs. Wise* (1 Hill 247), and in *Bernal vs. Hovious*, the question was merely who was entitled to the possession of the crop, not whether the owner or the occupant was in possession of the land, not whether the relation of landlord and tenant existed between the parties, though that question was incidentally discussed."

This case of *Walls vs. Preston* gives a very clear discussion by Mr. Justice Rhodes on the points involved as distinguishing between a lease interest and a mere crop agreement. The case held a certain contract to be a lease. The contract used the word "lease" but provided for a rental in the form of delivery to the owner of one-sixth of the crop. The court shows that it would disregard mere words and ascertain the real intent of the parties. It is particularly pointed out that the mere fact that rent is to be paid in the form of a division of the crop rather than in money will not prevent the parties from being considered as landlord and tenant. At pages 64, 65 and 66 the court says:

"The two principles deducible from those cases are these: First—If the agreement contains terms which by themselves would import a lease, and other terms which provide for a division of the crops, and it is doubtful which it is—a lease or a cropping contract—it will be deemed a cropping contract, by reason of a division of the crops; and second, where the agreement provides for a division of the crops between the owner and occupant, they are held to be tenants in common of the crop. It cannot be maintained, upon those authorities, and certainly not upon principle, that a lease, in the usual form of a demise, *for a term of years, with covenants sufficient to give the lessee the exclusive possession of the land during the time, and to require him to yield up the possession at the end of that term, shall not be a lease, and the occupant shall not be a tenant, but shall be a mere servant of the owner, because the parties have made provisions for a division of some portion or all of the crops that may be produced.* The term division, as applied to the crops, has no more forcible signification in aid of the interpretation of the instrument than has the word demise when employed in connection with the land.

Mr. Justice Cowen, in *Putnam vs. Wise*, cites with approbation Woodfall (Land. and Ten.), who says that the most proper and authentic form of demise. No reason can be assigned why the same rule of construction should not be applicable to the words providing for a division of the crop.

* * * * *

Where it plainly appears that the parties have made a lease the court will not declare it *not* to be a lease simply because the parties have inserted a covenant that more appropriately belongs to a contract of a different character. In the cases we have cited the courts were endeavoring to ascertain the intention of the parties, and, having ascertained it, they declared the rights of the parties under the contract as they made it, so far as the same were in issue.

There is certainly no rule of law so absolute in its nature as to prevent the occupant of land, under a contract which constitutes him a tenant in

common with the owner in the crops, from having as entire a control over the premises during the term, if the parties so agree, as a tenant covenanting to pay a money rent would have. In other words, from being a tenant of the land under a lease, and at the same time a tenant in common of the crop, or of some part of it. Such agreements are constantly made, and it never occurs to the parties, and they do not intend, that the tenant is changed into a servant of the lessor because the lessor receives a portion of all of his compensation for the use of the land in some uncertain quantity of the products of the land." (Italics ours.)

At page 66 the court indicates its disapproval of the New York cases in the following language:

"We can see nothing incompatible in the tenants of the land under a lease being at the same time a tenant in common of the crops; and there never would have been any doubt upon this point *had not the judges in New York, in passing upon questions concerning the rights of the parties to the possession of the crops, uttered dicta which seemed to determine the point against the occupant.*" (Italics ours.)

At page 67 the court says:

"If a reservation of rent, or some benefit or recompense equivalent to rent, is deemed necessary, in order to constitute a contract a lease, the covenant to pay or deliver a portion of the crop amounts in every sense to a recompense for the use and occupation of the land as fully as would a covenant to pay money, or a certain amount of the crops, or to improve the premises, or keep them in repair, or to pay the taxes, or perform labor for the lessor, all of which have been held good as a reservation of rent."

* * * * *

"It clearly appears to us that the parties in this case intended to make a lease, and that the instrument executed by them was a lease; that its effect as such was not destroyed by their having contracted for the payment to the lessor of a portion of the specific crops to be produced, and that that covenant was an agreement to pay the rent of the premises out of the crops."

In *Clarke and Cain vs. Cobb*, 121 Cal. 595, the court held that a contract by which farming lands were demised and let for a term of years to one who agreed to give annually for the use thereof a certain portion of the crops of grain and other products grown thereon was a lease creating the conventional relations of landlord and tenant and not a cropping contract.

At page 597 the court said:

"At the threshold of this investigation it becomes important to determine the legal status of the contracts entered into with Cobb by Clarke and his executors. That these contracts were leases, that the conventional relation of landlord and tenant existed between the parties, and that the grains and fruits to be delivered to the landlord when gathered and harvested were rent, we are entirely satisfied. Rent is a compensation paid for the use of land. *It need not be money. Any chattels or products of the soil serve the purpose equally as well. These contracts are in no sense cropping contracts. The single difference differentiating them from ordinary conventional leases is that the rent is to be paid in products of the soil, after harvest, rather than in money. But such difference is wholly immaterial, as changing the character and aspect of the instruments.*

"It is substantially conceded that the landlord and tenant are not co-tenants in the land, but it is claimed that they are co-tenants in the crops to be raised. The authorities in this state recognize that such conditions

may exist. (*Bernal vs. Hovious*, 17 Cal. 544; 79 Am. Dec. 147; *Walls vs. Preston*, 25 Cal. 59.) But we find no apt words here to disclose such a status. When it is established that a certain contract is a lease, and that the relation of landlord and tenant exists between the parties, there must be some appropriate words in the contract to indicate that the crops raised on the lands are to be held in co-tenancy or such will not be the conclusion reached. If there is nothing in the language to indicate that intention, then the products to be delivered to the landlord after harvest, by the tenant, will be deemed the property of the tenant until that time, and treated as rent to be then paid." (Italics ours.)

At page 598 the court, in discussing the above California cases of *Walls vs. Preston* and *Bernal vs. Hovious*, and also the New York decisions, said:

"In *Walls vs. Preston*, *supra*, *Bernal vs. Hovious*, *supra*, and the New York authorities upon which it is based, are reviewed and explained, and the doctrine of the *Bernal* case limited. In *Walls vs. Preston*, *supra*, the facts were entirely similar to those found in this record, and after a careful consideration of the principles involved the court said: 'It clearly appears to us that the parties in this case intended to make a lease, and that the instrument executed by them was a lease; that its effect as such was not destroyed by their having contracted for the payment to the lessor of a portion of the specific crops to be produced, and that that covenant was an agreement to pay the rent of the premises out of the crops.'"

In *Knox vs. Marshall*, 19 Cal. 617, just as in the case of *Bernal vs. Hovious*, the only question involved was whether the owner and the party working the land were *tenants in common of the hay and grain that was grown*. As is pointed out in the California cases there may be the relation of landlord and tenant and at the same time the landlord and tenant be tenants in common with reference to the grain that is grown.

In *Smith vs. Schultz*, 89 Cal. 526, a written contract purported to be a lease of land for a specified term. The lessee was to plant crops, certain shares of the crops were to be delivered to the lessor, the lessor was to have the right of re-entry in case of default on the part of the lessee, otherwise the lessee was to hold for a definite term. This was held to be a lease and not a partnership.

It is to be noted that there is a definite term of four years fixed in the crop agreement in the case at bar.

The ordinary relationship of landlord and tenant is where A leases land from B and A has complete title to the crops grown thereon and he pays rent to B in the form of money.

If we have A in possession of the land and not owning the crop, but merely having a part interest therein along with B, this is a variation and departure from the ordinary relationship of landlord and tenant. Then there arose the question in California, does the fact that A does not own all the crop negative the idea that he is a lessee? The California supreme court has answered this question in the negative. That court has criticized the New York decisions which determined that in such a case the parties were co-tenants in the crop (a proper determination) and then continued to state in *dicta* unnecessary to the decision, that A had no interest in the land and that therefore he was not a lessee. The California court has said that the question of whether the arrangement is a lease in no way depends upon the interests of the landowner and the cropper in the crops. We have seen that in the contract now before the court nothing is said as to who has title to the crop. The contract might well be construed to mean that the landowner and the cropper are tenants in common to the crop. Let us

assume, however, that there was an express condition, as indeed there might be in some other cropping contract, to the effect that until division of the crop title to the crop is in the landowner.

We would then go one step further than in the cases which have been decided by the California supreme court. Instead of A having only a part interest in the crop he would have no legal title thereto until division. On division he would be entitled to one-half of the crop. This is but a further step toward taking from A an interest in the crop. But the identical conclusion of the California supreme court would logically follow. That is, it could not be argued that A is not a lessee merely because legal title to the entire land and crop is in B, any more than the same argument could be made when A had a one-half undivided interest in the crop, the other undivided one-half interest being in the landowner.

The important thing from the standpoint of the state is, irrespective of their agreement as to the legal refinements in the matter of title, A in fact would have a real interest in this product of the soil. Let us assume in our case that just prior to a division the entire crop harvested and ready for division is destroyed by lightning. Neither party would be at fault. Could the cropper make any claim against the landowner for compensation on account of his services as an "employee"? We respectfully submit that it is obvious that he could make no such claim. His remuneration was to come from a division of the crop. The crop has been destroyed by lightning. It is his loss just as it is the landowner's loss. Here we have a real test to show that irrespective of anything that is said in the contract about his being an "employee" and his receiving "compensation" and the title to the land at all times being in the landowner, there is a real tangible interest in this land vesting in the cropper. He cannot be properly described as a mere employee. He has such an interest in the land as to permit of the state's land policy declaring that if he be an alien ineligible to citizenship this cropping contract is prohibited by law.

If A would be paying "rent" by yielding unto B one-half of the crop instead of a stated sum of money, he would also be paying rent if he yielded unto B all of the crop.

And again, A would nevertheless be paying rent if he agreed that complete title to the crop should be in B until a division and that at such division one-half of the crop would be given over unto A. What difference, so far as the state's land policy is concerned, is there between A retaining title to the crop and paying a fixed sum of money as rent and his yielding entire title to the crop until division and then receiving from B one-half of the crop?

See *Moulton vs. Robinson*, 27 N. H. 550, for the point that the mere fact that the landowner and the tenant are tenants in common to the crop does not destroy the relationship of landlord and tenant.

In *Warner vs. Abbey*, 112 Mass. 355, it was held that under all the circumstances of that case the parties intended that the cropper was to have title to the crop before division.

What real difference is there between a landowner letting land to a cropper and receiving part of the crops *as rent* and the identical relationship between them only the cropper is to receive one-half of the crop *as compensation*? The situation is that in the first arrangement the landowner receives "rent" so-called and in the second arrangement the cropper receives "compensation" so-called. But this distinction means nothing to the state in its efforts to control possession, enjoyment and dominion over its agricultural lands.

The construction by the California supreme court as to the relations existing between a landowner and a cropper should, we submit, be most persuasive with this court in construing the California statute.

V.

ADDITIONAL AUTHORITIES FROM STATES OTHER THAN CALIFORNIA, IN THE MATTER OF CROP AGREEMENTS.

Ferris vs. Hoaglund, 25 So. 834 (Alabama supreme court). A crop agreement gave to so-called "lessee" right to cultivate a vineyard—in a certain way—and take a reasonable compensation from the sales proceeds of the crop, and return balance of proceeds to owner. Held, that this is mere employment—and not a lease. Also held that even though "lessee" did not cultivate as per his agreement, he was so entitled to possess, and that therefore proper remedy was to have contract canceled. And so this case holds that even such an employee has sufficient lawful interest in the land to prevent trespass lying.

At page 836 the court said:

"But, so far as it affects the question of trespass, the result is the same. The contract remained in force, there being no rescission by the parties. It not only conferred the right, but imposed the duty, upon defendant to enter upon the land in the execution of the work of gathering the crop as well as of cultivation. It gave a license to defendant to so enter, which being granted upon a valuable consideration, was not revocable so as to destroy his right to collect from the crop after it had ripened, and so as to cause a failure in the performance of his obligation to gather and market same. The doctrine of estoppel *in pais* applies in such case. (*Thodes vs. Otis*, 33 App. 496.) For the purpose of restraining a trespass the bill is without equity, but, if it sufficiently shows a right in complainants to cancel or rescind the contract, it may stand for relief in that aspect. When the remedy for recovery of damages at law is adequate, equity may decree the cancellation of a contract, at the instance of a party who has substantially complied with it, for its nonperformance by the other party, and where the parties can be placed substantially *in statu quo*."

In *Dixon vs. Niccolls*, 89 A. D. 312 (Ill.), the tenant had exclusive possession of the premises, with agreement he to pay rent in form of a portion of the crop, to be delivered to owner after it was threshed. Held, relation of landlord and tenant existed. Tenant was Brodrick, owner was Knoop. At page 316 the court says:

"But in all cases, whether it is simply raising a crop on joint account or a tenancy, the rent payable in kind depends upon the intention of the parties.

"In this case there can be no misconception on that point. The exclusive possession of the farm for a series of years by Brodrick, a rent agreed upon, and the nonresidence of Knoop, the owner, all conspire to show the relation of landlord and tenant, and thereby constituting Brodrick the exclusive owner of the crop until the stipulated rent was set apart or paid to the landlord. It is not like any one of the cases cited by the plaintiff in error. In all of them, facts are disclosed going to show the intention that there should exist a joint ownership in the crop to be raised, and not a tenancy at a stipulated rent."

In some of those jurisdictions holding that in the absence of an agreement on the subject, the landowner and tenant are tenants in common to the crop, it has also been held that even though there be an express agreement that title to the crop is in the landowner until division, this amounts

to nothing more than a chattel mortgage executed by the cropper for the security of the landowner.

See *McNeal vs. Ryder*, 81 N. W. 830 (supreme court of Minnesota).

And what would this same court say if asked as to the interest of the cropper where the only question involved was the rights of the sovereign state in its control over the cultivation and dominion of its agricultural lands?

The Minnesota supreme court has also decided that the mere recital in a cropper's agreement that the landowner shall have title to the crop until division does not warrant an action by him against the cropper, prior to division, to recover possession of all of the crops where the cropper has not defaulted in his contract. (*Strangeway vs. Einsenman*, 71 N. W. 617.)

The contract in that case provided "until such division" (of the crop) "the title and possession of all crops and stock on the premises to be and remain in the plaintiff" (the landowner).

And in consideration of the cropper's performance of all the terms of the contract to be by him performed, the plaintiff upon reasonable request thereafter made was to give and deliver to the defendant one-half of all grain, hay and other crops raised on the farm each year.

At pages 618 and 619 the Minnesota supreme court said:

"In brief, there was, under the evidence, no provision in the contract which entitled the plaintiff to the possession of the property, unless it was the one that until division 'the title and possession' should be and remain in him.

"The cases are in hopeless conflict as to the construction of contracts between the owner and occupier of land for its cultivation on shares, and as to the rights of the respective parties in the land and in the crops. We have no intention of going into any extended consideration of the subject or the cases. Those who wish to do so will find a quite full collection of the cases and discussion of the subject in the notes to the leading case of *Putnam vs. Wise*, 37 Am. Dec. 309. (See, also, *Freem. Co-Ten.*, sec. 100.) No general rule can be laid down, applicable to all cases of agreements of this kind, because the precise nature of the interest or title between the contracting parties is largely a question of their intention, as expressed in the language they have used, and hence must depend upon the particular provisions of the contract itself. But it may be stated generally that the present tendency of the authorities is to hold that whenever there is a provision, in whatever form, for dividing the specific products of the premises, a tenancy in common arises in the products which are to be divided. As applied to most agreements for the cultivation of land on shares, this view is much more in accordance with the actual intention as well as interest of both parties than to hold that either the owner or occupier of the land is the exclusive owner of the crops before division, and merely the debtor or creditor of the other for rent or wages. Taking the present contract by its four corners, and considering all its provisions together, we are satisfied that its true construction is that, whatever may have been the relation of the parties as to the land, they were tenants in common of the crops before division, and that, so long as defendant kept and performed all the terms of the contract, he was entitled to the possession and control of the crops for the purpose of performing upon them the labor in the way of harvesting, threshing, etc., which he had a right to do, and was required to do by the terms of his agreement. The provision that until division the title and possession should be and remain in the plaintiff, if given the effect claimed for it by him, would be as repugnant to both the

letter and spirit of the other provisions in the contract as would be a provision that defendant should have no right to enter upon the premises at all, and that, if he did so, he would be a trespasser. The only effect that can be given to that provision consistent with the general purpose, as well as the other express provisions, of the contract, is that plaintiff should have the title, and when necessary, the right to the possession of the crops, as security for the performance of the terms of the contract by the defendant. Any other construction would nullify the entire contract, and render impossible its performance by the defendant."

VI.

CONCLUSION.

When the people of California used the very sweeping language forbidding an ineligible alien to "*acquire, possess, enjoy and transfer* real property, or any interest therein, in this state," except as permitted by treaty, they certainly intended to prevent such aliens controlling great tracts of agricultural lands in this state by the mere device of cropping contracts. It was the possession and enjoyment and occupancy of these agricultural lands by these ineligible aliens of another race in competition with our own citizens which the people attempted to make impossible. It was not the acquirement of title in fee alone that this legislation was designed to prevent. It was intended to withhold from ineligible aliens all of the advantages which the ownership of agricultural lands gives. It was intended to withhold from them dominion, occupancy, possession, enjoyment. It was intended to prevent ineligible aliens from having that use, that control, of agricultural lands which would give to them in whole or in part the fruits thereof. It was intended to free the American farmer from the competition, upon American soil, of the Oriental farmer. The act was drawn by those who know and in recognition of the established fact that the American farmer cannot live in competition with the Oriental farmer. It was drawn by those who know and in recognition of the established fact that the American farm which is in competition with the Oriental farm will cease to be cultivated, or will be cultivated by Orientals. It was to save the American farmer and the American farm laborer from the competition of unlimited hordes of labor of the Oriental; indeed, from the competition of the labor of the wives, widows and children. The act was designed to protect the American home life from the competition of the Oriental home life. The American farm home, which is our country's boast, will not long endure if the Oriental farm home is to become its competitor. The members of the American farm home cannot continue the activities which now ennoble farm life if such home and such activities are to be sustained against Oriental habits and customs. Wife and daughter cannot confine their activities to keeping the home; the children of suitable age cannot be kept in schools, with father and son in the hopeless struggle of tilling the farm in competition with all the members of a family of an Oriental engaged in the same labor.

The labor of the Oriental paid for by fixed compensation as wages is not destructive. The labor of the Oriental when the compensation is to be increased by Oriental habit and custom is destructive. The American farm was not builded upon the idea of wives and daughters tilling the soil.

This act was designed to protect the farm as it now exists in California and elsewhere in the agricultural areas of the United States. The destruction of our farm life is not the more desirable because destroyed by a horde of Orientals whose signatures have been attached to cropping con-

tracts, rather than by the same people holding the title in fee. It is the destruction of the farm life that is to be prevented and not the method of its destruction.

A word description often fails, as here it may fail, to produce an actual picture of a physical condition. Though the physical condition exists, one who has looked upon it always finds language inadequate to accurately portray the condition to one who has not actually observed it, and one who has actually observed the condition does not need the word description.

The condition we are attempting to describe may be readily seen by any one who will travel any state highway through any of the richest agricultural districts of California. We respectfully urge that the court ignore the surface veneering and strike at the substance of a structure of Oriental agricultural development in California which is well on its way to a considerable growth, after a loudly acclaimed birth. Printed forms of these cropping contracts are being distributed throughout the state; legal advice is being extensively given to ineligible Orientals encouraging them in this evasion of the real purposes of our California Alien Land Act.

The fundamental consideration must be, as has been determined by federal and state courts, that there is reserved to all the states the absolute control of any and every character of real interest in the agricultural lands of the state. Upon this principle rests the safety of our form of government.

The principle, well established in the law, that permits the State of California to prohibit ineligible aliens from acquiring fee simple title to agricultural lands, must also, in all reason and logic, permit of our prohibiting the same class of individuals from securing in such lands that interest, dominion, enjoyment and possession thereof and of the fruits thereof which these cropping contracts lead to.

This is no time, we respectfully submit, for nice refinements such as have been suggested, in statutory construction and in the assumed distinction between "employment" and the enjoyment of a real interest in agricultural lands and the produce of such lands.

We respectfully point out to the court that section 717 of the Civil Code of California limits a lease of land for agricultural purposes, in which shall be reserved any rent or service of any kind, to a period of fifteen years. This section reads:

"No lease or grant of land for agricultural or horticultural purposes for a longer period than fifteen years, in which shall be reserved any rent or service of any kind, shall be valid; provided, that any land of a municipality used for agricultural or horticultural purposes and upon which is discharged sewage or waste water may be leased for a period not exceeding twenty-five years."

If ineligible aliens may possess the agricultural lands of California for indefinite periods of time through the means of such cropping agreements as are involved in the case at bar, such ineligible aliens would be in a far better position to circumvent the purposes of the California statute than would be the case if they were expressly permitted to lease our lands for periods of fifteen years. Our Alien Land Law would thus be held to be useless to accomplish the real and the vital purpose of the people of our state.

It is a fundamental rule that contracts "affecting the public interest" are to be construed liberally in favor of the public.

Williston, in his work on contracts, vol. 2, sec. 689, states:

"It will be observed that this rule is based on a different reason from the ordinary rules of interpretation. There is no reason to suppose that

the parties in fact intended to favor the public, and when the court so assumes it does so because it is for the public interest so to assume."

In the last analysis the rights of the subjects and citizens of two great nations which have been fixed and determined by those nations in a solemn treaty are involved in this case. For the reason that it is perfectly obvious that the crop contract in question was prepared with the view of avoiding the treaty limitations, we respectfully submit that public interest demands that this contract be construed as a violation of the California Alien Land Law. The treaty and the California law, read together, are harmonious and are declarative of a broad public policy, prohibiting the subjects of either country from entering into the possession and control of any lands in the other except for the purposes specified, to-wit, commercial and residential purposes, as permitted by the treaty.

The California Alien Land Law of 1920 expressly recognizes all rights guaranteed to the nationals of the respective countries by the United States-Japan treaty of February 21, 1911. A reading of the said treaty therefore will assist us in understanding what the California act attempts to prohibit. There is nothing in the treaty granting any right to the subjects of either of these countries to enjoy or possess agricultural lands in the other country. The treaty strictly limits these rights, so far as interest in lands or buildings is concerned, to the use of these lands or buildings for commercial or residential purposes.

Article I of the treaty grants to the citizens or subjects of each of the high contracting parties "liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

The California Alien Land Act prohibits, except as permitted by this treaty, the creation of any interest in California land for the benefit of ineligible aliens. Neither country intended that the other should have any rights of occupation of lands except for commercial or residential purposes. The proposed occupancy of the land in this case is for an entirely different purpose, to-wit: for agricultural and horticultural purposes, which is prohibited by the California Alien Land Law.

We particularly call the court's attention to the concurring opinion of Judge Bledsoe in this case. (Trans., fols. 48 and following.) Judge Bledsoe presents our theories with considerable force. We follow his logic until the final paragraph of his opinion wherein Judge Bledsoe decides that the mere expression in the contract "provided that the cropper shall have no interest or estate whatsoever in the land described herein" controls over all the other clearly expressed provisions of this cropping contract. We are anxious to impress upon the court our position that the mere phraseology quoted by Judge Bledsoe from the cropping contract should not have persuaded him to a construction which was not supported by the terms of the contract when read in their entirety. The mere statement that the cropper was to have no interest in the land should not, in our judgment, control over the positive provisions of the contract which did, in fact, give to the cropper an interest in real property. There are many cases deciding that where co-partners declare in a written instrument that it is not their intention to be partners the courts will nevertheless hold them to have

entered into a co-partnership if the general legal effect of the other language in the contract requires such a construction.

If ineligible aliens may be given possession and enjoyment of agricultural lands and then seek protection in such phraseology as is referred to by Judge Bledsoe, it is useless for the Western states to attempt to control a situation which is of the gravest importance to the welfare of the people of these states.

The court is called upon to construe a new act, an act without antecedent, and drafted to meet a new condition. In its construction the court is not led or restrained by precedent. The books may help, but the daily life about us furnishes the true guide. The facts with which this statute deals have not heretofore been met with in judicial or legislative history.

Justice Crane of the New York court of appeals recently stated:

"The two sources of the law are to be found, first, in the books and, second, in the life about us."

The reason for this law is found in the life about us, and a consideration of the facts which impelled its enactment is indispensable to its proper construction.

The language found in judicial expressions should not be given application to facts and conditions different from those in reference to which such language was used. We contend for no change in the law. We ask only that it be properly applied to new facts and new conditions.

This thought was recently expressed by Justice Holmes in reference to the Constitution, as follows:

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding year."

And so in this case. The rules of landlord and tenant and of employer and employee do not change, but as "the habits of life of the people vary with each succeeding year," so we must not attempt to apply such rules to these changing conditions without realizing the controlling circumstances which brought about the original judicial expressions.

A metropolitan newspaper referred to Justice Clarke, upon his retirement from the United States Supreme Court, as "one of its strongest minds and most liberal and democratic spirits—recognizing the law less as a rule of applying antiquated cases to present conditions than as a human and therefore a progressive institution keeping pace with humanity's growing and changing needs."

With this conception of the law, we respectfully submit this case.

2. APPELLEE'S POINTS, BY LOUIS MARSHALL.

This is an appeal from an order granting the appellees' motion for a preliminary injunction restraining the appellants from bringing or permitting to be brought against the appellees any proceeding at law or in equity for the purpose of enforcing an act of the State of California entitled "An Act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith," submitted by the initiative and approved by the electors November 2, 1920, from preventing the appellees executing a cropping contract in

the form described in the bill of complaint, and from causing them to be arrested for alleged violation of the terms and provisions of said act.

The constitutionality of the law having been challenged, pursuant to statute the motion for the injunction was heard and decided by a court composed of the Honorable William H. Hunt, circuit judge, and Honorable Benjamin F. Bledsoe and Honorable Maurice T. Dooling, district judges (Rec., pp. 17-20).

The statute involved in this action is the act whose constitutionality is the subject of controversy in *Porterfield and Mizuno vs. Webb, as attorney-general of the State of California, and Woolwine, as district attorney of the County of Los Angeles*, October term, 1922, No. 299, argued herewith. Only certain aspects of these questions will be taken up in this brief, although the argument made in the Porterfield case against the constitutionality of this legislation is regarded as applicable to and controlling of the case at bar.

The court below having, however, enjoined the appellants on the ground that the act, even if constitutional, did not prohibit the execution of the contract which is referred to in the bill of complaint herein, the present brief will be confined to an argument in support of the correctness of the decision rendered.

THE PROVISIONS OF THE STATUTE APPLICABLE TO THIS ACTION.

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Sec. 2. All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent, and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

"Sec. 8. Any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section 2 of this act, or by any company, association or corporation mentioned in section 3 of this act, shall escheat to the State of California. The attorney-general or district attorney of the proper county shall institute proceedings to have such escheat adjudged and enforced as provided in section 7 of this act. In such proceedings the court shall determine and adjudge the value of such leasehold or other interest in such real property, and enter judgment for the state for the amount thereof, together with costs. Thereupon the court shall order a sale of the real property covered by such leasehold or other interest in manner provided by section 1271 of the Code of Civil Procedure. Out of the proceeds arising from such sale, the amount of the judgment rendered for the state shall be paid into the state treasury and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein. Any share or stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section 3 of this act shall escheat to the State of California. Such escheat shall be adjudged and enforced in the same manner as provided in this section for the escheat of a leasehold or other interest in real property less than the fee.

"Sec. 9. Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby con-

veyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section 2 hereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

"A *prima facie* presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:"

It is unnecessary to enumerate them, since there is nothing in the record which brings the case within any of the categories mentioned.

"Sec. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

THE BILL OF COMPLAINT.

The plaintiff O'Brien is a citizen of the United States and of the State of California. The plaintiff Inouye is a Japanese, a subject of the Emperor of Japan, and a resident of the Northern District of California. The defendant Webb is the attorney-general of California, and the defendant Coolidge the district attorney of Santa Clara County, California (Rec., p. 1).

The plaintiff O'Brien is and for some years past has been the owner of a ten-acre tract situated in Santa Clara County, California. The property is agricultural in character and is particularly adapted to the raising of strawberries, loganberries, raspberries and vegetables, and for a number of years has been and now is being devoted to that and kindred agricultural purposes.

The plaintiff Inouye is a capable farmer, in all respects a desirable and competent person to farm such realty and to enter into a cropping contract for the growing of crops upon the land. O'Brien desires to execute a cropping contract with Inouye, which is set forth in the bill of complaint, and Inouye wishes to enter into the employ of O'Brien in accordance with such proposed contract, the execution of which is necessary in order that the land may be farmed to the best advantage, that O'Brien may secure the largest return from it, and that Inouye may receive compensation therefrom.

If the plaintiffs are prevented from entering into the proposed contract or any cropping contract substantially in the form set forth in the bill of complaint, Inouye will be deprived of his right to earn a living in the business for which he is best fitted and which he understands, and will be seriously embarrassed in his efforts to earn a living for himself, and if O'Brien is prevented from entering into the contract or a cropping contract in substantially the same form he will be seriously obstructed and interfered with and will suffer great damage in the management and control of his property.

Both of the plaintiffs are law-abiding and wish to conform in every way with all proper laws, but in view of the threats of the defendant Webb, as attorney-general of the State of California, they fear to enter into the contract, and will be prevented from doing so unless protected by the injunction of the court (Rec., pp. 2, 3).

The defendants have threatened to enforce against the plaintiffs, should they enter into the contract, the act above referred to, and will enforce the act and all of its terms against the plaintiffs if they should execute the cropping contract referred to in the bill of complaint, and will forfeit or attempt to forfeit the real property to which the contract relates to the State of California by escheat proceedings, and will prosecute the plaintiffs criminally for an alleged violation of the act (Rec., p. 3).

The act in its terms is so drastic and the penalties attached to a violation of its terms are so great that the plaintiffs may not make or execute the cropping contract even for the purpose of testing its constitutionality and validity or its application to the contract, and unless the court should determine the validity and application of the act in this proceeding the plaintiffs would be compelled to submit to the act, whether it be valid or invalid, to the defendants' interpretation of it and to their threats in connection therewith, and will be thereby deprived of their property without due process of law and denied the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States, which both of them invoke (Rec., pp. 3, 4).

THE CONTRACT PROPOSED TO BE EXECUTED.

It is described as a cropping contract. By its terms O'Brien recites that he is the owner of the ten-acre tract above referred to; that he "wishes to employ Inouye (who is described as the cropper) for a period of four years, being from the first day of December, 1921, to the first day of December, 1925, as an employee for the purpose of planting, cultivating and harvesting crops to be grown on owner's (O'Brien's) land above described, under the following terms and conditions:" (Rec., p. 6). The contract then contains the following stipulations of O'Brien, the owner, who agrees (Rec., pp. 6, 7):

"A. To employ cropper and not to interfere with him in the planting, cultivating and harvesting of the crop in any way, and to protect cropper during the existence of this contract against interference by any person whatsoever, *the general possession of the land above described being reserved to owner.*

"B. To provide and maintain housing accommodations for cropper.

"C. To furnish all necessary tools, farming implements, tractors and the oil and gasoline for the operation thereof, horses and horse feed for the planting, cultivating and harvesting of the crop or crops herein provided for, during the term hereof, and to furnish any and all things necessary for the proper farming of the land herein described for the purposes herein set forth.

"D. To haul the said crop when properly prepared by cropper for hauling and shipping, to the packing-house or nearby station.

"E. To permit the cropper to work the land upon the conditions herein set forth, *provided that the cropper shall have no interest or estate whatsoever in the land described herein.*

"F. To give to cropper fifty (50) per cent of all crops grown on the above described land during the period of this agreement, as compensation for the services and labor of the cropper, as herein set forth.

"G. To grant to the cropper his right to a division of the crop after it is harvested and before its removal from the land, provided that the cropper exercises his option thereunto, and in the event of the exercise of such option, to grant to cropper the right to remove from the land his share of the crops within a reasonable time, even though said time shall extend beyond the term of the cropper's employment as herein provided for.

"H. To grant to the cropper the right to carry out the terms of this agreement by employing such agents or employees as he shall see fit, and to give such agents or employees free ingress or egress from said property, or the right to live thereon, without let or hindrance."

The contract then contains the following stipulations of the cropper, who agrees (Rec., p. 8):

"I. After the execution and delivery of this agreement, and at the proper

time to plant, cultivate and harvest the following specified crops: strawberries, raspberries, loganberries and vegetables in a good and farmerlike manner.

"J. To maintain and keep up the personal property and to return to owner at the termination of this agreement all farming tools, implements, tractors, horses and all other personal property of every kind and character, the use of which is herein granted, in as good condition as they were when delivered to cropper, reasonable wear and tear thereof excepted.

"K. To keep the banks and bottoms of irrigation ditches on, adjacent to and tributary to said land, free from weeds and foul growth; to repair and maintain all levees; to prevent losses of irrigation water, and in particular to prevent the overflow thereof into driveways and roads and to guard against fires of all kinds.

"L. To harvest all crops when ripe, to pack the same in accordance with best standards, to prepare the same for shipping or transportation if necessary."

The contract then contains the following mutual agreements (Rec., pp. 8, 9):

"It is mutually understood and agreed by the parties hereto that in case of the land being sold, during the term of this agreement, the owner shall have the option to terminate this agreement by paying to cropper *for his own services* at the rate of \$100 per month from the beginning of the calendar year in which this agreement is to be terminated, together with all money expended or incurred by said cropper *for and on account of labor and materials furnished for the planting and cultivation of the crop or crops then growing on the land*, with interest at the rate of seven (7) per cent per annum, or allow cropper to harvest the crop or crops then growing thereon.

"It is further mutually understood and agreed by the parties hereto that in case of any breach of this contract on the part of owner or in case of any hindrance with or prevention of farming upon said or any part of said land, owner agrees to pay to cropper, within thirty days from the date of such breach, all moneys expended or incurred by cropper for the planting and cultivation of the then growing crop or crops, and in addition thereto a sum equivalent to twenty (20) per cent of such total amount so expended or incurred by cropper, as his liquidated damages for the cancellation of this agreement, provided, however, that cropper, at the date of such breach, shall have fully kept and performed all the covenants by him to be performed under this agreement."

THE PROOF OF DEFENDANTS' THREATS TO PROCEED AGAINST PARTIES TO CROPPING AGREEMENTS.

In connection with the motion for the injunction, an affidavit was presented to the court which sets forth various letters and announcements issued and published by the attorney-general, in which he indicated his purpose to proceed under the provisions of the statute relating to escheat and to the enforcement of criminal proceedings against persons entering into agreements of the character proposed by the appellees which he asserted came within the inhibition of the act. These documents contain, among other clauses, the following:

"The efforts of aliens ineligible to citizenship to acquire land in this state in violation or evasion of the Alien Land Laws of 1913 and 1920 are in various forms continuing, and to successfully meet these efforts there is required the most intelligent and vigilant action by all officers in any manner charged with duties in the enforcement of these laws. * * *

"Where the effort is not to acquire title but to secure the beneficial use of the land, various forms of contracts are resorted to, such as an agreement that the ineligible alien shall occupy, possess and farm the land and receive a share of the product. In the majority of instances these transactions involve the participation of one or more American citizens, fully advised in reference to these laws and of necessity well knowing that the indirect method of dealing is adopted for the purpose of avoiding them, and not infrequently their action constitutes a direct violation of the penal provisions of the Alien Land Act of 1920. * * *

"The act of 1920 makes it your duty, as well as that of the attorney-general, to commence the proper proceedings to have an escheat adjudged whenever requisite evidence therefor is obtained.

"With the view of supplementing these laws and providing further means for their enforcement a new section, numbered 931, was added to the Penal Code by the last legislature, approved by the governor, and will become effective on July 28, 1921, which directs that the grand jury of the county shall investigate any transaction appearing to be in violation or avoidance of the Alien Land Law, and your assistance should, of course, be fully given to the grand jury in such investigations. The administration of the penal provisions of the Alien Land Law rests largely with the local officers, to whom the evidence of violations is most accessible, and who are empowered by law to secure such assistance as may be required and to incur such expense as may be necessary in performance of the duties of enforcement.

"The colonization in many parts of this state by ineligible aliens, and particularly by alien Japanese, is so well known as to make its statement unnecessary and I know that you will agree with me that every effort should be made to secure the strict enforcement of these laws.

"Your attention is especially called to the fact that the penal provisions of these laws apply alike to all persons, citizens as well as aliens, and I urge you, and through you the grand jury and other local officers, to make the most vigorous efforts to secure for this state the objects which these laws seek to attain.

"In order to insure the fullest co-operation I am addressing this letter to each district attorney in the state." (Rec., pp. 10, 11.)

In answer to a question submitted to him as to the validity of cropping contracts with Japanese, according to various plans described, the attorney-general said:

"Prior to the adoption of the Alien Land Law of 1913, aliens ineligible to citizenship could legally purchase or lease agricultural lands. Where it was not sought to acquire the title, the custom of leasing was very common and the increasing acreage of farming lands passing into the possession and control of alien Japanese became so alarming that the legislature adopted in 1913 the so-called Alien Land Act.

"I drafted this act, but the original act did not authorize leasing of agricultural lands, and upon the representation of certain landowners that the prohibition of leases at that time would work a grave injury to such owners, and that if a reasonable time be provided for, such owners would be able to adjust themselves to the new conditions and avoid the threatened losses the legislature, yielding to these representations, changed the original draft by adding the provision permitting leases for a term of three years. Under the operation of this leasing clause the acreage passing to the control of Japanese rapidly increased, and by vote of the people the leasing provision was eliminated at the election of 1920. * * *

"The propositions stated in your letter evidence a plan whereby ineligible

aliens may be given the possession, enjoyment and beneficial use of agricultural lands as completely as though this were accomplished through the direct payment of rental, whether such payment be made in cash or by a portion of the crop. It would seem that an alien placed in possession of lands under such an agreement would have such rights in the land as given by the usual form of lease. Such arrangements seek to accomplish what the statute prohibits without incurring its penalties. * * *

"I think the agreements suggested in your three propositions are prohibited by the terms of the Alien Land Act and are wholly antagonistic to the spirit and purpose actuating the electorate of this state in adopting it." (Rec., pp. 12, 13.)

The attorney-general also issued a letter to all of the district attorneys of California, in which he said (Rec., p. 13):

"Where the effort is not to acquire title but to secure the beneficial use of the land, various forms of contracts are resorted to, such as an agreement that the ineligible alien shall occupy, possess and farm the land and receive a share of the product. In the majority of instances these transactions involve the participation of one or more American citizens, fully advised in reference to these laws and of necessity well knowing that the indirect method of dealing is adopted for the purpose of avoiding them, and not infrequently their action constitutes a direct violation of the penal provisions of the Alien Land Act of 1920."

Further opinions and declarations of the attorney-general to the same effect, in which he specifically deals with cropping contracts and declares them to come within the terms of the provisions of the Alien Land Act, are to be found (Rec., pp. 14-17).

The motion for injunction having been heard on these papers, the district court unanimously decided to grant the preliminary injunction prayed for, the opinion of the court having been written by Judge Dooling and a concurring opinion by Judge Bledsoe (Rec., pp. 20-30).

POINTS.

I.

THE CROPPING CONTRACT BETWEEN O'BRIEN AND INOUE, THE EXECUTION OF WHICH THE APPELLANTS CONTEND WOULD SUBJECT THE PARTIES TO PUNISHMENT BY IMPRISONMENT OR FINE, OR BOTH, AND WOULD IMMEDIATELY RESULT IN AN ESCHATE OF THE LAND TO WHICH IT RELATES, TO THE STATE OF CALIFORNIA, DOES NOT COME WITHIN THE TERMS OF THE ACT, BECAUSE IT DOES NOT EFFECT A TRANSFER OF REAL PROPERTY OR OF AN INTEREST THEREIN.

THE STATUTORY PROVISIONS TO BE INTERPRETED.

This statute does not undertake to prohibit any aliens from entering into a contract for the performance of labor upon agricultural lands within the State of California. Had it attempted to do so, the effort would have been nugatory, because it would clearly offend against the provisions of the Fourteenth Amendment to the Constitution of the United States which guarantees them against deprivation of their liberty and property without due process of law.

Yick Wo vs. Hopkins, 118 U. S. 356; *Truax vs. Raich*, 239 U. S. 39, 41.

Section 1977 of the United States Revised Statutes, which was enacted on May 31, 1879 (Ch. 114, 16 St. L. 144), pursuant to section 5 of the Fourteenth Amendment, which empowers Congress to enforce by appropriate legislation the provisions of the article, declares:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory *to make and enforce contracts*, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

Like the due process and equal protection clauses of the Fourteenth Amendment, this statutory provision applies the universal principle proclaimed to aliens, as well as to citizens, regardless of color.

Whitfield vs. Hanges, 222 Fed. Rep. 745.

It follows that, in the interpretation of the California Alien Land Law, the Fourteenth Amendment and section 1977, just quoted, must be continually borne in mind.

In order to give the statute of 1920 any constitutional effect whatever (which we have contended, in the Porterfield case, cannot be done), it must relate to the acquisition of the title to real property or of an interest therein. That is the only reasonable significance that can attach to the language of sections 1, 2 and 3.

This is emphasized by the language of section 7, which refers to the escheat of "any real property hereafter acquired in fee in violation of this act." It is accentuated by the language of section 8, which relates to the escheat of "*any leasehold or other interest in real property less than the fee*, hereafter acquired in violation of the provisions of this act," and by the concluding sentence of section 8, which refers to the escheat of shares of stock or the interest of any member of a company, association or corporation, that such escheat shall be enforced in the same manner as provided for an escheat "of a leasehold or other interest in real property less than the fee."

A further index of the purpose of the statute is afforded by the language of section 9, which avoids "every transfer of real property or of an interest therein, though colorable in form."

Finally, the penal provision contained in section 10 refers to a conspiracy "*to effect a transfer of real property, or of an interest therein.*"

THE NATURE OF THE CONTRACT TO WHICH THE STATUTE IS TO BE APPLIED.

The cropping contract set forth in the bill of complaint does not constitute a transfer of real property. Consequently, unless it constitutes a leasehold or creates an interest in the real property therein described, it does not come within the purview of the act, and the threats of the defendants to escheat the property and to prosecute the appellees for a crime, or to avoid the instrument, would interfere with the appellees' constitutional and contractual rights and justify the injunction issued by the district court.

The terms of the cropping contract clearly indicate that it neither creates a leasehold to Inouye nor confers upon him an interest in the land belonging to O'Brien. It is in its essence a contract of employment. It contains not a single word or phrase essential to the creation of a lease. It does not convey or transfer any land to Inouye. It does not provide for the payment by him of any rent. It does not give to him the general possession of the land, but, on the contrary, the general possession is reserved to O'Brien, the owner. It does not confer upon him the ownership of the crops growing on the land. It does not even provide that he shall give to the owner any part of the crops produced. On the contrary, O'Brien, the owner, is to compensate Inouye for his labor and services, by giving to him one-half of the crops grown on the land, and in order to avoid any

possibility of a misinterpretation the instrument merely permits Inouye to work the land and provides that he shall have no interest or estate whatsoever in it. There is not a word which would justify an inference that the contract was anything else than a contract for personal services rendered by Inouye. Nor does it by its terms inure to or bind his personal representatives or assigns. From the beginning to the end of the document the relation between the parties as that of employer and employee is meticulously maintained.

One would suppose from a mere perusal of the contract and this analysis of its terms that the Alien Land Act has no application to it. Yet, in view of the insistence of the appellants that it does apply and of the great importance of the decision of this case to landowners in California and to those lawfully within the State of California who desire to exercise their constitutional right of earning their livelihood by performing legitimate agricultural labor, whom the appellants seek to deprive of that right, we venture to refer the court to some of the many decisions rendered in the various states of the Union that have adjudged that contracts of this character do not constitute leaseholds and do not confer an interest in land.

THE CONTROLLING CANONS OF INTERPRETATION.

Preliminarily, however, it is important to advert to the circumstance that to sustain the appellants' contention would involve the escheat of O'Brien's property—a forfeiture—and the imprisonment or fine, or both fine and imprisonment, of both O'Brien and Inouye under the penal provisions of the act.

It is proverbial that the law abhors a forfeiture. It is equally one of the canons of statutory interpretation that a penal law is to be strictly construed, and that, irrespective of what may be conceived to have been the possible purpose of the legislature, it is only when it has defined that purpose in clear, explicit and unmistakable terms, that property may be forfeited or imprisonment or fine inflicted for an act done or omitted.

Statutes in derogation of common law rights (*Meister vs. Moore*, 96 U. S. 79; *Shaw vs. North Pennsylvania Ry. Co.*, 101 U. S. 565; *Texas etc. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, 437; *Thompson vs. Thompson*, 218 U. S. 618) and all statutes of a penal nature, whether civil or criminal, must be construed strictly in favor of those whom they affect, irrespective of whether the penalty is forfeiture of property, fine, or imprisonment.

Fairfax vs. Hunter, 7 Cravath 625; *U. S. vs. Wiltberger*, 5 Wheat. 96; *U. S. vs. Baltimore etc. R. R. Co.*, 222 U. S. 8; *Huntington vs. Attrill*, 146 U. S. 657; *Diversey vs. Smith*, 103 Ill. 378, 390; *Bell vs. Farwell*, 176 Ill. 489; *Drew vs. Russell*, 47 Vt. 250, 253; *Gardner vs. N. Y. etc. R. Co.*, 17 R. I. 790, 791.

If the acts alleged do not come clearly within the prohibition of the statute, its scope will not be extended to include other offenses than those which are clearly prescribed and provided for; and if there is a fair doubt as to whether the act charged is embraced in the prohibition, that doubt is to be resolved in favor of the defendant.

U. S. vs. Hartwell, 6 Wall. 396; *Harrison vs. Vose*, 9 How. 378; *Erbaugh vs. U. S.*, 173 Fed. Rep. 433; *Chase vs. Curtis*, 113 U. S. 452; *United States vs. One Cadillac-Eight Automobile*, 255 Fed. Rep. 173; *The Ben R.*, 134 Fed. Rep. 784; *People vs. Craig*, 195 N. Y. 190; *Western Union Telegraph Co. vs. Axtell*, 69 Ind. 199; *State vs. Peabody*, 103 Me. 327.

THE LAW AND DECISIONS RELATING TO CROPPERS AGREEMENTS.

Working agricultural land on shares has been for many years a prevalent practice in all parts of the country and has given rise to many decisions. Whatever differences may have existed at an earlier period as to the effect of cropping contracts, the law is now well settled, and unless the provisions of the agreement clearly indicate an intent to create a leasehold or to confer an interest in land on which the work is to be done, the relation between the owner of the property and the person cultivating the land is regarded as that of employer and employee.

In 1 Washburn on Real Property, 5th edition, page 604, the author says:

"There is a mode of letting lands, not unusual in the country, where the tenant is to cultivate them, and share the crops with his landlord. In respect to these tenancies, many of the ordinary rules heretofore explained do not apply, and the rights of the parties, moreover, depend much upon the particular terms of their agreement. Thus, if it amounts only to an agreement on the part of the one who is to do the labor to take charge of and manage the land on shares, it is not regarded as a lease, but more in the nature of a payment for services rendered by a part of the crops raised. In order to constitute a lease, the occupant must have an interest in the soil and freehold. So it is said, a letting of lands upon shares, if for a single crop, is no lease of the land, and the owner alone must bring trespass for breaking the close. And the same rule prevails if it be for successive crops."

In 2 Reeves on Real Property, section 564, the author says:

"He who goes on the property of another by virtue of no authority or contract, except one by which he is to farm the land and divide the products with its owner, cannot establish the requisites of a tenancy for years as explained in the last preceding paragraph. He is there merely for a temporary purpose—to produce a crop for himself and the owner of the land. His possession, moreover, closely exemplifies, in the law of today, the original status of temporary holders or farmers of real property. He may be called the last survivor of the ancient theory that made such holders bailiffs or servants; and his contract with the landowner merely to cultivate on shares has not yet (as a rule) been held sufficiently strong and comprehensive in itself to make him a tenant. The relationship between the two is that of master and servant; and, as the crops grow, which are ultimately to be divided, they are, according to the weight of authority, owned by them as co-owners—in most states of this country today as tenants in common—in the proportions fixed by their agreement."

In Jones on Landlord and Tenant, section 49, the author lays down the rule that if one hired to work land, receiving for his compensation a part of the produce, he is a cropper, and not a tenant, having no interest in the land but receiving his share as the price of his labor. "The possession is still in the owner of the land, who alone can maintain trespass, nor can he distrain, for he does not maintain the relation of landlord and tenant."

In Warvelle on Ejectment, section 26, dealing with the same subject, the author says:

"It is well settled that such an agreement does not create a tenancy of any kind on the part of the cultivator. At best he is only a tenant in common of the crop, which is generally regarded as personalty, and the legal possession of the land is in the owner."

See, also, McAdam on Landlord and Tenant, 4th ed., sec. 45.

In 17 Corpus Juris, title "Crops," p. 382, we find the following statement, abundantly supported by authorities from many of the states:

"Sec. 9. A. Definition. A cropper is one who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor.

"Sec. 10. B. Existence of Relation. The intention of the parties as expressed in the language they have used, interpreted in the light of the surrounding circumstances, controls in determining whether a given contract makes the cultivator a cropper. If the language used imports a present demise of any character by which any interest in the land passes to the occupier, or by which he obtains the right of exclusive possession, the contract becomes one of lease, and the relation of landlord and tenant is created. If, on the other hand, there is no language in the contract importing a conveyance of any interest in the land, but by the express terms of the contract the general possession of the land is reserved by the owner, the occupant becomes a mere cropper.

"Sec. 11. C. Rights and Liabilities. In General. A cropper's contract gives the cropper no legal possession of the premises further than as an employee; the legal possession is in the employer. The cropper is entitled to go upon the land for the purpose of producing, harvesting and dividing the crop, but when this is done his possessory right ceases. Before the division of the crop, the whole is the property of the landlord, and the cropper has no legal title to any part thereof, although in some jurisdictions the parties are held to be tenants in common. When, however, their respective rights in the crop have been adjusted and the cropper's part has been specifically set aside to him the title thereto is in him. Apart from these rules of law, the rights and liabilities of the landowner and the cropper are governed by the terms of the particular contract into which they enter."

One of the early cases in which this subject came up for adjudication is *Caswell vs. Districh*, 15 Wend. (N. Y.) 378. There the plaintiff's testator had agreed to let the defendant have his farm for one year. The latter agreed to sow grain and give the testator certain proportions of the product according to description. The plaintiff proved the quantities raised by the defendant and rested. The defendant contended that the instrument produced was an agreement to work the land on shares, and not a lease securing rent, and that the parties, therefore, were tenants in common in the crops, and that an action for rent of the premises would not lie. The trial court so held, and on appeal to the supreme court the judgment was affirmed in an opinion written by Mr. Justice Nelson, subsequently a member of this court, who said:

"The agreement between the parties was a letting of the premises upon shares, and, technically speaking, was not a lease. There is nothing which indicates that the stipulation for a portion of the crops was by way of rent; but the contrary. The shares were of the specific crops raised upon the farm. It is very material to the landlord, and no injury to the tenant, that this view of the contract should be maintained, unless otherwise clearly expressed, for then the landlord has an interest to the extent of his share in the crops. If it is deemed rent, the whole interest belongs to the tenant until a division. * * *

"This case is clearly distinguishable from that of *Stewart vs. Dougherty*, 9 Johns. R. 108. There the court, from the correspondence between the phraseology of the instrument and the terms usual in leases in the reservation of rent, came to the conclusion that the proportion of the crops specified in the agreement was intended as payment of rent in kind, and that therefore the whole interest belonged to the tenant. If my conclusion be correct,

then the parties were tenants in common in the crops, and as the plaintiff stood in the place of her testator, she was not entitled to sustain her action."

In *Putnam vs. Wise*, 1 Hill 234, the owners of a farm agreed with two persons, by contract under seal, that the latter should occupy and work it for a year, and if they performed, then to have it the same way for a year longer, the occupiers agreeing, in consideration thereof, to yield and pay the owners one-half of all the grain, etc., raised. It was held that until a division, or something equivalent, the parties were tenants in common of the grain; and this though the contract contained the technical phraseology of a lease reserving rent.

Both of these cases were considered in *Bernal vs. Hovious*, 17 Cal. 541. There one Vasques entered into an oral agreement with one Bernal in relation to the use and cultivation of a farm situated in San Mateo County. The agreement was called by the parties a lease. The substance of Vasques' testimony was that he leased the premises to Bernal for three years; that the lease was not in writing, but that by its terms he was to furnish the seed, the farming tools and implements and the wagons and horses, and also the sacks for his share of the grain; that Bernal was to do the work upon the farm and give him for the use of the land one-third of the grain raised, free from the expense of threshing—his share to be taken after the grain was put in sacks. A question arose as to the ownership of the grain raised on the land, and that depended upon whether the agreement was a lease or a contract to work the farm on shares. It was held that it was the latter and that the parties were tenants in common of the grain until a division was made. Chief Justice Field, subsequently a member of this court, considering these facts, said (p. 545):

"The agreement for the use of the farm, though designated by the parties as a lease, is not one in our judgment. It is a contract for the working of the farm upon shares—Vasques of the one part agreeing to furnish the farming implements, the wagons, the horses and the seed; and Nicholas Bernal, on the other part, agreeing to work the farm, and to give Vasques one-third of the grain after it is put in sacks; and, until a division was made between them, the parties were tenants in common of the grain. The agreement is not materially different from the one in the case of *Caswell vs. Districh* (15 Wend. 379). * * * The case of *Putnam vs. Wise* (1 Hill 235) is a much stronger case than the one at bar, and is conclusive of the point that Vasques and the plaintiff were tenants in common of the grain to be divided. In that case the agreement was under seal, and contained the phraseology of a lease reserving rent. Its language was that the parties of the first part 'do by these presents lease, and to farm let' the premises, and that the parties of the second part covenant, in consideration of the use of the land, to 'yield, pay and give one-half of all the grain raised by them' on the farm; and the court said: 'It is a case in which we ought not to tie ourselves up to the consideration of mere words. The substance should be looked at; and that, as it would be universally understood among farmers, is an agreement between owners and occupants, that the latter should come in rather as servants than tenants; each party taking an interest as common owners in the crops and other products, as they accrue, by way of compensation to the owners for the use of their farm, and the occupiers for their labor.' (Vid. *Maverick & Lewis vs. McCord*, 211.) * * * To the same effect is the case of *Dinehart vs. Wilson* (15 Barb. 595). There the agreement was in the form of a lease, the tenant to deliver to the lessor a certain portion of each crop; and it was also held, the court resting its decision upon the case *Putnam vs. Wise*, that

until a division was made the parties were tenants in common of the crops. (See, also, *Harrower vs. Heath et al.*, 19 Barb. 331.)"

In *Walls vs. Preston*, 25 Cal. 59, the contract not only used the word "lease" as descriptive of the arrangement between the parties, but it also provided for the payment of a rental by the person to whom the lease was given, in the form of the delivery to the owner by the lessee of one-sixth of the crop. After considering the cases the court said:

"The two principles deducible from those cases are these: First—If the agreement contains terms which by themselves would import a lease, and other terms which provide for a division of the crops, and it is doubtful which it is—a lease or a cropping contract—it will be deemed a cropping contract, by reason of a division of the crops; and second, where the agreement provides for a division of the crops between the owner and occupant, they are held to be tenants in common of the crop. It cannot be maintained, upon those authorities, and certainly not upon principle, that a lease, in the usual form of a demise, for a term of years, with covenants sufficient to give the lessee the exclusive possession of the land during the time, and to require him to yield up the possession at the end of that term, shall not be a lease, and the occupant shall not be a tenant, but shall be a mere servant of the owner, because the parties have made provisions for a division of some portion or all of the crops that may be produced."

In *Clarke vs. Cobb*, 121 Cal. 595, 54 Pac. Rep. 74, a contract was made whereby one of the parties agreed to farm land let to him for a term of years and to give annually for the use thereof a certain portion of the products grown thereon. It was held to be a lease and not a cropping contract, and the portion of the product to be delivered to the landlord when gathered was regarded as rent. The court said:

"At the threshold of this investigation, it becomes important to determine the legal status of the contracts entered into with Cobb by Clarke and his executors. That these contracts were leases, that the conventional relation of landlord and tenant existed between the parties, and that the grains and fruits to be delivered to the landlord when gathered and harvested were rent, we are entirely satisfied. Rent is a compensation paid for the use of land. It need not be money. Any chattels or products of the soil serve the purpose equally as well. These contracts are in no sense cropping contracts. The single difference differentiating them from ordinary conventional leases is that the rent is to be paid in products of the soil, after harvest, rather than in money. But such difference is wholly immaterial as changing the character and aspect of the instruments. It is substantially conceded that the landlord and tenant are co-tenants in the land, but it is claimed that they are co-tenants in the crops to be raised. The authorities of this state recognize that such conditions may exist. (*Bernal vs. Hovious*, 17 Cal. 544; *Walls vs. Preston*, 25 Cal. 59.) But we find no apt words here to disclose such a status. When it is established that a certain contract is a lease and that the relation of landlord and tenant exists between the parties, there must be some appropriate words in the contract to indicate that the crops raised on the lands are to be held in co-tenancy, or such will not be the conclusion reached. If there is nothing in the language to indicate that intention, then the products to be delivered to the landlord, after harvest, by the tenant, will be deemed the property of the tenant until that time, and treated as rent to be then paid. * * *

This court held in *Bernal vs. Hovious*, *supra*, that the contract under consideration in that case was a cropping contract; and, of course, when such is the fact, the title to the products of the land necessarily vests in both

parties, for the relation of co-tenancy is created. The facts of that case are broadly different from the facts here presented."

It is well to pause here for the purpose of contrasting the language of the contracts in *Walls vs. Preston* and *Clarke vs. Cobb* with that of the instrument in the case at bar. Here the contract contained no words of demise, no reference to a lease. The crops belonged to O'Brien and not to Inouye. The latter was merely an employee, who received a share of the crops produced, from O'Brien, the owner of the land, as compensation. It was expressly stipulated that O'Brien was to have the general possession of the land, and that Inouye was to have no interest or estate in it whatsoever. The element of a lease and of rent is entirely absent, but that of employment and compensation is paramount.

The fundamental idea of the California decisions is based on the principle laid down in *Caswell vs. Districh*, *supra*. Later New York cases clarify the doctrine to a marked degree.

Thus, in *Taylor vs. Bradley*, 39 N. Y. 129, Judge Woodruff said (p. 139):

"Parties are certainly at liberty to define and establish their legal relations by the use of terms legally appropriate to the object; and it is not clear to my mind that courts should not give effect thereto, according to their understood legal meaning.

"Hence, when A agrees with B that he will employ B, with his team, etc., upon his farm, *whether for one year or five*, leaving B at liberty to cultivate such fields, and plant such crops as he shall see fit, with just regard to what good husbandry requires, and to pay B for his work, labor and services one-half of the crops raised—it is obvious that the parties intend an agreement for work, labor and services, to be paid for by A in a share of the results.

"On the other hand, if A should demise, lease and let the farm to B, to have and to hold for the term of one or five years, to be cultivated in a husbandlike manner, rendering and paying to A an annual rent for the use of the farm, to-wit, one-half of the crops raised—I perceive no sensible reason why the parties should not be deemed to intend an actual and technical lease, which would entitle the lessee to *possession*, give him a *term* in the land, make his payment *rent* in the technical sense. It may well be inferred from this language, contradistinguished from the other, that here it was intended that the tenant should have exclusive possession and the whole ownership for the term, subject only to his duty to pay the rent as it accrued."

The case at bar is much stronger for the appellees than the first illustration just quoted, for here O'Brien, the owner, was to furnish all necessary tools, farming implements, tractors and the oil and gasoline for the operation thereof, horses and horse feed, for the planting, cultivating and harvesting of the crops during the term of the agreement, and to furnish any and all things necessary for the proper farming of the land for the purposes in the agreement set forth (Rec., p. 7), and was to haul the crop when properly prepared by Inouye for hauling and shipping to the packing house; while in the case supposed, the team and appliances were to be supplied by the cultivator of the land.

In *Unglish vs. Marvin*, 128 N. Y. 380, the parties entered into an oral contract, by which the plaintiff agreed to occupy seven or eight acres of defendant's farm for a period of five years. The defendant was to furnish for plaintiff's use and occupancy the house and garden on the premises, the lower part of the barn, pasture for a horse and cow, and straw for feed and bedding, and the use of a horse in the busy season; to prepare so much

of the ground as he might conclude to be desirable for the reception of plants and bushes, furnish one-half the sets of plants and bushes, pay one-half the cost of picking the small fruits and berries, and build a dry-house. The plaintiff was to furnish half the sets of plants and bushes, plant the small fruits, various kinds of berries and currants, to hoe and care for the berries then on the place, cultivate and care for the plants and bushes to be set out, to pick the berries and currants when ripe, market and sell them, to dry and sell the remainder, and to divide the rest, less cost of picking, equally between himself and the defendant. The court said:

"The relation of landlord and tenant in any form was not created either by the agreement itself or in consequence of any occupancy under it," citing *Taylor vs. Bradley*, *supra*, and *Reynolds vs. Reynolds*, 48 Hun. 142.

In *Reynolds vs. Reynolds*, just referred to, the defendant agreed, in writing, to permit the plaintiff for the term of five years to work his farm. The plaintiff agreed to perform all the work and labor on the farm during that period and to conduct the farm in a first-class manner. Each of the parties was to furnish one-half of the seed required and the grain produced was to be equally divided. Both parties were to reside on the farm in separate houses. Presiding Justice Barker said (48 Hun. 144):

"By this agreement the legal relation of landlord and tenant was not created. The parties to the agreement became tenants in common of the grain and the other products of the farm produced by the labor and care of the defendant. * * * It is now well settled by all the more recent decisions, that the form of the agreement is not controlling in determining whether the relation of landlord and tenant has been created; that it is the substance of the contract which determines its legal character. In the division of property growing crops are classed as personal property, and they may be sold on execution and the title thereto transferred by a parol agreement, and as between the heirs at law and the personal representatives of a deceased person, the latter take title."

To the same effect are:

Vaughn vs. De Wandler, 63 How. Pr. 380; *Booher vs. Stewart*, 75 Hun. 214; *Matter of Estate of Ellis*, 78 Misc. Rep. 589.

In *Stall vs. Wilbur*, 77 N. Y. 158, it was held that growing crops are not part of the real estate upon which they are growing, but are personal property. This decision was approved in *Sexton vs. Breese*, 135 N. Y. 391, and in *Crosby vs. Woleben*, 149 App. Div. 338.

That the relation of landlord and tenant will not be implied was recognized by this court in *Wiggins Ferry Co. vs. Ohio and Mississippi Ry. Co.*, 142 U. S. 396, 407, where Mr. Justice Brown, referring to that relation, said:

"Such relationship will never be implied when the acts and conduct of the parties are inconsistent with its existence. In *Carpenter vs. United States*, 17 Wall. 489, 493, it was held by this court that no reason for the implication of a tenancy existed, 'when an express contract or an arrangement between the parties shows that it was not intended by them to constitute the relation of landlord and tenant, but that the occupation was taken and held for another purpose.'"

In *Taylor vs. Donahoe*, 125 Wis. 513, 103 N. W. Rep. 1099, a contract provided that the defendant should cultivate land belonging to one subsequently becoming a garnishee, raise crops, and care for the stock for a certain "term of service"; that certain expenses should be shared between the parties; that the defendant should furnish certain stock and seed, should perform the work in a faithful and husbandlike manner, and receive

in full compensation for his services one-third of all the produce of the farm; possession of the premises and title to the crops until divided were to remain in the garnishee, and it was declared that defendant was to be merely an employee. It was held that he was a cropper and not a tenant, so that ownership of the entire crop prior to division was in the garnishee. Referring to these facts Mr. Justice Winslow said:

"If a tenant, he owned the crop; if a cropper, Donahoe owned it, and was entitled to dispose of it. The distinction between a tenant and a cropper is that the tenant has an estate in the land for a given time, and a right of property in the crops, and hence makes the division thereof between himself and the landlord in case of an agreement upon shares, while a cropper has no estate in the land, nor ownership of the crops, but is merely a servant, and receives his share of the crops from the landlord, in whom the title is. * * * It is always a question of construction of the agreement under which the parties are acting. The agreement in question here seems to us to be very clear and definite upon the subject. It nowhere refers to Finnegan as a tenant, but specifically refers to his work as 'service,' and expressly provides that Donahoe shall pay him for his services by certain shares of the crops, and that possession of the land and ownership of the crops are to remain in Donahoe, and that Finnegan is merely to be an employee in the tilling of the land and caring for the stock. Language could hardly be plainer or more appropriate for the purpose of creating a cropper arrangement. The fact that Finnegan was to put some stock on the place and furnish certain seed and tools, and was given the right to use certain rooms in the house, cannot reasonably be considered as changing the relation between the parties, in the face of the definite and certain clauses of the agreement."

In *Guest vs. Opdyke*, 31 N. J. Law, 552, and *State vs. Jewell*, 34 N. J. Law, 259, the doctrine of *Caswell vs. Districh*, *supra*, was adopted; and in *State vs. Reynolds*, 67 N. J. Law, 169, 50 Atl. Rep. 670, a contract with the owner of a farm to cultivate it for a certain period for a specified share of the crop was held not to create the relation of landlord and tenant although the contractor occupied the farm buildings while so employed. Mr. Justice Gummere said:

"It is apparent from a reading of it that this agreement does not constitute a lease. It is a contract for the farming of the land and a division of the proceeds, and nothing more. That such an agreement does not constitute the relationship of landlord and tenant between the parties has been frequently decided. * * * Assuming that, under this agreement, Gray is by implication entitled to the use of the buildings thereon during the period covered by it, his occupation of it is a mere remuneration in part for his services, and does not create him a tenant."

The following cases further recognize the doctrine for which we contend:

Ferris vs. Hoglan, 121 Ala. 240, 25 So. 834; *Gray vs. Robinson*, 2 Ariz. 24, 33 Pac. Rep. 712; *Hammock vs. Creekmore*, 48 Ark. 264; *Maltbie vs. Olds*, 88 Conn. 633, 637, 92 Atl. Rep. 403; *Williams vs. Clever*, 4 Houston (Del.) 458; *Bryant vs. Pugh*, 86 Ga. 625, 12 S. E. Rep. 927; *Alwood vs. Ruckman*, 21 Ill. 200; *Pittsburgh, C. & St. L. R. Co. vs. Thornburgh*, 98 Ind. 201; *Garger vs. Fee*, 140 Ind. 572, 39 N. E. Rep. 93; *Wood vs. Garrison*, 23 Ky. Law, 295, 62 S. W. Rep. 728; *Haywood vs. Rogers*, 17 N. C. 320; *Harrison vs. Ricks*, 71 N. C. 11; *Steele vs. Frick*, 56 Pa. St. 172; *McCormick vs. Skiles*, 163 Pa. 590; *McCutchen vs. Crenshaw*, 40 S. C. 511, 19 S. E. Rep. 140; *Webb vs. Garrett*, 30 Tex. C. App. 240, 7 S. W. Rep. 992; *Mead vs. Owen*, 80 Vt. 273, 67 Atl. Rep. 722; *Parrish vs. Commonwealth*, 81 Va. 1.

SOME OF THE DECISIONS CITED FOR APPELLANTS.

The case of *Smith vs. Schultz*, 89 Cal. 526, 26 Pac. Rep. 1087, cited for the appellants, grew out of a contract in which the parties of the second part, "their heirs, executors and assigns," "granted, demised and let" a certain ranch for three years with the privilege to the second parties to keep hogs thereon until a certain day succeeding the expiration of the lease. The second parties were to plant certain crops and make improvements, the first party to furnish all farming implements, seeds and materials and make certain improvements. The increase of certain hogs and fowls belonged to the first party, and certain crops were to be divided in certain proportions, the sales to be made only upon "mutual consent." The first party could re-enter in case of default in any of the covenants by the second parties, but if such covenants were performed then the second parties might during such term hold the premises without hindrance from the first party "his heirs and assigns." That was clearly a contract of lease. On its face it was expressly assignable. The conventional relation of landlord and tenant existed. In every respect the contract there covered was in direct contrast with that in the case at bar.

Dixon vs. Nicolls, 89 A. D. (Ill.) 312, was a case where a tenant had exclusive possession of the premises and agreed to pay rent in the form of a portion of the crop, all of which indicated that the parties intended to create the relationship of landlord and tenant.

In *Ferris vs. Hoglan*, 25 So. Rep. 834, an agreement giving the right to cultivate a vineyard referred to the person to whom it was given as "the lessee," who was to take a reasonable compensation from the proceeds of the sale of the crop and return the balance of the proceeds to the owner. Nevertheless this was held to constitute a contract of employment, and not of lease.

There is nothing in the cases of *Strangeway vs. Eisenman*, 71 N. W. Rep. 617, and *McNeal vs. Ryder*, 81 N. W. Rep. 830, cited for appellants on pages 43-46 of their brief, which militates against our contention.

It would seem, however, to be unnecessary to enter upon an elaborate analysis of the decisions or to multiply the citation of authorities in support of the doctrines as laid down in the vast majority of cases bearing on the subject of the relation of a cropper to the owner of property which he cultivates, because of the virtual concession of appellants on pages 19-22 of their brief. There the distinction between a cropper and a lessee, as laid down by the authorities on which we rely, is unqualifiedly recognized.

THE APPELLANTS' ARGUMENT BASED ON THE TERMS OF THE CONTRACT.

(1) An effort has been made by appellants to disregard the clear and express terms of the agreement and to contort it into the very converse of what that language declares and shows it to be. The facts, that it is an agreement for employment; that the owner is to furnish the tools, implements, supplies and horses with which Inouye is to do his work; that it is provided that the cropper shall have no interest or estate whatsoever in the land; that the latter is to receive his compensation from the owner for the labor and services rendered, in the form of a share of the crops; that the general possession of the land is reserved to the owner; that Inouye is to perform the duties specifically described, all of which represent labor and service performed by him—are swept to one side, or are dismissed with the statement that similar provisions might have been put into a lease, which, with respect to the substantial and controlling provisions,

would have resulted in an incongruity. In their present setting all of the clauses are consistent and harmonious.

(2) Thus, for illustration, let us refer to paragraph I (Rec., p. 8), wherein the cropper agrees "after the execution and delivery of the agreement and at the proper time to plant, cultivate and harvest the following specified crops: strawberries, raspberries, loganberries and vegetables, in a good and farmerlike manner." Appellants' counsel says that, by this provision, the cropper is given discretion as to any crops to be planted, and that no such discretion is given to the owner with the exception of the particular crops above specified.

This is a rather confusing statement. The cropper unqualifiedly agrees to plant, cultivate and harvest specified crops, to do it in a good and workmanlike manner, and at the proper time. There is not a word in this paragraph, or elsewhere, which gives the cropper any discretion as to what crops should be planted. He is expressly told by the owner exactly what crops he shall plant, cultivate and harvest, and how and when he shall do it. He is given no discretion whatsoever in any particular; whereas the owner, by the provisions of the contract, directs, in precise terms, what the cropper, as his employee, is obliged to do.

What has been said of paragraph I is equally true of paragraphs J, K and L (Rec., p. 8).

(3) Appellants, however, direct the weight of their criticism to paragraphs A and H (Rec., pp. 6, 7), upon which Judge Bledsoe likewise comments, although he recognizes the provision in paragraph E, which provides that the cropper shall have no interest or estate whatsoever in the land described in the contract, as being portentous and controlling, and as operating as an estoppel against any claim by Inouye that he had any right in the land (Rec., p. 30).

Regardless of the conclusive answer thus made to the contention based on paragraphs A and H, and of the fact that the contract, read as a whole, eloquently answers the suggestion that it confers an interest in land, we will briefly advert to the two paragraphs particularized.

(4) In paragraph A the owner agrees to employ the cropper and not to interfere with him in the planting, cultivating and harvesting of the crop in any way, and to protect the cropper during the existence of the contract against interference by any person whatsoever, the paragraph ending with the clause: "the general possession of the land above described being reserved to owner" (Rec., p. 6).

The meaning of this provision, in the light of the authorities, is clear. The cropper being a mere employee and the general possession of the land being reserved to the owner, the cropper has no right of action against a trespasser who seeks to interfere with him while engaged in his work. Nor could he maintain an action of trespass against his employer were he to prevent the cropper from planting, cultivating and harvesting the crop upon which the compensation which he is to receive for his labor depends.

It is well settled that a cropper may not maintain trespass or ejectment for a wrongful entry upon the premises on which he carries on his work. That was decided in the early case of *Bradish vs. Schenck*, 8 Johns. 151, on the authority of *Hare vs. Celey*, Cro. Eliz. 143, the court saying:

"Letting land upon shares, if for a single crop, is no lease of the land, and the owner alone must bring trespass for breaking the close."

In *Decker vs. Decker*, 17 Hun. 14, 15, this subject was fully considered in the light of the authorities.

Of course, if the cropper cannot maintain an action against a trespasser

who should seek to interfere with the doing of his work, especially where his compensation is based upon the results attained, then it is but natural that the owner of the property, who has the right to maintain an action for trespass, shall protect the cropper against interference. For the like reason an agreement on his part that he himself will not interfere with the cropper in the planting, cultivation and harvesting of the crop is merely an assurance of what a court would imply without an express provision, that one employing another on a contingent basis is to do nothing to interfere with the performance by the employee of his contract and the earning of his compensation measured by the results of his labor.

Paragraph I, already considered, shows, however, that the nature of the planting, cultivating and harvesting which is to be carried on by the cropper is carefully prescribed by the owner.

(5) Paragraph G (Rec., p. 7) has also been adverted to as creating an interest in the land. Having stipulated in paragraph F to give the cropper fifty per cent of all crops grown on the land during the period of the agreement as compensation for his services and labor, the cropper is given the right to divide the crop after it is harvested and before its removal from the land. That is an option which the cropper may waive. If the cropper exercises the option he is given a reasonable time to remove his share of the crops thus given him within a reasonable time, even though it should extend beyond the terms of his employment. This is merely an abundance of caution. It is believed that without such consent the cropper could not be a trespasser were he to remove his part of the crop after his employment had ended.

(6) So far as paragraph H is concerned, the employer agrees that the cropper in carrying out his agreement may employ "such agents or employees as he shall see fit, and to give to such agents or employees free ingress or egress from said property, or the right to live thereon, without let or hindrance." (Rec., p. 7.) This merely means that the cropper may, at his own expense, if he finds it desirable, employ others to help him in performing the work which he has to do, and that such employees are not to be prevented from having access to the property or from living upon the property in connection with the work which they are to perform. Certainly nobody can pretend that this provision gives to these agents or employees an interest in the land.

The situation would be precisely the same if O'Brien had been the owner of a clay bed and Inouye had been employed by him to make bricks out of the clay, his compensation to be paid by O'Brien in the form of a percentage of the price realized for the bricks, Inouye being permitted to employ such assistance as he desired under a clause precisely like that which we are now considering. Would anybody contend that this gave him an interest in the land, or that such a provision as paragraph H would in any way tend to create such an interest? Could a Japanese brickmaker be constitutionally deprived of the opportunity to earn his livelihood, by converting the clay-bank into bricks, even had this statute (which it has not) declared that his contract created an interest in land? If he could, then he might with equal right be prohibited, under pains and penalties, from working in a mine under a contract, because it would be an agreement in respect to land.

If the brickmaker and the miner would not and could not come within the purview of this statute, on what theory can the state prohibit a cultivator of land under a cropper contract, such as that now under discussion, from working under such a contract?

In all these instances, the brickmaker, the miner and the cropper, though

working on the land and deriving compensation from their employment dependent on the productivity of their labor, have no "interest in the land," as such—in the sense in which that term has been always understood.

(7) The two concluding provisions of the contract (Rec., pp. 8, 9) are in every way consistent with a contract of employment. The owner, having agreed to employ the cropper for a period of four years, reserves the privilege of terminating the agreement in the event that he should sell the land on which the cropper is to plant, cultivate and harvest crops. A measure of compensation, in lieu of that specified in the previous part of the contract, is stipulated for in the event that the owner should exercise his option to terminate the agreement. The amount to be paid is expressly described as paid to the cropper "for his own services" for a specified period, "together with all moneys expended or incurred by said cropper for and on account of labor and materials furnished for the planting and cultivation of the crop or crops then growing on the land."

The clause with regard to the payment of damages by the owner to the cropper, in the event that the former should commit a breach of the contract, is likewise consistent with a contract of employment, and has been inserted in the contract as fixing the measure of damages in such a case, a subject which has received consideration in many cases and especially in *Taylor vs. Bradley*, 39 N. Y. 129, and which ordinary prudence would induce the parties to exclude from the domain of uncertainty and controversy.

II.

THERE IS NO MERIT IN THE SUGGESTION OF THE APPELLANTS THAT THE ACT UNDER CONSIDERATION IN ANY MANNER EFFECTED A CHANGE IN THE PRINCIPLES CONTROLLING A CROPPER'S CONTRACT AND ITS LEGAL EFFECT SO AS TO CONVERT IT INTO A LEASE AND A TRANSFER OF AN INTEREST IN LAND AND THUS MAKE IT THE BASIS OF A FORFEITURE AND A CRIMINAL PROSECUTION.

We do not acquiesce in the proposition, asserted on page 24 of the appellants' brief, that no one is entitled to acquire the title to land without the permission of the state. A general prohibition by the state of the right to sell or acquire the ownership of land would deprive the owner or the intending purchaser of his liberty and property. Within certain limits we may concede that the state may prohibit aliens, as a class, to acquire the title to real property. The limitations upon such prohibition are discussed in our brief in *Porterfield vs. Webb*.

We contend, however, that the state cannot prohibit the owner of property from cultivating it by means of employees of his selection, irrespective of whether such employees are citizens or aliens, and regardless of their racial stock. One would suppose that there could be no contention to the contrary since the decision in *Truax vs. Raich*, *supra*.

The state has no such dominion over any property within its boundaries, whether it be used for agricultural or other purposes, as to limit the owner in the selection of the agencies by which he may desire to utilize his land or as to the method by which such agencies shall be paid, whether it shall be in money or in the product of the land, whether upon a daily or weekly wage basis, or whether the compensation shall be measured by a specified share or percentage of the product of the labor performed. No fancied distinction, based on the alienage of the employee, can interfere with that right of the owner of the property; nor can it interfere with the right of the alien employee to earn his livelihood by means of his labor in an honest employment, whether it be in a factory, a workshop, or in an agricultural pursuit.

The State of California cannot, as a sovereign, say to an owner of land within its jurisdiction, that he is required himself to cultivate his land, that he shall not permit an alien to cultivate it for him, or that he is required personally to act as the manager of the operations conducted upon his farm.

The state cannot even exclude aliens from its territory. That is exclusively within the jurisdiction of the Federal Government. It is conceded that the latter may so shape its immigration laws as to forbid the entry into the country of all aliens. So long as it has not done so, however, the state cannot, without violating the Federal Constitution, make it criminal for a farmer to employ any alien whatsoever, who has been lawfully admitted into the United States, or for any alien, so admitted, to enter into the employ of a farmer under a contract such as that which O'Brien and Inouye have negotiated in the case at bar and which they are desirous of performing.

Appellants are forced to concede that the farmer may employ "an ineligible alien" to work for him, and yet that concession is coupled with the condition that he may not work for him under a cropping contract of a character which has been recognized not only as valid, but commendable, in most of the states of the Union, and which, up to the present time, has never been questioned anywhere. If the State of California had regarded such a contract as an evil, it would have been a very simple matter to have used appropriate language in the statute to forbid a landowner or an alien from entering into such a contract. But it refrained from doing so.

A failure to express what it would have been easy to say is significant and frequently decisive.

U. S. vs. Chase, 135 U. S. 259; *National Bank vs. Matthews*, 98 U. S. 627; *Thompkins vs. Fort Smith Ry. Co.*, 125 U. S. 127; *Tillson vs. U. S.*, 100 U. S. 46; *Baltimore R. R. Co. vs. Grant*, 98 U. S. 403; *U. S. vs. Detroit First Natl. Bank*, 234 U. S. 262.

The fact that the authorities are at one in declaring that such an agreement as that in the case at bar is one of employment and does not confer an interest in land shows beyond a doubt that there is nothing in this statute which amounts to an exercise by the state of that dominion which appellants are seeking to ascribe to it. It would certainly put the state in a most unenviable light, however, if it permitted cropping contracts like the present between citizens or between a citizen and an alien German, Russian, Hungarian, Bulgarian, Italian, Spaniard, Parsee or Syrian, and forbade such a contract between a citizen and a subject of Japan.

The criticism made of Orientals who cultivate farms is not that they are incompetent, that they prevent the land from being productive, that their methods of tilling the soil are inadequate or wasteful, that they are indolent or careless or negligent, but, on the contrary, that they are too industrious, too intensive and too efficient, and that they have increased the productivity of the land on which they are employed.

Until the State of California, in a statute couched in clear and unambiguous language, has declared that a citizen-owner of agricultural lands and a Japanese admitted to the United States are to be penalized for entering into such a cropping contract as that which we have before us, it is not to be presumed that it intended, by the act of 1920, to accomplish a result so startling in its consequences. Even a sovereign state when it lays down a new policy, or seeks to create a new crime, must say what it means in unmistakable language.

III.

It is respectfully submitted that the order of the district court should be affirmed.

LOUIS MARSHALL,
Counsel for Appellees.

3. DECISION OF THE COURT.

(November 19, 1923.)

Mr. Justice Butler delivered the opinion of the court.

This is a suit brought by the appellees to enjoin the attorney-general of California and the district attorney of Santa Clara County from instituting any proceedings to enforce the California Alien Land Law against them.

O'Brien is a citizen and resident of California and owns ten acres of agricultural land in the County of Santa Clara. Inouye is a capable farmer, and is a Japanese subject living in California. O'Brien and Inouye desire to enter into a cropping contract covering the planting, cultivating and harvesting of crops to be grown on the land. They allege that the execution of such a contract is necessary in order that the owner may receive the largest return from the land, and that the alien may receive compensation therefrom; that the attorney-general and district attorney have threatened to and will enforce the act against them if they execute the contract, and will forfeit or attempt to forfeit the land by an escheat proceeding, and will prosecute them criminally for violating the act. They aver that the act is so drastic, and the penalties for its violation are so great, that neither of them may execute the contract even for the purpose of testing its validity and its application thereto; and that, unless the court shall determine the validity of the act and its application, they will be compelled to submit to it, whether valid or invalid, and to the appellants' interpretation of it, and so be deprived of their property without due process of law and denied the equal protection of the laws in contravention of the Fourteenth Amendment.

Appellees applied for an interlocutory injunction. The matter was heard by three judges, as provided in section 266 of the Judicial Code. The injunction was granted and the attorney-general and district attorney appealed.

O'Brien, who is a citizen, has no legal right to enter into the proposed contract with Inouye, who is an ineligible Japanese alien, unless the latter is permitted by law to make and carry out such a contract. At common law, aliens, though not permitted to take land by operation of law, may take by the act of the parties; but they have no capacity to hold against the state, and the land so taken may be escheated to the state. (See *Fairfax's Devisee vs. Hunter's Lessee*, 7 Cranch. 603, 609, 619, 620; *Gouverneur's Heirs vs. Robertson*, 11 Wheaton 332, 355; *Phillips vs. Moore*, 100 U. S. 208, 212; *Atlantic and Pacific Railroad vs. Mingus*, 165 U. S. 413, 431.) In the absence of a treaty to the contrary, the state has power to deny to aliens the right to own land within its borders. (*Terrace et al. vs. Thompson*, .. U. S. ..; *Hauenstein vs. Lynham*, 100 U. S. 483, 484, 488; *Blythe vs. Hinckley*, 127 Cal. 431, affirmed 180 U. S. 333, 340; *In the Matter of Okahara*, decided June 28, 1923, .. Cal. ...) The provision of the act which limits the privilege of ineligible aliens to acquire real property or any interest therein to that prescribed by treaty is not in conflict with the Fourteenth Amendment. (*Terrace et al. vs. Thompson*, *supra*; *Porterfield vs. Webb*, .. U. S. ..; *In the Matter of Okahara*, *supra*.) The treaty between the United States and

Japan (37 Stats. 1504-1509) does not confer upon the citizens or subjects of either in the territories of the other the right to acquire, possess or enjoy lands for agricultural purposes. (*Terrace et al. vs. Thompson, supra; In the Matter of Okahara, supra.*)

By the proposed cropping contract Inouye is given the right for a term of four years to plant, cultivate and harvest crops—berries and vegetables—on the land, and to be free from interference by the owner, who undertakes to protect him during the term against interference by any other person. He is entitled to housing for himself, and is granted the right to employ others to work on the land, and to give them free ingress and egress and the right to live on the land. He is entitled to one-half of all crops grown on the land during the term, to be divided after they are harvested and before removal from the land, and is given a reasonable time after the expiration of the term to remove his share of the crops. He is required to accept his share of the crops as reimbursement for expenditures made to carry on the farming operations, and as his only return from the undertaking. Assuming that the proposed arrangement does not amount to a leasing or to a transfer of an interest in real property, and that it includes the elements of a contract of employment (*In the Matter of Okahara, supra*), we are of opinion that it is more than a contract of employment; and that, if executed, it will give Inouye a right to use and to have or share in the benefit of the land for agricultural purposes. And this is so, notwithstanding other clauses of the contract to the effect that the general possession of the land is reserved to the owner, that the cropper shall have no interest or estate whatever in the land, that he is given one-half of all crops grown as compensation for his services and labor, and that division of the crops is to be made after they are harvested and before their removal from the land.

The treaty grants liberty to own or lease and occupy houses, manufactories, warehouses and shops, and to lease land for residential and commercial purposes. Section 2 of the act extends the privilege to acquire, possess, enjoy and transfer real property or any interest therein only in the manner and to the extent and for the purposes prescribed in the treaty. The treaty gives no permission to enjoy, use or have the benefit of land for agricultural purposes. The privileges granted by the act are carefully limited to those prescribed in the treaty. The act as a whole evidences legislative intention that ineligible aliens shall not be permitted to have or enjoy any privilege in respect of the use or the benefit of land for agricultural purposes. And this view is supported by the circumstances and negotiations leading up to the making of the treaty. (See *Terrace et al. vs. Thompson, supra; Terrace et al. vs. Thompson*. 274 Fed. 841, 844, 845.) As applied to this case, the act may be read thus: "Ineligible aliens may own or lease houses, manufactories, warehouses and shops, and may lease land for residential and commercial purposes. These things, but no possession or enjoyment of land otherwise, are permitted."

The terms of the proposed contract, the measure of control and dominion over the land which is necessarily involved in the performance of such a contract, the cropper's right to have housing for himself and to have his employees live on the land, and his obligation to accept one-half the crops as his only return for tilling the land clearly distinguish the arrangement from one of mere employment. The case differs from *Truax vs. Raich*, 239 U. S. 33. In that case a statute of Arizona making it a criminal offense for an employer of more than five workers, regardless of kind or class of work or sex of workers, to employ less than eighty per cent native born citizens of the United States was held to infringe the right, secured by the Fourteenth

Amendment, of a resident alien to work in a common occupation—cooking in a restaurant. The right to make and carry out cropper contracts such as that before us is not safeguarded to ineligible aliens by the Constitution. A denial of it does not deny the ordinary means of earning a livelihood or the right to work for a living. The practical result of such contract is that the cropper has use, control and benefit of land for agricultural purposes substantially similar to that granted to a lessee. Conceivably, by the use of such contracts, the population living on and cultivating the farm lands might come to be made up largely of ineligible aliens. The allegiance of the farmers to the state directly affects its strength and safety. (*Terrace et al. vs. Thompson, supra.*) We think it within the power of the state to deny to ineligible aliens the privilege so to use agricultural lands within its borders.

The decision of the supreme court of California in *In the Matter of Okahara, supra*, a *habeas corpus* case, does not support the appellees' contention. In that case an ineligible Japanese was held on a warrant charging him with conspiracy to effect a transfer of real property in violation of section 10 of the Alien Land Law. The gravamen of the offense charged was that Okahara, in furtherance of the conspiracy, executed a contract with another, whereby the latter transferred to him for a term of five years an interest in 20 acres of agricultural land. The only question before the court in that case was whether the contract amounted to a transfer of real property or of an interest therein in violation of section 10. The court said: " * * * the instrument before us cannot be characterized as a lease or transfer of any interest in real property because it lacks many of the essential elements of a lease, while on the other hand it bears all the characteristics of an agreement of hiring. But if it cannot be said to be an agreement of employment pure and simple it cannot under any rule of construction be held to be more than a cropping contract." After referring to the terms of the contract and reviewing authorities, it said: "The argument that the law forbids the making of a contract of employment or agreement to till the soil on shares can only be sustained by adopting the theory that the particular agreement under consideration transfers an interest in land." The court held that the contract did not violate section 10 and discharged Okahara. The contract in that case differs in important particulars from the one before us; but in the view we take of this case, we need not determine whether, within the meaning of this act, the contract between O'Brien and Inouye, if executed, would effect a transfer of an interest in real property. The question in this case is not whether the proposed contract is prohibited by section 10, but it is whether appellees have shown that they have a right under the Constitution or treaty to make and carry out the contract, and are entitled to an interlocutory injunction against the officers of the state. A negative answer must be given.

The privilege to make and carry out the proposed cropping contract, or to have the right to the possession, enjoyment and benefit of land for agricultural purposes as contemplated and provided for therein, is not given to Japanese subjects by the treaty. The act denies the privilege because not given by the treaty. No constitutional right of the alien is infringed. It therefore follows that the injunction should have been denied.

The order appealed from is reversed.

Mr. Justice McReynolds and Mr. Justice Brandeis think there is no justiciable question involved and that the case should have been dismissed on that ground.

Mr. Justice Sutherland took no part in the consideration or decision of this case.

A true copy.

4. PETITION FOR REHEARING, BY LOUIS MARSHALL.

To the Supreme Court of the United States:

Your petitioners, J. J. O'Brien and J. Inouye, appellees in the above-entitled cause, respectfully petition this honorable court for a rehearing of this cause, and in support thereof allege:

This suit was brought by them in the United States district court for the Northern District of California to enjoin the appellants from instituting any proceedings to enforce the so-called California Alien Land Law against them. They moved for a temporary injunction to restrain the appellants, during the pendency of the action, as prayed for in the bill of complaint. Thereupon an order was made directing such motion to be heard before three judges and a hearing took place before Honorable William H. Hunt, circuit judge, and Honorable Benjamin F. Bledsoe and Honorable M. T. Dooling, district judges, who granted the preliminary injunction, solely on the ground that the contract which the appellees had agreed upon was a cropping contract and did not create any estate or interest in the appellee Inouye in the land of the appellee O'Brien within the meaning of Initiative Measure adopted November 2, 1920, Statutes of California, 1921, page lxxxiii. It was held that the act itself did not contravene any constitutional provision and violated no treaty stipulation. An appeal was taken by the attorney-general of California and by the district attorney of Santa Clara County from the order granting the temporary injunction to this court, and on November 19, 1923, a decision was rendered reversing the order appealed from.

The only question presented on the appeal related to the interpretation of the California statute which the supreme court of California in *Ex parte Okahara*, 216 Pac. Rep. 614, had on June 28, 1923, construed, as your petitioners claim, in conformity with their contention herein, and your petitioners contend:

First.—The construction given by the highest court of the State of California statute is controlling on the question presented for decision to this court.

Second.—The United States district court for the Northern District of California having decided that the California Alien Land Law did not violate any provision of the Constitution of the United States or any treaty stipulation, the appeal herein should have been dismissed.

Wherefore your petitioners pray for a rehearing of the appeal herein.

J. J. O'BRIEN,

J. INOUE,

By LOUIS MARSHALL, their Attorney,

Petitioners.

I hereby certify that I have examined the foregoing petition, that in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioners should be granted.

Dated, December 14, 1923.

LOUIS MARSHALL,
Petitioners' Counsel,

I.

The only question presented on appellants' appeal and the only assignments of error on which the appeal was based involved the interpretation of the California Alien Land Law, namely, whether the contract described in the bill of complaint would operate as a transfer of real property in the State of California or of any interest in such real property to the appellee Inouye. Such appeal, therefore, did not bring up for review the validity of the statute under the Constitution of the United States or under the treaty between the United States and Japan. The interpretation of the statute could not therefore be considered by this court on a direct appeal from the United States district court. Hence, the appeal should have been dismissed for want of jurisdiction. *Ross vs. State of Oregon*, 227 U. S. 150; *Quong Ham Wah Co. vs. Industrial Commission*, 255 U. S. 445, 448.

II.

The interpretation of the Alien Land Law of California by the supreme court of that state prior to the decision herein by this court, is believed to be controlling, and therefore it is claimed that, following *Ex parte Okahara*, 216 Pac. Rep. 614, the order of the district court for the Northern District of California should have been affirmed.

In the leading case of *Elmendorff vs. Taylor*, 10 Wheat. 159, Mr. Chief Justice Marshall said:

"This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of that state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the court of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction of the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the Constitution, laws or treaties of the United States."

This doctrine has been applied in many cases:

Commercial Bank of Cincinnati vs. Buckingham, 5 How. 317, 325; *Morley vs. Lake Shore Ry. Co.*, 146 U. S. 162, 166; *Wade vs. Travis County*, 174 U. S. 499, 508; *Johnson vs. New York Life Ins. Co.*, 187 U. S. 491; *Blackstone vs. Miller*, 188 U. S. 203; *Carstairs vs. Cochran*, 193 U. S. 10; *Lindsley vs. Natural Carbonic Gas Co.*, 220 U. S. 61, 73; *Quong Ham Wah Co. vs. Industrial Commission*, 255 U. S. 445, 448.

"The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text."

Leffingwell vs. Warren, 2 Black 599, 603.

"The meaning of a state statute declared by the highest court of a state is conclusive upon this court."

Morley vs. Lake Shore Ry. Co., supra.

"Coming to the provision in question, it is necessary to inquire what construction has been put upon it by the highest court of the state, for that construction must be accepted by the courts of the United States and be regarded by them as a part of the provision when they are called upon to determine whether it violates any right secured by the Federal Constitution."

Lindsley vs. Natural Carbonic Gas Co., supra.

"In determining what the laws of the several states are, which will be regarded as rules of decision, we are bound to look, not only at their constitutions and statutes, but at the decisions of their highest courts giving construction to them."

Wade vs. Travis County, supra.

"But it is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state."

Quong Ham Wah Co. vs. Industrial Commission, supra.

In *Terrace vs. Thompson*, decided November 12, 1923, and which involved the Washington Alien Land Law, Mr. Justice Butler employed the language last quoted in support of the proposition that the question as to whether or not a state statute conflicts with the constitution of the state is settled by the decision of its highest court.

The United States district court, after considering the precedents in which the nature of a cropping contract was involved, and especially the California decisions, *Bernal vs. Hovious*, 17 Cal. 541, *Walls vs. Preston*, 25 Cal. 59, and *Clark & Kane vs. Cobb*, 121 Cal. 595, the decisions upon which they were based, and recognized text books on the law of landlord and tenant, decided that the contract which the appellees proposed to enter into did not create an estate or interest in land within the meaning of the statute.

In *Ex parte Okahara*, 216 Pac. Rep. 614, unanimously decided by the supreme court of California on June 28, 1923, that court, upon the authority of the same and additional precedents, as well as the decision of the United States district court in *O'Brien vs. Webb*, held that a contract in its essential provisions similar to that here involved, did not create an estate or interest in land. In the opinion there rendered Mr. Justice Seawell said, relating to the contract there under consideration:

"The question is: Does it show upon its face a violation of the law as written? In form and substance this contract follows closely a contract considered and upheld by the United States district court, Northern District of California, in the case of *O'Brien vs. Webb, supra*, and we entertain no doubt that it was patterned after that contract and its drafters were aided by the discussion of the question therein made. By the application of the rule above invoked the instrument before us cannot be characterized as a lease or transfer of an interest in real property because it lacks many of the essential elements of a lease, while on the other hand it bears all the characteristics of an agreement of hiring. But if it cannot be said to be an agreement of employment pure and simple, it cannot under any rule of construction be held to be more than a cropping contract."

In that case the owner of the land was called by the instrument the em-

ployer, and Okahara, the other party to the agreement, was called the contractor. In the contract now before the court O'Brien was called the owner and Inouye the cropper.

Okahara agreed to clear 20 acres of land, make it ready for plowing and planting, and to plant the whole of the property to orchard, the trees to be furnished by the employer, and to plant between the rows of fruit trees, raspberries, blackberries, strawberries, tomatoes, cantaloupes, and other garden truck.

In the present case it is recited that the owner wished to *employ* the cropper for the term specified "as an employe for the purpose of planting, cultivating and harvesting crops to be grown on owner's land" (Rec., p. 6), and at the proper time to plant, cultivate and harvest crops of strawberries, raspberries, loganberries and vegetables in a good and farmerlike manner (Rec., p. 8, par. I).

Okahara agreed to furnish all and every kind of labor and all and every kind of machinery, tools and equipment necessary for the performance of the terms of the agreement.

In the instant case the owner agreed (Rec., p. 7, par. C), "to furnish all necessary tools, farming implements, tractors and the oil and gasoline for the operation thereof, horses and horse feed for the planting, cultivating and harvesting of the crop or crops herein provided for, during the term hereof, and to furnish any and all things necessary for the proper farming of the land herein described for the purposes herein set forth." Inouye agreed on his part (Rec., p. 8, par. J), "to maintain and keep up the personal property and to return to owner at the termination of this agreement the farming tools, implements, horses and all other personal property of every kind and character, the use of which is herein granted, in as good condition as they were when delivered to cropper, reasonable wear and tear thereof excepted." He also agreed (Rec., p. 8, par. K), to maintain the irrigation ditches, keep them free from weeds and foul growths, to prevent losses of irrigation water and the overflow thereof, and to guard against fires of all kinds.

This was certainly even more consistent with the idea of employment than the provision in the Okahara contract to which reference has just been made.

Under the Okahara contract the contractor was to receive as his compensation, in addition to an allowance for clearing the land, 50 per cent of the net proceeds derived from the sale of the products.

In the present case O'Brien was to give Inouye 50 per cent of all crops grown upon the land during the period of the agreement "as compensation for the services and labor of the cropper as herein set forth."

As indicative of the intention of the parties, the contract now before the court expressly provided "that the cropper shall not have any interest or estate whatsoever in the land described herein." (Rec., p. 7.)

So far as the report shows, there was no equivalent provision in the Okahara contract, except that contained in paragraph 6, which is certainly not as comprehensive and unambiguous as paragraphs E and F of the O'Brien contract (Rec., p. 7).

The opinion in the Okahara case quotes and analyzes paragraph 7, which reads:

"The employer shall have no control over the said contractor and his employes and equipment, but the contractor agrees that he and all persons employed by him shall be sufficient and diligent in the prosecution of said work, all of which shall be done in good and workmanlike manner and according to the best husbandry and methods of doing said work."

This certainly did not approach in clarity and directness the following provisions contained in the O'Brien contract, namely, paragraph A, whereby the owner agreed to employ the cropper and to protect him during the existence of the contract against interference by any person whatsoever, "the general possession of the land above described being reserved to owner" (Rec., p. 7); paragraph H, whereby the owner granted to the cropper the right to carry out the terms of this contract employing such agents or employees as he shall see fit, and to give to such agents or employees free ingress or egress from said property, or the right to live thereon, without let or hindrance (Rec., p. 7); the paragraph (Rec., p. 8), which gave the owner the option to terminate this agreement in case of a sale of the land "by paying to cropper for his own services at the rate of \$100 per month from the beginning of the calendar year in which this agreement is to be terminated, together with all money expended or incurred by cropper for and on account of labor and materials furnished for the planting and cultivating of the crop or crops then growing on the land"; and the concluding paragraph which provided for damages to be paid by the owner to the cropper upon the breach of the contract by the owner.

In the Okahara contract it was provided that "the employer shall have no control over the said contractor and his employees and equipment, but the contractor agrees that he and all persons employed by him shall be sufficient and diligent in the prosecution of said work."

Contrasting this provision with those quoted from the O'Brien contract, if there is any legal distinction between them it would seem that it would be in favor of the O'Brien rather than the Okahara contract.

The supreme court of California, therefore, with full appreciation of what had been decided by the United States district court in the present case, and regarding the contract there involved as the practical equivalent of the Okahara contract, placed an interpretation upon the statute similar to that of the United States district court, and carefully defined the language of the California statute so as to exclude from its prohibitions a cropper contract.

III.

For the reasons above stated it is respectfully urged that a rehearing be granted.

LOUIS MARSHALL,
Petitioner's Counsel.

Note: The court denied the petition, without giving any reason.

CHAPTER III.—OKAHARA CASE.

In the Matter of K. OKAHARA, on Habeas Corpus.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

CRIMINAL No. 2473.

1. PETITIONER'S POINTS AND AUTHORITIES ON APPLICATION FOR WRIT OF HABEAS CORPUS.

This is a petition for a writ of *habeas corpus* directed to the sheriff of Placer County, who is holding petitioner on a warrant issued by the justice of the peace of township No. 3 of said county, on a complaint charging petitioner and one Tom Vicencio with conspiracy to violate the Alien Land Law of 1920.

The complaint sets out in full, by reference and attaching the same thereto, a contract alleged to have been entered into between the parties, the making of which contract is the unlawful act alleged.

I.

An examination of the contract in question shows that it is not one the execution of which is prohibited by the act.

The act provides, in so far as we are concerned with it here, as follows:

"Section 1. Rights of Aliens Eligible to Citizenship.—All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United states, except as otherwise provided by the laws of this state.

"Section 2. Rights of Other Aliens.—All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States, and the nation or country of which such alien is a citizen or subject, and not otherwise.

"Section 10. Penalty for Conspiracy to Effect Illegal Transfer.—If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

The contract, which designates one of the parties as "employer," and the other, being the alien Japanese, as the "contractor," provides in substance as follows:

"(1) Contractor is to clear land described in contract, for which employer is to pay him \$50.00 an acre in addition to other compensation provided for.

"(2) Employer employs contractor to plow, prune, etc., the land and trees, and care for vines and vegetables grown thereon; care for tools and implements furnished; pick and pack fruit therefrom, and deliver the same to fruit house designated by the employer; to plant additional trees furnished by the employer, and furnish labor, tools, etc., necessary therefor, and to cultivate, pick and pack the crop.

"(3) Contractor agrees to plant certain parts of the land to various kinds of berries enumerated and to other specified crops.

"(4) Employer agrees to allow contractor to use tools now on land, to be returned at end of five-year period.

"(5) Products of the land are to be picked, packed and delivered to the employer, to be sold as he shall deem best, and the employer shall pay the contractor for his services, a sum equal to 50 per cent of the net proceeds of the sale, to be paid in 30 days after receipt thereof by the employer.

"Net proceeds to be determined by deducting from the selling price the market value of all materials furnished by the employer to the contractor, all costs, commissions and expenses incurred by the employer other than work done by the contractor, and all moneys advanced to the contractor.

"(6) The contractor shall have access to the land at all convenient times for the purpose of doing his work, all crops to belong to the employer, and the contractor shall have no property in the crops, his sole right being to compensation as provided.

"(7) The employer shall have no control over the contractor or his employees and equipment.

"If employer is dissatisfied at any time he may terminate the contract on ten days' written notice, and shall pay the contractor for work already done at usual wages for similar work.

"The contractor shall not assign the agreement without written consent of employer, and the contract shall be in force for five years from date."

The complaint does not state a public offense.

The contract is obviously one of employment, or, at most, involves a working of the land on share, by which the contractor not only does not acquire, possess, enjoy or have transferred to him any real property, or any interest therein, but he does not even have any property in the crops, either before or after they are served from the land.

Such a relation is one of hiring, and not of landlord and tenant.

Hunt vs. Matthews, 13 Ala. 286, 31 So. 613; *Hudgins vs. Wood*, 72 N. C. 256; *Taylor vs. Donahoe* (Wis.), 103 N. W. 1099.

A full discussion of the legal principles involved here is found in the case of *O'Brien et al. vs. Webb*, No. 654, in equity, decided in December, 1921, and reported in "The Recorder," issue of December 22, 1921, by the United States District Court for the Northern District of California, involving a cropping contract under this same statute.

In that case the cropper was actually given a part of the crop, while here he only gets a sum equivalent to 50 per cent of the net proceeds after sale by the employer. In the *O'Brien* case the contract was held to be no violation of the act.

II.

The act under which petitioner is charged is in violation of the Fourteenth Amendment to the Constitution of the United States, and of the Equal Civil Rights Statute.

The Fourteenth Amendment to the Constitution of the United States guarantees "to any person within its jurisdiction the equal protection of the laws." This applies to aliens as well as to citizens.

Yick Wo vs. Hopkins, 118 U. S. 220; *In re Kotta*, 62 Cal. Dec. 315.

It has been held that a state may forbid the taking or holding of property within its limits by aliens (*Blythe vs. Hinckley*, 127 Cal. 436; 180 U. S. 333), but such restriction is limited to all aliens.

It has not been held by this court, or by the supreme court of the United States that a state may discriminate between aliens in that regard.

There is no sound basis for classifying "aliens ineligible for citizenship" in a class by themselves, and forbidding their holding any interest in lands, and such classification denies them the equal protection of the laws.

This court, in the case of *In re Kotta*, 62 Cal. Dec. 315, quoted with approval from *Gulf etc. Ry. Co. vs. Ellis*, 165 U. S. 150, as follows:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

For the foregoing reasons we respectfully submit that the writ should be granted and the petitioner discharged.

THOMAS & SULLIVAN,
RAGLAN TUTTLE,
Attorneys for Petitioner.

The petition of K. Okahara respectfully shows:

I.

That petitioner is an alien male inhabitant of the State of California, of the age of over twenty-one years, and is a subject of the Empire of Japan, and that he is a resident of Placer County, in said State of California.

II.

That petitioner is imprisoned and restrained of his liberty by E. H. Gum, sheriff of the said County of Placer.

III.

That said imprisonment and restraint is illegal, and the illegality thereof consists as follows:

(a) That there was submitted by initiative and approved by the electors of the State of California, at an election held on November 2, 1920, a certain act commonly known as the California Alien Land Law, which said act became effective December 9, 1920 (Stats. 1921, p. 83).

(b) That among other things said act provides as follows:

"Section 1. Rights of Aliens Eligible to Citizenship.—All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Sec. 2. Rights of Other Aliens.—All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States, and the nation or country of which such alien is a citizen or subject, and not otherwise.

"Sec. 10. Penalty for Conspiracy to Effect Illegal Transfer.—If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

(c) That on the 31st day of May, 1922, in the County of Placer, State of

California, your petitioner was arrested and taken into custody by E. H. Gum, sheriff of the County of Placer, in said state, his agents and servants, on a warrant issued upon a complaint sworn to before the justice of the peace of township No. 3, County of Placer, which said complaint and warrant charged petitioner with a violation of the said act and statute of the State of California hereinabove referred to, in that your petitioner unlawfully entered into a certain contract with one Tom Vicencio in violation of the provisions of said act and statute and particularly in violation of section 10 of said act and statute. A copy of said complaint is attached hereto and marked "Exhibit A" and is made a part hereof.

(d) That the act and statute hereinabove referred to is void and of no force or effect so far as petitioner is concerned, and is without and in excess of the power of the electors and people of the State of California, and is in violation of the Fourteenth Amendment to the Constitution of the United States, and is invalid because it is in conflict with the Act of Congress of May 31, 1870 (sec. 1977, R. S.; U. S. Compiled Statutes, sec. 3925), known as the Equal Civil Rights Statute.

(e) That the complaint hereinabove referred to does not state a public offense.

IV.

That petitioner has made no other application for a writ of *habeas corpus* to any court of the State of California, or of the United States, or to any judge of any of said courts.

V.

That your petitioner makes this application to the supreme court of the State of California in the first instance, for the following reasons:

"(a) That in the County of Placer, and in other counties of the State of California, there are a great many orchards and large tracts of agricultural lands which have been heretofore, and are now cared for and farmed by Japanese aliens; that it is extremely difficult and impracticable for the owners or lessors of said lands to secure the services of persons other than alien Japanese to properly care for and farm such orchards and lands; that there are at the present time a great many (the exact number to petitioner unknown) of owners and lessors of such agricultural lands, ready, willing and eager to enter into contracts with alien Japanese, in the form of contract attached hereto; that there are a great many alien Japanese farmers in said state who are equally ready, willing and desirous of entering into said contracts with such owners and lessors.

(b) That a serious loss will accrue to said owners and lessors and alien Japanese, unless an early determination of their rights under said act and statute and under the laws of the State of California and of the United States to enter into contracts in the form attached can be had.

(c) That the decision of petitioners' application will involve the rights and liberties of a great number of aliens ineligible to citizenship in the State of California, and also of a great many citizens of this state who are the owners of and lessors of agricultural lands.

Wherefore, your petitioner prays that a writ of *habeas corpus* be granted directed to E. H. Gum, sheriff of the County of Placer as aforesaid, commanding him to have the body of your petitioner before the supreme court of the State of California at the time and place therein to be specified to do, and receive what shall then and there be considered by your Honors concerning the said K. Okahara, together with the time and cause of his detention and said writ, and that he, the said K. Okahara, be restored to his liberty. That in the mean-

time and immediately upon the granting of a writ herein petitioner be admitted to bail in such reasonable sum as may be fixed by this court.

THOMAS AND SULLIVAN,

RAGLAN TUTTLE,

Attorneys for Petitioner.

M. A. Thomas, being first duly sworn, deposes and says: That he is one of the attorneys for the petitioner in the foregoing proceedings, and one of the persons who signed the foregoing petition on behalf of said petitioner; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and that as to such matters he believes it to be true.

M. A. THOMAS.

Subscribed and sworn to before me this 31st day of May, 1922.

J. P. BROWN,

Notary Public in and for the City and County of San Francisco, State of California.

Personally appeared before me this day, Fred P. Tuttle, Jr., who, being duly sworn, deposes and says that in this county, on or about the 20th day of March, A. D. 1922, a felony was committed by Tom Vicencio and K. Okahara. Said crime was committed as follows:

The said defendant at the time and place last aforesaid, did then and there unlawfully, wilfully, knowingly, and fraudulently conspire and agree together to transfer an interest in real property, in violation of the provisions of section 2 of "an act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provision hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith," said act being submitted by the initiative and approved by the electors of the State of California on the 2nd day of November, 1920, and in effect December 9, 1920, by an agreement made and executed on the 20th day of March, 1922, and recorded in the office of the county recorder of Placer County, California, on the 16th day of May, 1922, in Book 13 of Contracts, at page 459 thereof, by and between said Tom Vicencio and said K. Okahara, wherein said Tom Vicencio agreed to, and did then and there transfer to the said K. Okahara an interest in the real property described in said agreement for a term of five years from the date thereof, in consideration of certain services to be performed by the said K. Okahara.

That a copy of said contract is attached hereto and made a part hereof.

That the said K. Okahara is a native of Japan and not a naturalized citizen of the United States, and is not an alien eligible to citizenship under the laws of the United States.

That there is no treaty between the Government of the United States and the Government of Japan granting a citizen of Japan the right to acquire, possess, or transfer an interest in real property situated within the United States.

All of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of California.

Said complainant therefore prays that a warrant may be issued for the

arrest of said defendant and that they may be dealt with according to law.

FRED P. TUTTLE, JR. (Seal)

Subscribed and sworn to before me this 31st day of May, 1922.

JOHN DAVIS, (Seal)
Justice of the Peace.

This agreement, made and executed this 20th day of March, 1922, by and between Tom Vicencio, hereinafter called the "employer" and K. Okahara, hereinafter called the "contractor."

Witnesseth: Whereas, the employer is the lessee of a certain tract of land situate in the County of Placer, State of California, known and described as follows, to-wit:

The northwesterly twenty acres of the west half of section one, township twelve, range seven east, Mount Diablo base and meridian, being a parcel of land square in shape, and

Whereas, the said employer desires to hire and employ the said contractor as an independent contractor to plant out and properly care for an orchard to be planted thereon and to pick and pack the fruit therefrom, and deliver the same at any place designated by the said employer, and also to plant and raise certain other crops thereon as hereinafter specified, and deliver the same at any place designated by the said employer and also to plant and raise certain other crops therein as hereinafter specified and deliver the same in the same manner to said employer, and the said contractor is willing to undertake said employment on the terms and conditions hereinafter named.

It is now agreed by and between the respective parties as follows, to-wit:

1. The contractor agrees to clear all of said property ready for plowing, and he shall receive in addition to compensation hereinafter specified, the sum of fifty dollars (\$50.00) per acre for all land so cleared, and all of land shall be cleared within two years from the date hereof, one-half to be cleared the first year and one-half to be cleared the second year.

2. The employer does hereby hire and employ said contractor as an independent contractor to properly, and according to the most approved custom of the neighborhood, plow, prune, spray, cultivate and take proper care of the said land and the trees, vines and vegetables to be grown thereon, properly care for and irrigate the entire orchard, properly care for all wagons, tools, implements and other personal property which the employer may allow the contractor to use in or about said work, and to do all labor necessary to properly pick and pack all merchantable fruit, berries and vegetables grown during the term of this agreement, at the proper time and seasons, and to deliver all of said fruit in a good and marketable condition at any fruit house designated by said employer. The contractor also agrees to plant the whole of said property to orchard, in trees furnished by employer, said planting to be done within two years from the date hereof. The said contractor does hereby agree to do all of said work in a good and husbandlike manner and to furnish all and every kind of labor, machinery, horses, tools, and equipment required by the employer in the performance of all of said labor in connection with the raising, cultivating, picking and packing of the crop upon said land for the term of this contract for the compensation hereinafter mentioned.

3. The contractor agrees to plant five (5) acres of said land to raspberries, five (5) acres of said land to blackberries, five (5) acres of said land to strawberries, and five (5) acres of said land to tomatoes, cantaloupes

and other garden truck; said planting to be done between the rows of trees after the orchard is planted.

4. The employer does also agree to allow the contractor to use all tools and implements now on said premises with which to do the work aforesaid, said tools and implements to be kept by the said contractor in good condition and to be returned to the said employer at the expiration of the term of this contract in as good condition, wear and tear and operation of the elements excepted, as when received by the said contractor.

5. The products from said land, after the same shall have been picked, packed and delivered as aforesaid by said contractor to said employer, shall be sold by the latter on such terms and conditions as in his discretion he may deem best, and the said employer agrees to pay the said contractor, as compensation for his services, a sum equivalent to fifty (50) per cent of the net proceeds derived from the sale of said products. Said sum shall be paid to said contractor by said employer within thirty (30) days after the same shall have been received by said employer. In determining the net proceeds, there shall be deducted from the price for which the employer may sell the fruit, the market value of all shook, hay straw and other material or property furnished by the employer to contractor, and all costs, charges, commissions and expenses of every kind paid or incurred in or about the said product, or the marketing thereof, by the owner, and also all costs, charges and expenses paid or incurred by the employer, for the cultivation of said land and orchard by the employer, other than work done by the contractor. All sums of money advanced by the employer to contractor and all indebtedness due or payable to the employer from the contractor shall be deducted by the employer from the sum that otherwise would be due to the contractor.

6. It is understood and agreed that the contractor shall have access to the land hereinbefore described at all convenient times for the purpose of doing the work aforesaid. All crops of every nature and character to be grown on said land shall belong to and be the property of the employer, and the contractor shall have no interest, right or claim in or to any part of the said crop, but his sole right shall be to the compensation paid by the employer as herein provided and the said compensation shall be in full payment for all services of said contractor for outlays and expenses paid or incurred by the contractor in or about said work.

7. The employer shall have no control over the said contractor and his employes and equipment, but the contractor agrees that he and all persons employed by him shall be efficient and diligent in the prosecution of said work, all of which shall be done in good and workmanlike manner and according to the best husbandry and methods of doing said work. It is further understood and agreed that if any time the employer is dissatisfied with the work done by the contractor or with the progress of such work, he may immediately terminate this contract on paying to the contractor compensation up to the time of such termination, as follows: Upon ten days' written notice given by employer to contractor, said compensation to be the usual wages paid for similar work in the same neighborhood.

Neither this agreement nor any interest therein shall be assignable or transferable by the contractor, either voluntarily or involuntarily, without the consent of the employer, in writing first had and obtained.

This contract shall be in force on and after the date hereof and shall continue in force and effect for a period of five (5) years thereafter.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

2. BRIEF FILED BY ATTORNEY-GENERAL WEBB.

This is a so-called "cropping contract" case and involves the validity of a certain contract entered into by and between a lessee of certain agricultural lands in the County of Placer, California, called the "employer," and a certain Japanese who is ineligible to citizenship in this country, called the "contractor." Under the terms of this contract it is proposed that the said "contractor" shall work and cultivate the said land of the "employer" for a period of five years and receive certain compensation for the said work, which compensation shall include fifty per cent of the net proceeds from the sale of the crops so raised by the "contractor." The petitioner for writ of *habeas corpus* is the said ineligible Japanese who was arrested under the terms of section 10 of the Initiative Alien Land Act of this state, adopted by the people in 1920. Said section 10 provides that:

"If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

We shall not present any argument to sustain the general validity of our Alien Land Act so far as its constitutionality or legality are concerned, when tested by the provisions of the United States Constitution or of the present treaty existing between the United States and Japan. This point has already been passed upon by this court in the case of *In re Y. Akado*, also known as *S. Ikada*, Criminal Number 2443, decided May 16, 1922.

The said act has also been sustained as to its general validity by the United States district court, Southern District of California, Southern Division, in the case entitled, *W. L. Porterfield et al. vs. U. S. Webb et al.*, Equity Number F61, vol. 279, Fed. Rep. Advance Sheets 114.

It is claimed by petitioner that the cropping contract amounts to nothing more than a contract of employment and that therefore there has been no violation of the Alien Land Act, since this contract does not directly or indirectly effect a transfer of real property or of any interest therein.

We welcome this first opportunity to have the highest court of California pass on this question because there has been, as we understand it, a different rule laid down by the supreme court of this state as to the general character of these cropping agreements from that prevailing in other jurisdictions. For the sake, therefore, of our record on appeal to the United States Supreme Court in a certain cropping contract case, referred to by counsel for petitioner, which was decided by the United States district court against our theories, *J. J. O'Brien vs. U. S. Webb et al.*, Equity No. 654, in the district court of the United States in and for the Northern District of California, Southern Division, decided December 20, 1921, it will avail the State of California the very greatest advantage if we may be in a position to point out to the United States Supreme Court that the court of final appeal in this state has placed a construction on such contracts in consonance with the views which we shall urge in the appeal in that case. We are mindful of the rule that the federal courts follow a construction of a state statute, which construction has been declared by the highest state court. In the *O'Brien* case, which was decided against the state, the court construed the California Alien Land Act of this state as

not prohibiting a cropping contract. We are now before the state supreme court and are urging for a contrary construction of this statute. We are, of course, well within our rights in so asking this court to so construe a statute of this state. In the first place, it is the peculiar province of a state court to construe state statutes. In the second place, the decision of the federal court in the O'Brien case is not final. We have appealed from that decision to the United States Supreme Court, and the hearing of this appeal has been set down for November of this year. It is therefore apparent with what interest and concern we approach the discussion of this question at this time before the supreme court of the State of California.

Section 2 of the California Alien Land Act provides that:

"All aliens other than those mentioned in section 1 of this act" (that is, other than those eligible to citizenship) "*may acquire, possess, enjoy and transfer real property, or any interest therein* in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

The above language in italics was clearly intended to prohibit the actual possession and enjoyment of real property in this state to the prohibited class. Paragraph 6 of the cropping contract in this case provides that,

"It is understood and agreed that the contractor shall have access to the land hereinbefore described at all convenient times for the purpose of doing the work aforesaid."

Paragraph 7 of the said cropping contract provides that,

"The employer shall have no control over the said contractor and his employees and equipment, * * *

In one of the opening clauses to the contract it is stated that the contractor is "to plant out and properly care for an orchard to be planted thereon" (that is on the said land) "and to pick and pack the fruit therefrom, * * *, and also to plant and raise certain other crops thereon as hereinafter specified * * *."

Paragraph 1 of the contract provides that the contractor "agrees to clear all of said property, ready for plowing * * *."

The second paragraph provides that the contractor shall

"plow, prune, spray, cultivate and take proper care of the said land and the trees, vines and vegetables to be grown thereon, properly care for and irrigate the entire orchard * * * and do all labor necessary to properly pick and pack all merchantable fruit, berries and vegetables grown during the term of this agreement, at the proper time and season * * *. The contractor also agrees to plant the whole of said property to orchard, * * * the said contractor does hereby agree * * * to furnish all and every kind of labor, machinery, horses, tools and equipment required by the employer * * *."

The above language, quoted from this contract, and in particular from paragraphs 6 and 7 thereof, shows the nature of the so-called "contractor's" interest in the contract. It shows that the cropper has an actual interest in the real property involved for all practical purposes. The reference to this contractor as an employee or the statement in the contract that it is a contract of employment, would appear to be a mere device to defeat the purposes of our California Alien Land Act.

The history of the Alien Land Law of this state shows that the state's purpose to prevent occupation of agricultural land by aliens ineligible to

citizenship might be completely defeated if such a cropping contract as we have here is held to come within the terms of our statute.

It is interesting to note the following allegation found in paragraph 5 of the petition herein:

"That your petitioner makes this application to the supreme court of the State of California in the first instance, for the following reasons:

"(a) That in the County of Placer, and in other counties of the State of California, there are a great many orchards and large tracts of agricultural lands which have been heretofore, and are now cared for and farmed by Japanese aliens; that it is extremely difficult and impracticable for the owners or lessors of said lands to secure the services of persons other than alien Japanese to properly care for and farm such orchards and lands; that there are at the present time a great many (the exact number to petitioner unknown) of owners and lessors of such agricultural lands, ready, willing and eager to enter into contracts with alien Japanese, in the form of contract attached hereto; that there are a great many alien Japanese farmers in said state who are equally ready, willing and desirous of entering into said contracts with such owners and lessors.

"(b) That a serious loss will accrue to said owners and lessors and alien Japanese, unless an early determination of their rights under said act and statute and under the laws of the State of California and of the United States to enter into contracts in the form attached can be had.

"(c) That the decision of petitioner's application will involve the rights and liberties of a great number of aliens ineligible to citizenship in the State of California, and also of a great many citizens of this state who are the owners of and lessors of agricultural lands."

The said allegation shows that as a practical matter we will have the use, control, occupancy, possession and enjoyment of and dominion over large tracts of agricultural lands in this state by aliens ineligible to citizenship if this court, and ultimately the United States Supreme Court, should construe our statute as not prohibiting this character of cropping contract.

THE CALIFORNIA RULE ON CROPPING AGREEMENTS IS DIFFERENT THAN THAT
PREVAILING IN OTHER JURISDICTIONS.

The mere fact that the tenant is to receive compensation in the form of a share of the net proceeds from sale of the crops does not in this state prevent his being considered as having an interest in the real property. The real test is the intention of the parties, and such expressions as "lessee", "leasing", "letting", "renting", or, on the other hand, "employee", "employment", "general possession", etc., do not necessarily control.

In the case of *Bernal vs. Hovious*, 17 Cal. 541, the owner of the land made an agreement with A, calling it a lease; A was to possess the land for three years; the owner was to furnish farming implements, horses, wagons, etc.; A to work the land and give the owner for the use thereof one-third of the grain that was raised. It was held by the court that this agreement was not a lease, though it was called such, but that it was a contract for working the farm upon shares and that the parties were tenants in common of the grain until the division was made.

The supreme court of this state, however, in *Walls vs. Preston*, 25 Cal. 60, at page 64, says, referring to the case of *Bernal vs. Hovious*, and also to the New York decisions, that:

"In all the cases in New York affirming on this point *Putnam vs. Wise* (1 Hill 247), and in *Bernal vs. Hovious*, the question was merely who was entitled to the possession of the crop, not whether the owner or the occu-

pant was in possession of the land, not whether the relation of landlord and tenant existed between the parties, though that question was incidentally discussed."

This case of *Walls vs. Preston* gives a very clear discussion by Mr. Justice Rhodes on the points involved as distinguishing between a lease interest and a mere crop agreement. The case held a certain contract to be a lease. The contract used the word "lease", but provided for a rental in the form of delivery to the owner of one-sixth of the crop. The court shows that it would disregard mere words and ascertain the real intent of the parties. It is particularly pointed out that the mere fact that rent is to be paid in the form of a division of the crop rather than in money will not prevent the parties from being considered as landlord and tenant. At pages 64, 65 and 66 the court says:

"The two principles deducible from those cases are these: First—If the agreement contains terms which by themselves would import a lease, and other terms which provide for a division of the crops, and it is doubtful which it is—a lease or a cropping contract—it will be deemed a cropping contract, by reason of a division of the crops; and second, where the agreement provides for a division of the crops between the owner and occupant, they are held to be tenants in common of the crop. It cannot be maintained, upon those authorities, and certainly not upon principle, that a lease, in the usual form of a demise, *for a term of years, with covenants sufficient to give the lessee the exclusive possession of the land during the time, and to require him to yield up the possession at the end of that term, shall not be a lease, and the occupant shall not be a tenant, but shall be a mere servant of the owner, because the parties have made provisions for a division of some portion or all of the crops that may be produced.* The term division, as applied to the crops, has no more forcible signification in aid of the interpretation of the instrument than has the word demise, when employed in connection with the land.

"Mr. Justice Cowen, in *Putnam vs. Wise*, cites with approbation Woodfall (Land. and Ten.), who says that the most proper and authentic form of words may be overcome by a contrary intent appearing in the deed of demise. No reason can be assigned why the same rule of construction should not be applicable to the words providing for a division of the crop.

* * * * *

"Where it plainly appears that the parties have made a lease, the court will not declare it *not* to be a lease simply because the parties have inserted a covenant that more appropriately belongs to a contract of a different character. In the cases we have cited the courts were endeavoring to ascertain the intention of the parties; and having ascertained it, they declared the rights of the parties under the contract, as they made it, so far as the same were in issue.

"There is certainly no rule of law so absolute in its nature as to prevent the occupant of land, under a contract which constitutes him a tenant in common with the owner in the crops, from having as entire a control over the premises during the term, if the parties so agree, as a tenant covenanting to pay a money rent would have. In other words, from being a tenant of the land under a lease, and at the same time a tenant in common of the crop, or of some part of it. Such agreements are constantly made, and it never occurs to the parties, and they do not intend, that the tenant is changed into a servant of the lessor, because the lessor receives a portion or all of his compensation for the use of the land in some uncertain quantity of the products of the land."

At page 66 the court indicates its disapproval of the New York cases in the following language:

"We can see nothing incompatible in the tenants of the land under a lease being at the same time a tenant in common of the crops; and there never would have been any doubt upon this point *had not the judges in New York, in passing upon questions concerning the rights of the parties to the possession of the crops, uttered dicta which seemed to determine the point against the occupant.*"

At page 67 the court says:

"If a reservation of rent, or some benefit or recompense equivalent to rent, is deemed necessary, in order to constitute a contract a lease, the covenant to pay or deliver a portion of the crop amounts in every sense to a recompense for the use and occupation of the land, as fully as would a covenant to pay money, or a certain amount of the crops, or to improve the premises, or keep them in repair, or to pay the taxes, or perform labor for the lessor, all of which have been held good as a reservation of rent."

* * * * *

"It clearly appears to us that the parties in this case intended to make a lease, and that the instrument executed by them was a lease; that its effect as such was not destroyed by their having contracted for the payment to the lessor of a portion of the specific crops to be produced, and that that covenant was an agreement to pay the rent of the premises out of the crops."

In *Clarke and Cain vs. Cobb*, 121 Cal. 595, the court held that a contract by which farming lands were demised and let for a term of years to one who agreed to give annually for the use thereof a certain portion of the crops of grain and other products grown thereon, was a lease, creating the conventional relations of landlord and tenant, and not a cropping contract.

At page 597 the court said:

"At the threshold of this investigation it becomes important to determine the legal status of the contracts entered into with Cobb by Clarke and his executors. That these contracts were leases, that the conventional relation of landlord and tenant existed between the parties, and that the grains and fruits to be delivered to the landlord when gathered and harvested were rent, we are entirely satisfied. Rent is a compensation paid for the use of land. *It need not be money. Any chattels or products of the soil serve the purpose equally as well. These contracts are in no sense cropping contracts. The single difference differentiating them from ordinary conventional leases is that the rent is to be paid in products of the soil, after harvest, rather than in money. But such difference is wholly immaterial, as changing the character and aspect of the instruments.*

"It is substantially conceded that the landlord and tenant are not co-tenants in the land, but it is claimed that they are co-tenants in the crops to be raised. The authorities in this state recognize that such conditions may exist. (*Bernal vs. Hovious*, 17 Cal. 544, 79 Am. Dec. 147; *Walls vs. Preston*, 25 Cal. 59.) But we find no apt words here to disclose such a status. When it is established that a certain contract is a lease, and that the relation of landlord and tenant exists between the parties, there must be some appropriate words in the contract to indicate that the crops raised on the lands are to be held in co-tenancy or such will not be the conclusion reached. If there is nothing in the language to indicate that intention, then the products to be delivered to the landlord after harvest, by the tenant, will be deemed the property of the tenant until that time, and treated as rent to be then paid."

At page 598 the court, in discussing the above California cases of *Walls vs. Preston* and *Bernal vs. Hovious*, and also the New York decisions, said:

"In *Walls vs. Preston*, *supra*; *Bernal vs. Hovious*, *supra*, and the New York authorities upon which it is based, are reviewed and explained, and the doctrine of the *Bernal* case limited. In *Walls vs. Preston*, *supra*, the facts were entirely similar to those found in this record, and after a careful consideration of the principles involved the court said: 'It clearly appears to us that the parties in this case intended to make a lease, and that the instrument executed by them was a lease; that its effect as such was not destroyed by their having contracted for the payment to the lessor of a portion of the specific crops to be produced, and that the covenant was an agreement to pay the rent of the premises out of the crops.'"

In *Knox vs. Marshall*, 19 Cal. 617, just as in the case of *Bernal vs. Hovious*, the only question involved was whether the owner and the party working the land were *tenants in common of the hay and grain that was grown*. As is pointed out in the California cases there may be the relation of landlord and tenant and at the same time the landlord and tenant be tenants in common with reference to the grain that is grown.

In *Smith vs. Schultz*, 89 Cal. 526, a written contract purported to be a lease of land for a specified term. The lessee was to plant crops, certain shares of the crop were to be delivered to the lessor, the lessor was to have the right of re-entry in case of default on the part of the lessee, otherwise the lessee was to hold for a definite term. This was held to be a lease and not a partnership.

It is to be noted that there is a definite term of five years fixed in the so-called crop agreement in the case at bar.

ADDITIONAL AUTHORITIES FROM STATES OTHER THAN CALIFORNIA IN THE MATTER OF CROP AGREEMENTS.

Ferris vs. Hoagland, 25 So. 834 (Alabama Supreme Court). A crop agreement gave to so-called "lessee" right to cultivate a vineyard—in a certain way—and take a reasonable compensation from the sales proceeds of the crop, and return balance of proceeds to owner. Held, that this is mere employment—and not a lease. Also held that even though "lessee" did not cultivate as per his agreement, he was so entitled to possess, that therefore proper remedy was to have contract canceled. And so this case holds that even such an employee has sufficient lawful interest in the land to prevent trespass lying.

At page 836 the court said:

"But, so far as it affects the question of trespass, the result is the same. The contract remained in force, there being no rescission by the parties. It not only conferred the right, but imposed the duty, upon defendant to enter upon the land in the execution of the work of gathering the crop as well as of cultivation. It gave a license to defendant to so enter, which being granted upon a valuable consideration, was not revocable so as to destroy his right to collect from the crop after it had ripened, and so as to cause a failure in the performance of his obligation to gather and market same. The doctrine of estoppel *in pais* applies in such case. (*Thodes vs. Otis*, 33 App. 496.) For the purpose of restraining a trespass the bill is without equity, but, if it sufficiently shows a right in complainants to cancel or rescind the contract, it may stand for relief in that aspect. When the remedy for recovery of damages at law is inadequate, equity may decree the cancellation of a contract, at the instance of a party who has substantially complied with it, for its nonperformance by the other party, and where the parties can be placed substantially *in statu quo*."

In *Dixon vs. Nicolls*, 89 A. D. 312 (Ill.), the tenant had exclusive possession of the premises, with agreement he to pay rent in form of a portion of the crop, to be delivered to owner after it was threshed. Held, relation of landlord and tenant existed. Tenant was Brodrick, owner was Knoop. At page 316 the court says:

"But in all cases, whether it is simply raising a crop on joint account or a tenancy, the rent payable in kind, depends upon the intention of the parties.

"In this case there can be no misconception on that point. The exclusive possession of the farm for a series of years by Brodrick, a rent agreed upon, and the nonresidence of Knoop, the owner, all conspire to show the relation of landlord and tenant, and thereby constituting Brodrick the exclusive owner of the crop until the stipulated rent was set apart or paid to the landlord. It is not like any one of the cases cited by the plaintiff in error. In all of them facts are disclosed going to show the intention that there should exist a joint ownership in the crop to be raised, and not a tenancy at a stipulated rent."

Counsel cite the case of *Hunt vs. Matthews*, 13 Ala. 286, 31 So. 613.

It is to be noted, however, that in that case the court had before it a code section which provided that when one party furnishes the land and the team to cultivate it, and another the labor, with a stipulation to divide the crop in certain proportions, a contract of hire shall be held to exist.

We believe that the California rule is to be distinguished from that which we find in other states.

We consider this as a matter of the utmost importance at this time in the history of our alien land legislation and litigation. The supreme court of this state now has an opportunity for the first time in any of these alien land act cases to establish a rule that a proper construction of our Alien Land Act requires that such cropping contracts as are here involved must be considered as prohibited by that act. That is, when the people used the very sweeping language forbidding an ineligible alien to "acquire, possess, enjoy and transfer real property, or any interest therein, in this state," except as permitted by treaty, they certainly intended to prevent such aliens controlling great tracts of agricultural lands in this state by the mere device of cropping contracts. It was the possession and enjoyment and occupancy of these agricultural lands by these ineligible aliens of another race in competition with our own citizens which the people attempted to make impossible. It was not the acquirement of title in fee alone that this legislation was designed to prevent. It was intended to withhold from ineligible aliens all of the advantages which the ownership of agricultural lands gives. It was intended to withhold from them dominion, occupancy, possession, enjoyment. It was intended to prevent ineligible aliens from having that use, that control, of agricultural lands which would give to them in whole or in part the fruits thereof. It was intended to free the American farmer from the competition, upon American soil, of the Oriental farmer. The act was drawn by those who know and in recognition of the established fact that the American farmer can not live in competition with the Oriental farmer. It was drawn by those who know and in recognition of the established fact that the American farm which is in competition with the Oriental farm will cease to be cultivated, or will be cultivated by Orientals. It was to save the American farmer and the American farm laborer from the competition of unlimited hordes of labor of the Oriental; indeed, from the competition of the labor of wives, widows and children. The act was designed to protect the American home life from the competition of the

Oriental home life. The American farm home, which is our country's boast, will not long endure if the Oriental farm home is to become its competitor. The members of the American farm home can not continue the activities which now ennoble farm life if such home and such activities are to be sustained against Oriental habits and customs. Wife and daughter can not confine their activities to keeping the home; the children of suitable age can not be kept in schools, with father and son in the hopeless struggle of tilling the farm in competition with all the members of a family of an Oriental engaged in the same labor.

The labor of the Oriental paid for by fixed compensation as wages is not destructive. The labor of the Oriental when the compensation is to be increased by Oriental habit and custom is destructive. The American farm was not builded upon the idea of wives and daughters tilling the soil.

This act was designed to protect the farm as it now exists in California and elsewhere in the agricultural areas of the United States. The destruction of our farm life is not the more desirable because destroyed by a horde of Orientals whose signatures have been attached to cropping contracts, rather than by the same people holding the title in fee. It is the destruction of the farm life that is to be prevented and not the method of its destruction.

A word description often fails, as here it may fail, to produce an actual picture of a physical condition. Though the physical condition exists, one who has looked upon it always finds language inadequate to accurately portray the condition to one who has not actually observed it, and one who has actually observed the condition does not need the word description.

The condition we are attempting to describe may be readily seen by any one who will travel any state highway through any of the richest agricultural districts of California. In no other case would a "view of the premises" be so helpful, and from such view the court would instantly gain an exact appreciation of the condition which the electorate of this state sought to terminate by the adoption of the Alien Land Act of 1920.

To this court is now presented the opportunity of ignoring the surface veneering and striking at the substance of a structure of Oriental agricultural development in this state which is well on its way to a considerable growth, after a loudly acclaimed birth. Printed forms of these cropping contracts are being distributed throughout the state; legal advice is being extensively given to ineligible Orientals encouraging them in this evasion of the real purposes of our California Alien Land Act.

The fundamental consideration must be, as has been determined by federal and state courts, that there is reserved to all the states the absolute control of any and every character of real interest in the agricultural lands of the state. Upon this principle rests the safety of our form of government.

It would be, in our judgment, indeed fortunate if we may stop the encroachment which has started on the practical carrying out of this fundamental principle by securing from the highest court of our state a construction of our Alien Land Act that will prohibit this encroachment before conditions become alarmingly serious.

The principle well established in the law that permits the State of California to prohibit ineligible aliens from acquiring fee simple title to agricultural lands, must also, in all reason and logic, permit of our prohibiting the same class of individuals from securing in such lands that interest, dominion, enjoyment and possession thereof and of the fruits thereof which these cropping contracts lead to.

This is no time, we respectfully submit, for nice refinements, such as have been suggested, in statutory construction and in the assumed distinction between "employment" and the enjoyment of a real interest in agricultural lands and the produce of such lands.

In conclusion, we respectfully point out to the court that section 717 of the Civil Code of this state limits a lease of land for agricultural or horticultural purposes, in which shall be reserved any rent or service of any kind, to a period of fifteen years.

If ineligible aliens may possess the agricultural lands of this state for indefinite periods of time through the means of such cropping agreements as are involved in the case at bar, such ineligible aliens would be in a far better position to circumvent the purposes of the California statute than would be the case if they were expressly permitted to lease our lands for periods of fifteen years. Our Alien Land Law would thus be held to be ineffective and useless to accomplish the real and the vital purpose of the people of our state.

We attach as an exhibit hereto a copy of the concurring opinion of Judge Bledsoe in the O'Brien case. We do this because, although Judge Bledsoe's final conclusion was against our theories as to the character of a cropping contract, it will be noted that he presents very clearly the reasoning upon which we base our argument in this case.

It is to be particularly noted that the language contained in the cropping contract in the O'Brien case, upon which Judge Bledsoe based his opinion, is not to be found in the cropping contract in this case. That language contained in the O'Brien contract, is as follows:

"Provided that the cropper shall have no interest or estate whatsoever in the land described herein."

We, however, are anxious to impress upon the court our position that the mere phraseology so quoted by Judge Bledsoe from the cropping contract which he was considering should not have persuaded the court to a construction which was not supported by the terms of the contract when read in their entirety. Merely stating that the cropper was to have no interest in the land should not, in our judgment, control over the positive provisions of the contract, which did in fact give to the cropper an interest in real property.

If ineligible aliens may be given possession and enjoyment of agricultural lands and then seek protection in such mere phraseology as is referred to by Judge Bledsoe, it is useless for the State of California to attempt to control a situation which is of the gravest importance to the welfare of the people of this state.

The court is called upon to construe a new act, an act without antecedent, and drafted to meet a new condition. In its construction the court is not led or restrained by precedent. The books may help, but the daily life about us furnishes the true guide. The danger of following a judicial pronouncement, hoary with age, and having, perhaps, no other recommendation, is not here present. The facts with which this statute deals have not heretofore been met with in judicial or legislative history.

Counsel seek to have this case ruled by decisions long ago pronounced in the construction of dissimilar statutes applying to unlike facts.

Justice Crane recently stated:

"The two sources of the law are to be found, first, in the books and, second, in the life about us."

The reason for this law is found in the life about us, and a considera-

tion of the facts which impelled its enactment is indispensable to its proper construction.

Respectfully submitted,

U. S. WEBB,

Attorney-General of the State of California.

FRANK ENGLISH,

Deputy Attorney-General of the State of California.

3. REPLY AND SUPPLEMENTARY BRIEF FOR PETITIONER, BY THOMAS SULLIVAN.

QUESTIONS INVOLVED.

The return denies none of the allegations of the petition filed herein, so all the allegations may be taken as true.

There are, therefore, two questions squarely before the court:

(1) Is the contract between the parties, and set forth in the petition, in violation of the Alien Land Law of 1920?

(2) Is such law in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the law forbids all aliens ineligible to citizenship under the laws of the United States, to "acquire, possess, enjoy, and transfer real property or any interest therein, in this state," except as provided by treaty?

We contend that the first question should be answered in the negative, and the second in the affirmative.

ARGUMENT.

I.

The contract is one of hiring, and gives to the alien no interest in real estate.

There is a presumption that the parties did not intend an illegal act, and any doubt should be resolved in their favor. The intention of the parties is important in determining the legal effect of a contract, and it is obvious that this contract was drawn with the Alien Land Law in mind, and with a desire to not come in conflict with its provisions.

The ordinary essentials of the creation of the relation of landlord and tenant are:

- (1) A contract between the parties involving rights of property;
 - (2) Reservation of rent;
 - (3) Transmission of estate;
 - (4) Transfer of possession;
 - (5) Reversion in the landlord.
- (24 Cyc., pp. 877, 878.)

None of these are present in the contract under consideration here.

The contractor has not even any property in the crops, it being provided that "his sole right shall be to the compensation paid by the employer as herein provided."

There is no reservation of rent, all payment being from the employer to the contractor. McAdam on Landlord and Tenant, volume 1, page 119, gives an apt illustration of the rule, as follows:

"When 'A' agrees with 'B' that he will employ 'B' with his teams, etc., on his farm, whether for one year or five, leaving 'B' at liberty to cultivate such fields, and plant such crops as he shall see fit, with just regard to what good husbandry requires, and to pay 'B' for his work one-half of

the crops raised, it is obvious that the parties intend an agreement for work, labor and services, and to be paid for by 'A' in a share of the final results. On the other hand, if 'A' should demise, lease and let the farm to 'B' to have and to hold for the term of one or five years, to be cultivated in a husbandlike manner, rendering and paying to 'A' an annual rent for the use of the farm, to-wit, one-half of the crops raised, there is no reason why the parties should not be deemed to intend an actual and technical lease, which would entitle the lessee to possession, give him a term in the land, and make his payment rent in the technical sense."

In the present case there is no transmission of estate or of possession, it being expressly provided that the contractor shall have "no property" even in the crops, and that the contractor shall merely have "access to the land" for the purpose of doing his work.

There is no reversion to the employer for the reason that no estate is granted. The owner merely has the right to terminate the service and pay for work already done at the going wage, in the event he should become "dissatisfied with the work done by the contractor or with the progress of such work."

The contractor has no more of an interest in the land than would any other contractor who should enter under a contract to dig a ditch or build a road or a house thereon.

The parties are designated as "employer" and "contractor" and not as lessor and lessee, or landlord and tenant.

This is evidence of an intention that the relation shall not be that of landlord and tenant.

In *Taylor vs. Donahoe* (Wis.), 103 N. W. 1099, there was a written agreement for the cultivation of certain lands owned and controlled by Donahoe, whereby Finnegan was to cultivate, do all the work of raising crops and marketing during his term of service, to furnish certain stock, seeds, etc. There were stipulations regarding sharing expenses, and Donahoe was to pay Finnegan "in full compensation for his services one-third of the crops." This agreement was characterized as a personal agreement. Finnegan was to have the use of the dwelling-house on the lands, except parts which Donahoe reserved for his own use. Chief Justice Winslow said:

"The distinction between a tenant and a cropper is that a tenant has an estate in the land for a given time and a right of property in the crops, and hence makes the division thereof between himself and the landlord in case of an agreement upon shares, while a cropper has no estate in the land nor ownership of the crops, but is merely a servant and receives his share of the crops from the landlord, in whom the title is. It is always a question of construction of the agreement under which the parties are acting. The agreement in question here seems to us to be very clear and definite upon the subject. It nowhere refers to Finnegan as a tenant, but specifically refers to his work as 'service' and expressly provides that Donahoe shall pay him for his services by certain shares of the crop, and that the possession of the land and ownership of the crops are to remain in Donahoe, and that Finnegan is merely to be an employee in the tilling of the land and caring for the stock. Language could hardly be plainer or more appropriate for the purpose of creating a cropper agreement."

In the case of *O'Brien and Inouye vs. Webb et al.*, U. S. district court, Northern District California, reported in 279 Fed. 117, the court quoted at length from the case of *Taylor vs. Donahoe*, above cited, and held that a contract very similar to the one involved here was not a violation of the act.

We quote from Jones on Landlord and Tenant, volume 1, section 50, page 60, as follows:

"When the agreement spoke of 'services,' and the landowner agreed to supply house, teams and give one-half the crops in pay for such services, there was no tenancy."

For a full and careful discussion and decision of the first question at issue here, we refer the court to the case of *O'Brien et al. vs. Webb et al.*, above cited, and to the cases cited therein.

Upon an oral argument of this case it was urged on behalf of the district attorney and the attorney-general that under the contract here the Japanese alien possesses and enjoys real property, although there may not have been transferred to him any legal interest therein. We need only to say in answer that the act, as appears by a reading of section 10 thereof, forbids and penalizes only a conspiracy "to effect a transfer of real property, or any interest therein."

The act should be considered as a whole, and the penal provisions of section 10 show that the words "acquire", "possess", "enjoy" and "transfer", appearing in section 2 of the act are used in their legal sense and refer to a legal interest in the property. There can be no "possession" or "enjoyment" within the meaning of the act, without "acquiring" or "transferring", and even if there could be, it is not made a public offense.

A great deal is said by the attorney-general in his brief about the contract in question here being "a device to defeat the purposes of our California Alien Land Act." The contract should not be called a "device" to defeat the statute merely because it does not run counter to the prohibition of the statute.

It is argued here (see attorney-general's brief, p. 7) that the purpose of the Alien Land Law is to prevent occupation of agricultural land by aliens ineligible to citizenship. If it was intended that ineligible aliens should labor in the fields solely for a per diem compensation payable in cash, the legislature should and would have so stated in the act.

If the attorney-general construes the act as it stands, as limiting the terms under which an ineligible alien may be employed and paid, he puts it under the ban of the rule laid down in *Truax vs. Raich*, 239 U. S. 33, and reiterated in *In re Kotta*, 62 Cal. Dec. 315.

As far as this case is concerned the rule on cropping agreements is no different in California than in other jurisdictions.

An examination of the cases cited in the attorney-general's brief shows that in each case where the contract was held to be a lease, the man working the land *paid rent* out of the crops.

In this present case, the man working the land has no *property in the crops* (contract, par. 6), and it is the employer or owner of the land who *pays the contractor*, "as compensation for his services, a sum equal to fifty (50) per cent of the net proceeds derived from the sale of said products." (Contract, par. 5.)

II.

The Alien Land Law is in violation of section I of the Fourteenth Amendment, in that it forbids the transfer to an alien ineligible to citizenship of an interest in real estate.

The ratification of the Fourteenth Amendment to the Constitution of the United States was proclaimed by the secretary of state on July 28, 1868. This date should be kept in mind by the court in examining the various decisions relative to restriction on the right of a state to control the tenure of real property within its borders. Many cases relied upon by the states

and referred to by the courts as authority for the principle of state control, were decided before the Fourteenth Amendment became a law. Many other cases so relied upon did not and could not have been affected by this amendment, for reasons which we shall hereafter present.

Only one decided case has dealt precisely with the question here presented.

In the case of *Porterfield et al. vs. Webb et al.*, 279 Fed. 114, a direct attack was made upon the constitutionality of the section in question here, and they were held not in violation of the Fourteenth Amendment. Judge Dooling, in the opinion of the court, says:

"The constitutional, statutory, and treaty provisions involved in this action were considered at length by Circuit Judge Gilbert and District Judges Cushman and Neterer in the recent case of *Terrace vs. Thompson*, (D. C.), 274 Fed. 841, upon an application for a temporary injunction to restrain the attorney-general of the State of Washington from enforcing a statute of that state of the same general character as the law of California now under consideration. The plaintiffs in that case advanced, urged and argued practically the same contentions that are made by plaintiffs here, all of which were rejected by the court. As we fully agree with the reasoning and conclusions in the Terrace case, it is unnecessary for us to restate them, or to go over them in detail."

Outstanding in the opinion of the court in the case of *Terrace vs. Thompson*, 274 Fed. 841, at page 843, is the following statement:

"A state may lawfully prohibit aliens acquiring land within its boundaries, if there is no treaty to the contrary. (*Chirac vs. Chirac*, 2 Wheat. 259, 272, 4 L. Ed. 234; *Hauenstein vs. Lynham*, 100 U. S. 483, 484, 25 L. Ed. 628; *De Vaughan vs. Hutchinson*, 165 U. S. 566, 570, 17 Sup. Ct. 461, 41 L. Ed. 827; *Clarke vs. Clarke*, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028; *Blythe vs. Hinckley*, 180 U. S. 333, 21 Sup. Ct. 390, 45 L. Ed. 557.)"

An examination of those cases shows that not one of them stands for the proposition for which they are cited, when viewed in the light of the Fourteenth Amendment.

Chirac vs. Chirac was decided in 1817, long before the passage of the Fourteenth Amendment. It involved the rights of a subject and resident of France to inherit lands in Maryland under the treaty of 1788, and a Maryland statute which provided that whenever any subject of France shall, by virtue of this act, become seized in fee of any real estate, his or her estate "after the term of ten years be expired, shall vest in the state, unless the person seized of the same shall within that time, either come and settle in, and become a citizen of this state, or enfeoff thereof some citizen of this or some other of the United States of America." The decision recognized the right of the state to pass such a law, in the absence of treaty. Certainly the prohibition of the Fourteenth Amendment would be as strong as a treaty provision, if such amendment had been in force at the time.

Hauenstein vs. Lynham was decided in 1879, after the amendment, but involves the construction of a treaty between Switzerland and the United States, and the right of a nonresident alien Swiss to inherit from an intestate who died in Virginia in 1861 or 1862. It cites *Chirac vs. Chirac* and a number of other old cases, and states that "the law of nations recognizes the liberty of every government to give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede. (Vattel, B. 2, ch. 8, sec. 14.) In our country this authority is primarily in the states where the property is situated."

The Fourteenth Amendment was not considered, nor could it have been

of any binding effect here, for the reason that the estate vested in 1861 or 1862, and the heirs were not persons within the United States.

De Vaughan vs. Hutchinson, decided March 1, 1897, likewise involved rights under the will of a testator who died in 1867, before the Fourteenth Amendment was enacted.

Mr. Justice Shiras, in the first paragraph, cites a familiar rule of property, that "It is a principle firmly established that to the law of the state in which the land is situated, we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances."

All the case decides is that the rule of *Shelley's* case was introduced into Maryland as a part of the common law; has continued in force in that state and the District of Columbia, and that the construction of the will in question is to be determined thereby.

No question of an alien is involved, nor is it said that the rule of property above stated is not limited by treaty or by the Federal Constitution.

Clarke vs. Clarke, decided in 1900, involved a controversy as to whether the laws of South Carolina or Connecticut governed as to lands in Connecticut, bequeathed by a will of a resident of South Carolina made and probated in the latter state. Mr. Justice White cites *De Vaughan vs. Hutchinson*, above discussed, and repeats the rule of property above quoted from that case, deciding that the laws of Connecticut govern.

No question of an alien is involved, and no question of equal protection of the laws appears in the case.

Blythe vs. Hinckley, decided in 1901, lays down the same general rule that the matter of inheritance of lands is within the control of the state. The decision is more particularly to the effect that section 671 of the Civil Code of California, providing that "any person, whether citizen or alien, may take, hold and dispose of property, real or personal, within this state," is not in violation of article 1, section 10, of the Constitution, which declares that "no state shall enter into any treaty, alliance, or confederation." The limitations of the Fourteenth Amendment to the Constitution of the United States were not considered, and could not have been considered in that case, for the reason that the claimant was a citizen and resident of England and never was in the United States until after the death of Blythe. The claimant was, therefore, not a person within the United States who could claim the benefit of the Fourteenth Amendment, and the statute objected to attempted to take no right away from her.

A number of other cases have been cited by the various courts on the point that the state has control of the tenure of real property, and that an alien can, therefore, be deprived of holding property within a state, if the state so desires.

Geoffrey vs. Riggs, 133 U. S. 258, arose out of an estate where the intestate died in 1888 and the claimants were citizens and residents of France. The Fourteenth Amendment was not considered in that case, and could not have been, for the reason that the claimants were not persons within the United States.

It should be observed in the discussions of this matter that all of the cases above referred to involve the devolution of real property by operation of law or will, and are not directly concerned with the question of private grants between the parties. It has long been recognized that the state has a peculiar interest in and power over the rights of inheritance, for the reason that it is only by operation of the law of the state that title passes

at all in such cases, being more closely related to the functions of the state in controlling public property as a proprietor.

The case of *People vs. Crane*, 108 N. E. 427, decided by the court of appeals of New York, lays down the proposition that the state may discriminate between aliens and citizens in the distribution of its own resources. At page 432 the court says:

"It must also be evident that nothing in this opinion gives countenance to the view that the government may deny to aliens the right to engage in any private trade or calling on terms of equality with citizens. (*Wick Wo vs. Hopkins*, 118 U. S. 356, 369; *Matter of Parrott* [CC], 1 Fed. 481.) If the calling is one that the state, in the exercise of its police power, may prohibit either absolutely or conditionally by the exaction of a license, the fact of alienage may justify a denial of the privilege. (*Patstone vs. Penn.*, 232 U. S. 138, etc.)

"There must, however, be some relation in such cases between the exclusion of the alien and the protection of the public welfare. But, subject only to the exercise of the police power, it is true that, in dealings between man and man, the alien and the citizen trade and labor on equal terms.

"It is a denial of the equal protection of the laws, when the government, in its capacity as a lawmaker, regulating not its own property, but private business, bars the alien from the right to trade and labor. It is not a denial of the equal protection of the laws when the government, in its capacity as proprietor, issuing a mandate to its own agents (*United States vs. Martin*, 94 U. S. 400; *Carter, Law, its Origin, Growth and Functions*, 230), bars the alien from the right to share in the property which it holds for its own citizens."

In the case of *Terrace vs. Thompson*, the court stated that the Fourteenth Amendment was not intended as an instrument to accomplish the end there sought, as is shown by legislation enacted by congress to give effect to the Fourteenth Amendment, the primary purpose of which was the enfranchisement of the slaves. It was early considered by the Supreme Court of the United States and other courts that the provisions of the amendment were more or less limited to the rights of former slaves, but in *Yick Wo vs. Hopkins*, 118 U. S. 356, and in numerous other cases since decided, the courts have taken a much broader view, holding that "person," as used in the amendment, includes aliens and all persons within the territorial jurisdiction, without regard to any difference of race or color or nationality. It was so held in *In re Kotta*, 62 Cal. Dec. 315. It was also held in that case that the classification of persons as aliens alone was not a proper classification within the Fourteenth Amendment for tax purposes.

It has been suggested that ineligibility to citizenship as a basis of classification was initiated by Congress in barring Chinese and Japanese from citizenship. The United States Government is not limited by the terms of the Fourteenth Amendment as are the states. In the case of *In re Ah Chong*, 2 Fed. 733, the court said:

"The Fourteenth Amendment of the National Constitution provides that 'no state shall * * * deny to any person within its jurisdiction the equal protection of the laws.' To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected, and it is to deny

to them the equal protection of the laws, contrary to those provisions of the Constitution. (Parrott's case, 21 Alb. L. J. 387 [1 Fed. Rep. 481]; *Strauder vs. Virginia*, 10 Cent. L. J. 227.) It is obvious, also, from a consideration of these various provisions of the new state constitution, and the several statutes in *pari materia* referred to, considered in connection with the public history of the times, that the act relating to fishing in question was not passed in pursuance of any public policy relating to the fisheries of the state as an end to be attained, but simply as a means of carrying out its policy of excluding the Chinese from the state, contrary to the provisions of the treaty. The end to be accomplished being unlawful, as we held in Parrott's case, it is unlawful to use any means to accomplish the unlawful object, however proper the means might be if used in a proper case and for a legitimate purpose."

The present act designed to discourage the immigration of Japanese into the United States, encroaches upon the prerogatives of the National Government and is as unlawful as was the act in question in Parrott's case and the Ah Chong case. This principle is restated with force in the next to the last paragraph at page 522 in *In the matter of the estate and guardianship of Tetsabumi Yano*, 63 Cal. Dec. 515.

In *Terrace vs. Thompson*, above cited, the court distinguishes that case from Ah Chong case, on the ground that under the Washington statute "alien" does not include an alien who has in good faith declared his intention to become a citizen of the United States. The present case cannot be so distinguished. It will be contended that the California Alien Land Law may be sustained upon the basis of classification, but we are unable to see how an arbitrary classification between aliens themselves can be made within the provisions of the Constitution. If it is the policy of the State of California that its land shall not be held by aliens, the bar should be against all aliens, for notwithstanding the provisions of the act aliens from any European country can acquire title to lands in California, and hold them indefinitely, there being no requirement that such holders of land declare their intentions to become citizens, or do anything more in regard thereto than the Japanese or the Chinese may do.

The case of *Claybrook vs. City of Owensboro*, 16 Fed. 297, holds "the equal protection of the laws guaranteed by the amendment must and can only mean that the laws of the states must be equal in their benefits as well as equal in their burdens, and that less would not be 'the equal protection of the laws.'"

The case of *Santa Clara County vs. S. Pac. R. R. Co.*, 118 U. S. 394, was a tax case, and the court held that "the basis of the imposition being *property as such*, the fact that certain property is owned by a corporation or a white man, or a man of bad character, or a clergyman, cannot be made the grounds of a levy, that both in form and in effect and in result is unequal and injurious."

The police powers authorize certain classifications for the purpose of promoting the public health, the public morals, and the public safety, but even under such powers there must be a real and substantial relation between the classification and the end sought.

In *People vs. Holder*, 199 Pac. 832, decided by the district court of appeal, second district, the court said:

"It is well settled that the police power cannot be made a cloak under which to overthrow or disregard constitutional rights. It is only when

the general welfare, the interests of the public as distinguished from those of individuals, will be protected that the rights of contract may be limited by a general exercise of the police power."

In *Walling vs. Michigan*, 116 U. S. 446, the court said:

"The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States Government created thereby; * * * and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution."

And finally, we ask that the court consider carefully the case of *Buchanan vs. Warley*, 245 U. S. 60. That case had under consideration an ordinance of the city of Louisville, Kentucky, which prevented either white persons or colored persons from moving into and occupying as a residence, a house in any block in which a greater number of houses were already occupied by persons of the opposite race. Buchanan, a white man, brought an action for specific performance of a contract for the sale of real estate situate in Louisville and within the segregated block. The defendant answered that he was a colored person and could not occupy the property, and, therefore, should not be compelled to perform his agreement. The plaintiff in reply alleged that the ordinance was in conflict with the Fourteenth Amendment to the Constitution of the United States and hence was no defense to the action for specific performance.

Mr. Justice Day, in deciding the case, said:

"The assignments of error in this court attack the ordinance upon the ground that it violates the Fourteenth Amendment to the Constitution of the United States (9 Fed. S. Ann. 416), in that it abridges the privileges and immunities of citizens of the United States to acquire and enjoy property, takes property without due process of law, and denies equal protection of the laws. * * *

"The right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property, and has obligated himself to take it. * * *

"This drastic measure is sought to be justified under the authority of the state in the exercise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color. * * *

"But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases.

"The Federal Constitution and laws passed within its authority are by the express terms of that instrument made the supreme law of the land. The Fourteenth Amendment protects life, liberty, and property from invasion by the states without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. (*Holden vs. Hardy*, 169 U. S. 366, 391; 18 S. Ct. 383; 42 U. S. [L. Ed.] 780, 791.) Property consists of the free use, enjoyment,

and disposal of a person's acquisitions without control or diminution save by the law of the land. (1 Blackstone Commentaries [Cooley's Ed.] 127.)

"True it is that dominion over property springing from ownership is not absolute and unqualified. This disposition and use of property may be controlled in the exercise of the police power in the interests of the public health, convenience, or welfare. Harmful occupations may be controlled and regulated. Legitimate business may also be regulated in the interest of the public. Certain uses of property may be confined to portions of the municipality other than the resident district. Such as livery stables, brick-yards and the like, because of the impairment of the health and comfort of the occupants of neighboring property. Many illustrations might be given from the decisions of this court, and other courts, of this principle, but these cases do not touch the one at bar. The concrete question here is: May the occupancy, and necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented makes it pertinent to inquire into the constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and occupant.

While a principal purpose of the latter amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the states. This is now the settled law. In many of the cases since arising the question of color has not been involved and the cases have been decided upon alleged violations of civil or property rights, irrespective of the race or color of the complainant.

"What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? * * *

"The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any state action that denies this immunity to a colored man is in conflict with the Constitution.

"In the face of these constitutional and statutory provisions, can a white man be denied, consistently, without due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?

"These enactments did not deal with the social rights of men, but those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. (Civil Rights Case, 109 U. S. 3; 22, etc. S. Ct. 18; 27 U. S. [L. Ed.] 835, 843.) The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to

qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.

"That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

"As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given, but in view of the rights secured by the Fourteenth Amendment to the Federal Constitution such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us.

"The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.

"It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

"It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable through lawful uses with the like results."

It was argued by the attorneys-general and suggested by the court on oral argument here, that this court has passed upon the constitutionality of the Alien Land Act of California in the case of *In re Y. Akado*, also known as *S. Ikada*, Criminal No. 2443, decided May 16, 1922.

In that case this court said:

"It is not claimed that the Alien Land Act is contrary to the state or Federal Constitution, in respect to the provisions forbidding the acquisition of agricultural land. It is well settled that, in the absence of a treaty to the contrary, a state may forbid the taking or holding of property within their limits by aliens. (*Blythe vs. Hinckley*, 127 Cal. 436)."

The relation of the Fourteenth Amendment to the act was not argued or briefed in the *Akado* case, and in view of what was actually decided in the case of *Blythe vs. Hinckley*, as we have pointed out on page 11 of this brief, we earnestly urge this court to consider the effect of the Federal Constitution and particularly of the Fourteenth Amendment on the act.

Power to regulate the right of suffrage was originally in the exclusive control of the states, but since the enactment of the Fifteenth Amendment to the Federal Constitution the states are subject to the constitutional restrictions as to race, color, and previous conditions of servitude.

The guarantee of the Fourteenth Amendment that "no state * * * shall * * * deny to any person within its jurisdiction the equal protection of the laws" is just as binding as any provision of the Fifteenth Amendment, but we do not look to cases decided before the adoption of the

Fifteenth Amendment to determine whether or not a negro can vote. A state may discriminate against and between nonresident aliens as it will, but when an alien becomes a person "within its jurisdiction," he is entitled, so far as the state is concerned, to contract and labor on the same terms as citizens and other aliens in the state, except as to state property and subject to reasonable police regulations.

For the foregoing reasons we respectfully submit that the petitioner should be discharged on the following grounds:

First: That the contract is not in violation of the Alien Land Law of California;

Second: That the Alien Land Law of California denies to the petitioner, and to Tom Vicencio, the employer, the equal protection of the laws guaranteed by the Constitution to all persons within the jurisdiction of the United States.

Respectfully submitted,

THOMAS & SULLIVAN,

RAGLAN TUTTLE,

Attorneys for Petitioner.

4. DECISION OF THE COURT.

June 28, 1923.

Application for writ of *habeas corpus* prayed to be directed to the sheriff of Placer County to secure the release of petitioner from custody upon a charge of conspiracy to violate the Alien Land Law. Petitioner discharged.

For petitioner—Thomas & Sullivan, Raglan Tuttle.

For respondent—U. S. Webb, attorney-general; Frank English, deputy attorney-general; C. C. Coolidge, district attorney of Santa Clara County.

Petitioner, K. Okahara, a person of the Japanese race and a native-born subject of the Empire of Japan, and being ineligible to citizenship in this country, is restrained of his liberty by the sheriff of Placer County, this state, upon a warrant issued on a complaint charging him with conspiring with one Tom Vicencio to unlawfully and feloniously effect a transfer of an interest in real property in violation of section 10 of the Alien Land Law, approved November 2, 1920, by the people of this state as an initiative measure (Stats. 1921, lxxxiii). By this proceeding he asks to be released from custody on the theory that he has committed no public offense.

The gravamen of the offense charged is that on March 20, 1922, petitioner, in furtherance of an unlawful conspiracy, executed an agreement and contract with said Vicencio whereby said Vicencio transferred to petitioner for a term of five years *an interest* in a certain parcel of agricultural land containing twenty acres, situate in the County of Placer. The portions of the act which bear directly on the case are sections 2 and 10, which provide as follows:

"Sec. 2. All aliens other than those mentioned in section 1 of this act (aliens eligible to citizenship) may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner, and to the extent, and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

"Sec. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary, not exceeding two years, or by a fine not exceeding \$5,000, or both."

The acquisition or ownership of agricultural lands or an interest therein is not one of the rights guaranteed to or conferred on alien Japanese by any treaty relations existing between the Empire of Japan and this country.

The facts relied upon to sustain the charge of conspiracy are those which constitute the substance of the covenants of the parties to the contract and therefore appear upon the face of the instrument, the material portions of which follow:

Vicencio, the party of the first part, who is himself but a tenant of the real property in controversy, is called by the instrument the employer, and Okahara, the party of the second part, is called the contractor. Said contractor agrees to clear all of said twenty acres of land and make it ready for plowing and planting within a period of two years from the date of the execution of said agreement, one-half of said land to be cleared during the first year of the agreement and the remaining half during the second year at the price of fifty dollars an acre. The contractor is to plant the whole of said property to orchard within two years from the date of said agreement, all trees to be furnished by the employer. The contractor agrees to plant between the rows of fruit trees five acres of the land to raspberries, five acres to blackberries, five acres to strawberries and five acres to tomatoes, cantaloupes and other garden truck. The agreement provides that the party of the second part is an independent contractor and he is required to adopt the most approved customs of the neighborhood in the care, raising and cultivation of fruit trees, vines and such vegetables as shall be grown on said property. He also agrees to gather, pick and pack all merchantable fruits, berries and vegetables at seasonable times and make delivery thereof at any fruit house designated by the employer. The contractor further agrees to furnish all and every kind of labor and all and every kind of machinery, tools and equipment necessary for the performance of the terms of said agreement. Such tools and implements as are on said premises may be used by the contractor in the performance of the contract and are to be returned at the expiration thereof in as good condition as when received, wear and tear excepted. The products from the soil are to be sold by the employer on such terms and conditions as he may deem best and the contractor is to receive as his compensation (in addition to the allowance hereinbefore mentioned of fifty dollars per acre for clearing said land) fifty per cent of the net proceeds derived from the sale of said products. The contractor's share of the net proceeds shall be paid to him in cash by the employer within thirty days after receipt thereof. Certain deductions are to be made from the net proceeds and allowed the employer, such as for shook, hay, straw or other materials furnished by him to the contractor, and all costs, charges, commissions and expenses paid or incurred by said employer on account of the products or the marketing thereof, including all costs, charges and expenses paid or incurred by the employer in the cultivation of said land and orchard other than work done by the contractor, as well as all sums of money advanced by the employer to the contractor, and all indebtedness due or payable to the employer by the contractor.

Paragraphs 6 and 7 of said agreement contain the terms and covenants by which the legal status of the agreement must be fixed and follow in the language of the contract:

"6. It is understood and agreed that the contractor shall have access to the land hereinbefore described at all convenient times for the purpose of doing the work aforesaid. All crops of every nature and character to be grown on said land shall belong to and be the property of the employer,

and the contractor shall have no interest, right or claim in or to any part of the said crops but his sole right shall be to the compensation paid by the employer as herein provided, and the said compensation shall be in full payment for all services of said contractor for outlays and expenses paid or incurred by the contractor in or about said work.

"7. The employer shall have no control over the said contractor and his employees and equipment, but the contractor agrees that he and all persons employed by him shall be *sufficient* and diligent in the prosecution of said work, all of which shall be done in good and workmanlike manner and according to the best husbandry and methods of doing said work. It is further understood and agreed that if at any time the employer is dissatisfied with the work done by the contractor or with the progress of such work he may immediately terminate this contract on paying to the contractor compensation up to the time of such termination, as follows: Upon ten days' written notice given by employer to contractor, said compensation to be the usual wages paid for similar work in the same neighborhood.

"Neither this agreement nor any interest therein shall be assignable or transferrable by the contractor either voluntarily or involuntarily, without the consent of the employer, in writing first had and obtained."

The validity of section 10 of the Alien Land Law is not open to question as this court recently, in a proceeding in which its validity was assailed, pronounced it valid. (*In re Y. Akado, known as S. Ikada*, 63 Cal. Dec. 577, 207 Pac. 245.) It is there said: "It is well settled that, in the absence of a treaty to the contrary, a state may forbid the taking or holding of property within its limits by aliens. (*Blythe vs. Hinckley*, 127 Cal. 436.) Our constitution leaves to the legislature this power with regard to all aliens ineligible to citizenship. (Art. I, sec. 17.) The provisions of the act in terms allow such aliens to take and hold agricultural land to the extent that such taking or holding is prescribed by any treaty with the country of which such alien is a subject. The treaty with Japan does not prescribe or secure to its citizens the right to take or hold agricultural land situated in this state. Hence the act does not violate the treaty in that respect." (See, also, cases cited in *Blythe vs. Hinckley, supra*; *O'Brien vs. Webb*, 279 Fed. 117; *Porterfield vs. Webb*, 279 Fed. 114; *Terrace vs. Thompson*, 274 Fed. 841.) The only question before us, therefore, is whether the acts, purposes and objects as shown upon the face of the instrument are, in fact, such acts, agreements, purposes and objects as are forbidden by subdivision 10 of the Alien Land Law. If by a reasonable construction of the agreement the case is fairly brought within the inhibition of the law the petitioner should be remanded, otherwise he must be discharged.

It is the law of this and most of the states of our Union that contracts of the character of the one before us do not transfer or convey any interest in real property. Neither do they constitute agreements to do so. At a very early period in our judicial history and at a time before the ownership of lands by aliens not eligible to citizenship had excited public interest, this court in *Bernal vs. Hovious*, 17 Cal. 542 (decided in 1861), Field, C. J., writing the opinion, held that an agreement in relation to the use and cultivation of land between the parties whereby the owner was to furnish the seed, teams and sacks and the other party was to do the work and give the owner for the use of the land one-third of the grain raised, although designated by the parties a lease, was not one, but a contract for the working of a farm upon shares. (*Bernal vs. Hovius, supra*.) That case, a

leading one, is based on the rule declared in *Caswell vs. Districh*, 15 Wend. 379, and *Putnam vs. Wise*, 1 Hill (N. Y.) 235, and runs through the decisions of this state.

Unquestionably, much care was taken in the selection of the words and phrases by the parties to the agreement with a view to avoid a violation of the law under which the charge is laid. But few of the formal words and phrases ordinarily found in freehold or leasehold instruments appear in the agreement. It is true, as suggested by counsel for the state, that the character of an instrument depends upon the intention of the parties as disclosed by the language used to express the intention of the parties and not by any particular name given it by them. But it is also true that we are not permitted to make the instrument before us the basis for a criminal action, even though we may be able to concur in the suggestion that it was artfully and adroitly drawn for the purpose of avoiding a conflict with a penal statute of the state. The question is: Does it show upon its face a violation of the law as written? In form and in substance this contract follows closely a contract considered and upheld by the United States district court, Northern District of California, in the case of *O'Brien vs. Webb*, *supra*, and we entertain no doubt but that it was patterned after that contract and its drafters were aided by the discussion of the question therein made.

By the application of the rule above invoked the instrument before us cannot be characterized as a lease or transfer of any interest in real property because it lacks many of the essential elements of a lease, while, on the other hand, it bears all the characteristics of an agreement of hiring. But if it cannot be said to be an agreement of employment pure and simple it cannot under any rule of construction be held to be more than a cropping contract. The right of entry or access is not, as it is contended, equivalent to possession as that word is used in a prohibitive sense. Access to the place upon which labor is to be performed is necessary for the execution of any conceivable contract of employment. Petitioner here is merely given access to the premises at all convenient times for the purpose of performing service. The situation in this respect is precisely as it would be if he were paid a daily or monthly wage. Under such employment no one would question his right to physically go upon and remain upon the premises. Every agreement or contract to perform farm labor must of necessity give the physical right to go upon the premises upon which the labor is to be done. In the contract under consideration nothing is said about leasing or letting the premises, but, on the contrary, it is expressly provided that "all crops of every nature and character to be grown on said land shall belong to and be the property of the employer, and the contractor shall have no interest, right or claim in or to any part of said crops, but his *sole right* shall be to the compensation paid by the employer" as provided by said agreement. (*Italics ours.*)

The fact that the crops are to be converted into money by the employer and divided on a net basis with the contractor could not work a transfer of any interest in the soil to the latter any more than the payment of wages made with moneys derived from the sale of the products of the soil under the most informal contract of employment would convey an interest in the soil to an employee who assisted in the labor of production.

The clause of the contract most criticized is the one which provides that "the employer shall have no control over the contractor and his employees." This clause amounts to no more than a statement of an implied privilege or right granted to every contractor, unless expressly limited, and has no

special significance in determining the character of the agreement one way or the other. The above-quoted clause is immediately followed by the provision that the employer "if dissatisfied with the work done, or the progress of such work" may upon giving the contractor ten days' notice, terminate the contract. If the employer elects to terminate the contract the contractor is to receive for his compensation the wages usually paid for the performance of similar work in the neighborhood. The contractor is not given a free hand to plant as he wills, but is specifically held to the planting of certain named varieties of berries of limited acreage, garden truck and an orchard of twenty acres. All crops of every kind and character grown on the land shall belong to and be the property of the employer and the contractor shall have *no interest, right or claim to any part of said crops*. By the abundance of the crops produced and the market price, less the cost of production, his compensation is fixed for the services performed.

The authorities are quite general to the effect that a tenancy in common may exist in crops and none whatever exist in the land. This principle of law is recognized in *Woodson vs. Chatom*, 65 Cal. Dec. 405; *Clarke vs. Cobb*, 121 Cal. 595; *Bernal vs. Hovious*, *supra*; *Henderson vs. Allen*, 23 Cal. 519; *Walls vs. Preston*, 25 Cal. 60; *Baughman vs. Reed*, 75 Cal. 319; *Jones vs. Durrer*, 96 Cal. 95; *O'Brien vs. Webb*, *supra*; *Smyth vs. Tenkersley*, 20 Ala. 212, 56 Am. Dec. 193.

In *Henderson vs. Allen*, *supra*, it is said: "It has been repeatedly held that even the letting of land to a person to cultivate—the crops to be divided between the owner and the cropper, in certain proportions—did not amount to a lease, or create the relation of landlord and tenant between them. In such case, the owner is held to be in possession of the land, and the parties are joint tenants in the crop. (Citing authorities.) In such case it is an agreement to work on shares, and not a lease to render rent, for which an action will lie against defendant."

Warvelle on Ejectment, section 26, states the situation as follows: "It is common for parties to enter into agreements for the cultivation of land 'on shares,' that is, one person contributing the use of land while another plants and cultivates the crop, which, when harvested, is divided between them. It is well settled that such an agreement does not create a tenancy of any kind on the part of the cultivator. At best, he is only a tenant in common of the crop, which is generally regarded as personalty, and the legal possession of the land is in the owner." (See, also, *Fuhrman vs. Interior Warehouse Co.*, 64 Wash. 159, 116 Pac. 666; *Taylor on Landlord and Tenant*, vol. 1, sec. 24a; *State vs. Jewell, Collector, etc.*, 34 N. J. L. 259.)

In *Taylor vs. Donahoe*, 125 Wis. 513, 103 N. W. 1099, the distinction between a tenant and a cropper is clearly stated by the author of the opinion. It is there said: "The distinction between a tenant and a cropper is that a tenant has an estate in the land for a given time, and a right of property in the crops, and hence makes the division thereof between himself and the landlord in case of an agreement upon shares, while a cropper has no estate in the land, nor ownership of the crops, but is merely a servant, and receives his share of the crops from the landlord, in whom the title is. It is always a question of construction of the agreement under which the parties are acting. The agreement in question here seems to us to be very clear and definite upon the subject. It nowhere refers to Finnegan as a tenant, but specifically refers to his work as 'service,' and expressly provides that Donahoe shall pay him for his service by certain shares of the crops, and that the possession of the land and ownership of the crops are to remain

in Donahoe, and that Finnegan is merely to be an employee in the tilling of the land and caring for the stock. Language could hardly be plainer or more appropriate for the purpose of creating a cropper arrangement."

It will be noted that the phraseology in many of the instruments under consideration is that which is usually found in leases, but the substance of the agreement being regarded the instruments were held to create the relationship of a tenancy in common. In some cases they purported on their faces to be leases. It is true that there may be created by the use of appropriate language, in a single instrument, the relationship of landlord and tenant and also the relationship of a tenancy in common in crops. But the intention of the parties and the nature of the covenants to be performed must be of such a character as to sustain such a construction. Nothing in the language of the instrument before us would permit of such a construction.

The words "acquire, possess, enjoy and transfer" used in an inhibitory sense are well understood legal terms. "Acquire" as used in the law of contracts and descents means to become the owner of property; to make one's own. (1 Words and Phrases, 113.) "Possess" used in reference to land titles and estates means to own; have as a belonging; property. (Cent. Dist.) "In popular usage the word 'possess' includes real and personal property to which one has title as his landed possessions." (Webster's Dict; 6 Words and Phrases, 54, 63, and cases cited.) The word "enjoy" is one frequently found in instruments of transfer and means to make such use of the thing transferred as is consistent with the tenure by which it is held. "Transfer" is a word commonly used to denote a passing of title in property (usually realty) or an interest therein from one to another. The entire clause, if considered with reference to its context, leaves no room for doubt as to what is meant thereby. The purpose of the Alien Land Law, as is well said in *O'Brien vs. Webb, supra*, "was apparently to prevent ownership and legal interest in farming lands from passing to aliens who never could become citizens; and there is nothing from which it can be legitimately inferred that that design of the law is to prevent an alien from entering into a cropping agreement whereby he gives his labor for a share in the crops to be raised." It must be presumed that the act was adopted by the people with full understanding on their part of the law of estates, tenures and transfers as created by constitutional and legislative authority and as expounded by the courts of the land. It must further be presumed that the law was passed with full understanding on the part of the people of the state of existing laws governing or affecting cognate subjects. The argument that the law forbids the making of a contract of employment or agreement to till the soil on shares can only be sustained by adopting the theory that the particular agreement under consideration transfers an interest in land. To accept this theory it would become necessary to give a new and unwarranted interpretation to words and terms of ancient and established usage the meaning of which has long been settled by judicial pronouncements and legislative sanction.

The extreme care exhibited by the selection of terms to avoid a transfer of an interest in real property seems to have strengthened the conviction in the minds of counsel for the state that the entire transaction is a cunningly devised plan calculated to circumvent the law and defeat the object intended thereby to be accomplished. No undisclosed or secret designs on the part of either of the parties to the agreement, if any such really exist, have been revealed in this proceeding and we cannot from the face of the

instrument alone presume that any exist. If the agreement be but a subterfuge, as argued, by which illegal and forbidden purposes may be consummated, the state is not shorn of its power by anything here decided to show by legal evidence the true relationship existing between the parties by such conduct, facts and circumstances as may tend to establish a relationship different from the one claimed to exist as in other cases charging conspiracy.

Courts are not clothed with legislative power. And it is not within the province of judicial tribunals to suggest what the state's policy should or should not be in respect to questions purely legislative in character. We can only say that we have examined the questions presented with care and feel convinced that we are not authorized by the language of the act under which the charge is laid to hold that the facts as presented are sufficient to justify us in holding that petitioner has committed a public offense. We are not at liberty to extend the application of the law to subjects not included within it either by express language or by fair implication.

The petitioner must therefore be discharged.

SEAWELL, J.

We concur:

WILBUR, C. J.

WASTE, J.

KERRIGAN, J.

MYERS, J.

LENNON, J.

CHAPTER IV.—PORTERFIELD AND MIZUNO CASE.

W. L. PORTERFIELD and Y. MIZUNO, Plaintiffs, vs. U. S. WEBB as Attorney-General of the State of California, and THOMAS LEE WOOLWINE, as District Attorney of the County of Los Angeles, State of California, Defendants.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

IN EQUITY. No. F. 61.

1. BILL OF COMPLAINT.

To the honorable, the judges of the district court of the United States for the Southern District of California, sitting in equity:

W. L. Porterfield, a citizen of the United States and of the State of California and a resident of the Southern District of California, and Y. Mizuno, a subject of the Emperor of Japan and a resident of the Southern District of California, bring this, their bill of complaint, against U. S. Webb, as attorney-general of the State of California, and Thomas Lee Woolwine, as district attorney of the County of Los Angeles, State of California, each of whom are citizens of the State of California, and said Thomas Lee Woolwine is a resident of the Southern District of the State of California and of the city of Los Angeles, and respectfully shows unto your honors as follows:

I.

That plaintiffs suing on behalf of themselves and all others similarly situated, bring this bill of complaint against said U. S. Webb as the duly elected, qualified and acting attorney-general of the State of California, and Thomas Lee Woolwine, as the duly elected, qualified and acting district attorney of the County of Los Angeles, State of California.

II.

That the value of the matter in dispute herein between each plaintiff and defendants exceeds the sum of \$3000.00 exclusive of interest and costs.

III.

That the jurisdiction of this honorable court is invoked and exists because and by reason of the federal question involved in this suit, in that, the controversy is one arising under the Constitution and laws of the United States, and to avoid a multiplicity of suits and involves the construction and interpretation of a treaty made by the Government of the United States and the Empire of Japan, and because plaintiffs have no adequate remedy at law.

IV.

That the plaintiff Porterfield is now and for a number of years has been the owner of the following described real estate lying and being in Los Angeles County, State of California, to-wit: being the north one-half of the southeast one quarter of section 20, township 1 N., range 9 west, and containing eighty (80) acres of land.

That said real estate is particularly adapted to raising vegetables and for a number of years last past has been, and is now being devoted to that and agricultural purposes. That the plaintiff Mizuno is a capable farmer and is in all respects a desirable person to become a tenant of said real estate. That the plaintiff Porterfield desires to lease said real estate to

the plaintiff Mizuno for the period of five years, and the plaintiff Mizuno desires to accept such lease, and but for the act hereinafter specifically mentioned, the plaintiff would execute a lease of said real estate from the plaintiff Porterfield to the plaintiff Mizuno for a period of five years from this date.

V.

That said plaintiff Mizuno, in addition to being a capable farmer, is engaged in the business of trading, wholesale and retail, in farm products, and, instead of purchasing such farm products, he desires to produce his own farm products for the purpose of selling them in the wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing such farm products for such trade, he will be prevented from engaging in trade and the incidents to trade as he is authorized so to do under the treaty hereinafter mentioned.

VI.

That on or about the 20th day of November, 1920, the people of the State of California, at a general election, attempted to adopt an act known as the "Alien Land Law," said act being entitled, "An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith." Being Act No. 156.

VII.

That the defendants, U. S. Webb, as the attorney-general of the State of California, and Thomas Lee Woolwine, as the district attorney of the County of Los Angeles, said state, each have threatened to, and will enforce said act in each and all of its terms, and the whole thereof, and particularly against the plaintiffs in the event that they enter into a lease of said real estate, for the purpose and terms aforesaid, and will forfeit or attempt to forfeit such leasehold interest to the State of California, and will prosecute these plaintiffs criminally for an alleged violation of said act, above mentioned, and the said act is in its terms so drastic, and the penalties attached to a violation of the terms thereof are so great, that neither of these plaintiffs may make or execute such lease, even for the purpose of testing the constitutionality and validity of said act above mentioned, and unless this court shall determine the validity of said act in this proceeding, said plaintiffs will be compelled to submit to said act whether the same be valid or invalid, and thereby be deprived of their property without due process of law and denied the equal protection of the law in contravention of the Fourteenth Amendment to the Federal Constitution, and the plaintiffs have no adequate remedy at law, but are relievable only in a court of equity.

VIII.

The said act, above mentioned, is violative of the rights of the plaintiffs under the Constitution of the United States, in that it denies to them the equal protection of the laws, and deprives them of property without due process of law which is guaranteed by section 1 of the Fourteenth Amendment to said Constitution to all persons submitting themselves to the jurisdiction of the United States whether citizens or aliens.

IX.

That said act, above mentioned, is in conflict with, repugnant to, and violates section 1977 of the Revised Statutes of the United States.

X.

That said act is in conflict with, repugnant to, and violates section 2164 of the Revised Statutes of the United States.

XI.

That said act is invalid for the further reason that it is unreasonable, arbitrary, oppressive, capricious, inequable, unjust and made to depend on a difference of race.

XII.

That said act is, in the penalties prescribed for its violation, so drastic that no owner of real estate, or of any interest therein, could invoke the jurisdiction of any court to test the validity thereof, except at the risk of confiscation of his property and imprisonment for long terms in jails or penitentiaries and the payment of enormous fines, and for this reason said act denies to the plaintiffs and all others so situated, the equal protection of the laws and deprives them of property without due process of law.

XIII.

That said act is invalid for the reason it is in violation of, and repugnant to the treaty between the United States of America and the Empire of Japan.

XIV.

That if plaintiffs are not permitted to enter into a lease of said real estate, as aforesaid, and on the terms above mentioned, a large and irreparable loss will occur to them and each of them, and the plaintiffs have no adequate remedy at law, but are relievable only in a court of equity.

Inasmuch as plaintiffs and each of them have no adequate remedy in the premises by the strict rules of law, and can obtain relief only in a court of equity where matters and things of the kind and character hereinbefore stated are perfectly cognizable and relievable, and to the end that they and each of them may have relief which they and each of them can only obtain in a court of equity, they and each of them pray:

(1) That U. S. Webb, as attorney-general of the State of California, and Thomas Lee Woolwine, as district attorney of the County of Los Angeles, State of California, and each of them, be enjoined and restrained, provisionally, preliminarily and perpetually by the order and injunction of this court from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceedings at law or in equity for the purpose of enforcing said act above mentioned, against these plaintiffs, or either of them, upon executing or attempting to execute a lease of real estate above mentioned for the above mentioned term, or any other person or corporation similarly situated, and from causing the plaintiffs, or either of them, or any other person or corporation, similarly situated, to be arrested for violating the terms and provisions of said act, and from taking any other action in any other manner to prevent or interfere with the plaintiffs, or either of them, from executing and delivering such lease on said real estate, and that an order to show cause issue herein upon application of the plaintiffs herein, directed to the above named defendants, requiring them to show cause why a temporary injunc-

tion should not issue as prayed for herein, and that a temporary restraining order may issue pending the hearing of said show cause order.

(2) That upon the hearing, the aforesaid act be declared to be unconstitutional, illegal and void, and that a perpetual injunction be issued restraining the enforcement thereof as hereinabove prayed for.

(3) That a writ of subpoena may issue to said defendants requiring them to answer this bill of complaint and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

2. APPLICATION FOR PRELIMINARY INJUNCTION.

Before Hon. Wm. H. Hunt, circuit judge, and Hon. Benj. F. Bledsoe and Hon. M. T. Dooling, district judges.

Dooling, District Judge. The bill of complaint herein avers that the plaintiff Porterfield is a citizen of the United States, and the plaintiff Mizuno a subject of the Emperor of Japan, lawfully residing in the State of California. Porterfield is the owner of 80 acres of land particularly adapted to raising vegetables, which he desires to lease to Mizuno, and which Mizuno desires to rent from him for a period of five years, but they are prevented from entering into such lease because of the provisions of the act adopted at the election in November, 1920, known as the "California Alien Land Law," and the threat on the part of the defendants U. S. Webb, attorney-general, and Thomas Lee Woolwine, district attorney, to enforce said act in all of its terms against them if the desired lease is executed. This action is brought to restrain such enforcement. It is claimed that the act violates certain provisions of the Constitution of the United States, and is in conflict with treaty guarantees and with certain named sections of the Revised Statutes.

The act provides, in sections 1 and 2, as follows:

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Sec. 2. All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Other sections provide penalties by escheat and imprisonment for its violation. It will readily be seen that the act itself violates no treaty provision because section 2 thereof expressly protects aliens not eligible to citizenship in their relation to real property to the extent and for the purpose prescribed by any treaty between the United States and their own country, so that whatever is guaranteed by such treaty is excluded from the operation of the act. The leasehold interest intended to be conveyed by Porterfield to Mizuno is an interest in agricultural land, and there is nothing in the treaty with Japan that secures to Japanese subjects resident in this country the right to acquire, possess or enjoy agricultural land or any interest therein. The constitutional, statutory and treaty provisions involved in this action were considered at length by Circuit Judge Gilbert and District Judges

Cushman and Neterer in the recent case of *Terrace et al. vs. Thompson*, 274 Fed. 841, upon an application for a temporary injunction to restrain the attorney-general of the State of Washington from enforcing a statute of that state of the same general character as the law of California now under consideration. The plaintiffs in that case advanced, urged and argued practically the same contentions that are made by plaintiffs here, all of which were rejected by the court. As we fully agree with the reasoning and conclusions in the Terrace case it is unnecessary for us to restate them, or to go over them in detail. It is urged, however, that this case differs from the Terrace case in that the Washington law excludes from ownership of land all aliens except those who have in good faith declared their intention to become citizens, while the California law excludes only such aliens as are ineligible to citizenship and that the designation of this limited class is arbitrary, unreasonable, unwarranted and therefore invalid. Or, as stated by counsel, the legislature cannot take what might be termed a natural class of persons (i. e. aliens), split that class in two, and then arbitrarily designate the dis severed fragments of the original unit as two classes; and thereupon enact different rules for the government of each. As a matter of fact, however, the Washington law does split up the natural class of persons (aliens) into aliens who have and aliens who have not in good faith declared their intention to become citizens of the United States, and enacted different rules for the government of each, in that the former may and the latter may not own land.

It is true that Congress has the power arbitrarily to say who may be naturalized, and that exercising such power it has limited the right of naturalization to "aliens being free white persons; and to aliens of African nativity and to persons of African descent." This limitation excludes three of the five great races of the world, the yellow, the brown and the red. And while such exclusion is in a sense arbitrary, it is not without foundation in reason, and has been in effect, except for a brief period, practically during the existence of our government. In any event, once established, however arbitrarily, and so long as it continues, it furnishes a fundamental and important distinction which may well be adopted by a state in determining who may not own land within its borders. That fact was clearly recognized by the court and given expression in the Terrace case in the following language:

"It is obvious that one who is not a citizen and cannot become one lacks an interest in and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a Tower of Babel from which the tenant in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged."

If there be anything in the case of *Ah Chung*, 2 Fed. 733, which may be held to prohibit a state from lawfully preventing persons ineligible to citizenship from owning land therein, to that extent we are not disposed to follow it.

The application for a preliminary injunction is denied.

3. PLAINTIFF'S BRIEF, BY D. B. CHAPIN.

STATEMENT OF THE CASE.

The bill of complaint herein alleges that the plaintiff Porterfield is the owner of certain land in this district, and desires to lease such land to his co-plaintiff Mizuno, a subject of Japan, who desires to accept such lease; that said Mizuno is also engaged in the business of trading, wholesale and retail, in farm products; that such lease will be prevented by the defendants' enforcement of an act of the people of the State of California, adopted on the 20th day of November, 1920, known as the "Alien Land Law."

It is alleged that the result will be that the plaintiff Mizuno

"If he is prevented from leasing land for the purpose of producing such farm products for such trade, he will be prevented from engaging in trade and the incidents to trade as he is authorized so to do under the treaty hereinafter mentioned." (United States and Japan.)

It is alleged that the act in question is contrary to the Fourteenth Amendment of the Constitution, in that it denies them (plaintiffs) the equal protection of the laws and deprives them of property without due process of law.

It is alleged that said act is in conflict with and repugnant to sections 1977 and 2164 of the Revised Statutes of the United States.

THE LAW OF THE CASE.

The plaintiffs contend that said law should be declared invalid for the following reasons:

(1) It is unconstitutional and void as to plaintiffs and all others similarly situated under the Fourteenth Amendment to the Constitution of the United States.

(2) It is in conflict with, repugnant to and violates section 1977 of the Revised Statutes of the United States.

(3) It is in conflict with, repugnant to and violates section 2164 of the Revised Statutes of the United States.

(4) It is in violation of and repugnant to the treaty between the United States of America and the Empire of Japan.

THE TERMS OF THE STATUTE.

It should be observed and clearly understood, to begin with, that it is quite impossible to get out of the statute its full intended meaning and possibilities in operation, without a full and complete knowledge of the operations thereof, and the exact purpose aimed at by the State of California; and for that purpose I respectfully submit the following analysis thereof:

A—Title:

"An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith."

B—Provisions of section 1:

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the

same extent as citizens of the United States, except as otherwise provided by the laws of this state."

C—Provisions of section 2:

"Sec. 2. All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Attention is called to the following pertinent facts:

(a) This statute is a grant to the aliens specified of the right to take and hold real property indicated.

(b) Aliens indicated in this section are "all aliens other than those mentioned in section 1 of this act." As the aliens indicated in section 1 are aliens eligible for citizenship in the United States, the aliens referred to in section 2 are aliens who are not eligible for such citizenship.

(c) The property which such aliens are empowered to take under this provision is, "real property, or any interest therein, in this state."

(d) The tenure such aliens may take is defined by the words "acquire, possess, enjoy and transfer real property, or any interest therein, in this state," with, however, this limitation that this shall be done only "in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject."

Attention is particularly called to the fact that this section does not purport to grant to aliens the full and complete rights to which they may be entitled under the treaty (and in the case of Japanese subjects it does not), but that on the contrary it grants to aliens certain rights specified, which rights are to be enjoyed to the full extent guaranteed by the treaty. Therefore, if there are any rights other than to "acquire, possess, enjoy and transfer real property, or any interest therein," granted by the treaty, such rights will, if the statute alone be considered, be non-operative in California.

(e) The statute confers on the aliens described the right to "acquire, possess, enjoy and transfer" the property indicated.

Attention is again directed to the fact that the first three of the powers given, to-wit: "acquire, possess, enjoy" are the same as those given in section 1 to those aliens who are eligible for citizenship, but that the last two of the powers given to the aliens named in section 1, namely, the power to "transmit" and to "inherit" are not extended to aliens of the class described in section 2, who are in lieu thereof given the power to "transfer."

This verbiage is of the utmost importance, because in legal contemplation and in the purview of this statute there is a difference between "transmit" (the language of section 1) and "transfer" (the language of section 2), the former being the broader term and including transmission by descent, whereas the term "transfer" will not authorize such transmission. This inability to transmit by descent relates not alone to transmission to aliens ineligible to citizenship, but also to transmission to citizens (U. S.) from ineligible aliens, or to aliens eligible to citizenship from such ineligible aliens. Furthermore, *transfer* fails to authorize transmission by devise, i. e., by will, either to citizens (U. S.), or to aliens eligible or ineligible as the case may be.

Nor will the term "transfer" of property include the *taking* either by devise or by inheritance. So that this section fails not alone to empower aliens falling within its provisions, that is, aliens ineligible to citizenship,

either to devise or to cast by descent the property the statute empowers them to acquire, but it also fails to empower others to inherit such property, either by descent or devise, unless it be that the word "acquire" is broad enough to permit the alien to take by inheritance, with latter supposition seems not well founded in view of the fact that notwithstanding the use of "acquire" in the first section, the word "inherit" is also used.

It is therefore submitted that the statute is not designed to confer upon aliens ineligible for citizenship either the right to transmit by devise or by inheritance, or to take by either method. Moreover, this inability so to take relates not only to real property passing by devise or inheritance from aliens ineligible to citizenship, but to real property coming from citizens of the United States or from aliens eligible to citizenship to such aliens.

The foregoing conclusion is supported by the clear language of the California Civil Code, which in section 1039 provides as follows:

"Transfer, what. Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another."

Attention is also directed to the provisions of section 1000 of the Code, which says:

"Property, how acquired. Property is acquired by:

1. Occupancy,
2. Accession,
3. Transfer,
4. Will, or
5. Succession."

D—*Provisions of section 3:*

This section has two paragraphs reading in their order as follows:

"Sec. 3. Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in section 1 of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy and convey real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise.

"Hereafter all aliens other than those specified in section 1 hereof may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

E—*Provisions of section 4:*

"Sec. 4. Hereafter no alien mentioned in section 2 hereof and no company, association or corporation mentioned in section 3 hereof, may be appointed guardian of that portion of the estate of a minor which consists of property which such alien or such company, association or corporation is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of this act. The public administrator of the proper county, or any other competent person or corporation, may be appointed guardian of the estate of a minor citizen whose parents are ineligible to appointment under the provisions of this section.

"On such notice to the guardian as the court may require, the superior

court may remove the guardian of such an estate, whenever it appears to the satisfaction of the court:

"(a) That the guardian has failed to file the report, required by the provisions of section five hereof; or

"(b) That the property of the ward has not been or is not being administered with due regard to the primary interest of the ward; or

"(c) That facts exist which would make the guardian ineligible to appointment in the first instance; or

"(d) That facts establishing any other legal ground of removal exist."

F—Provisions of section 5:

"Sec. 5. (a) The term "trustee" as used in this section means any person, company, association or corporation that as guardian, trustee, attorney-in-fact or agent, or in any other capacity has the title, custody or control of property, or some interest therein, belonging to an alien mentioned in section 2 hereof, or to the minor child of such an alien, if the property is of such a character that such alien is inhibited from acquiring, possessing, enjoying or transferring it.

"(b) Annually on or before the thirty-first day of January every such trustee must file in the office of the secretary of state of California and in the office of the county clerk of such county in which any of the property is situated, a verified written report showing:

"(1) The property, real or personal, held by him for or on behalf of such an alien or minor;

"(2) A statement showing the date when each item of such property came into his possession or control;

"(3) An itemized account of all expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements. In respect to land and the handling or sale of products thereof.

"(c) Any person, company, association or corporation that violates any provision of this section is guilty of a misdemeanor and shall be punished by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

"(d) The provisions of this section are cumulative and are not intended to change the jurisdiction or the rules of practice of courts of justice."

G—Provisions of section 6:

"Sec. 6. Whenever it appears to the court in any probate proceedings that by reason of the provisions of this act any heir or devisee cannot take real property in this state or membership or shares of stock in a company, association or corporation which, but for said provisions, said heir or devisee would take as such, the court, instead of ordering a distribution of such property to such heir or devisee, shall order a sale of said property to be made in the manner provided by law for probate sales of property and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such property."

H—Provisions of section 7:

"Sec. 7. Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section 2 of this act, or by any company, association or corporation mentioned in section 3 of this act, shall escheat to, and become and remain the property of the State of California. The attorney-general or district attorney of the proper county shall institute proceedings to have the escheat of such real property adjudged and enforced in the manner provided by section four hundred

seventy-four of the Political Code and title eight, part three, of the Code of Civil Procedure. Upon the entry of final judgment in such proceedings, the title to such real property shall pass to the State of California. The provisions of this section and of sections 2 and 3 of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon, or interest in such property, so long as such real property so acquired shall remain the property of the alien, company, association, or corporation acquiring the same in such manner. No alien, company, association or corporation mentioned in section 2 or section 3 hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt."

In respect to the last stated section we submit the following comments:

1. It is to operate upon real property hereafter acquired in fee in violation of the provisions of this act. As already stated no title in fee can be taken under this act by aliens ineligible for citizenship in the United States or by the companies, associations or corporations defined in section 3.

2. Real property held in fee in violation of the act is absolutely escheated to the state.

It will be observed that the final sentence appears to take away a part of the rights bestowed by the section as it stood in the former act, which act placed no limit on the enjoyment of property "acquired in the enforcement or in satisfaction of any lien now existing upon or interest in such property" by the persons and associations described in sections 2 and 3. The addition now made forbids such persons to retain *possession* of any agricultural land "acquired in the enforcement or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt" for a longer period than two years. But since *possession* in the common law is quite distinct in meaning from title or ownership, it must be assumed that the framers of this act intended to use the word "possession" in its technical sense, for while the persons described in sections 2 and 3 may not, as the statute states, hold possession for more than two years, they may, so far as the statute goes, retain their title indefinitely in accordance with the provisions of the law.

I—The provisions of section 8:

"Sec. 8. Any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section 2 of this act, or by any company, association or corporation mentioned in section 3 of this act, shall escheat to the State of California. The attorney-general or district attorney of the proper county shall institute proceedings to have such escheat adjudged and enforced as provided in section 7 of this act. In such proceedings the court shall determine and adjudge the value of such leasehold or other interest in such real property, and enter judgment for the state for the amount thereof together with costs. Thereupon the court shall order a sale of the real property covered by such leasehold, or other interest, in the manner provided by section twelve hundred seventy-one of the Code of Civil Procedure. Out of the proceeds arising from such sale, the amount of the judgment rendered for the state shall be paid into the state treasury and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein. Any share of stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section 3 of this act shall escheat

to the State of California. Such escheat shall be adjudged and enforced in the same manner as provided in this section for the escheat of a leasehold or other interest in real property less than the fee."

The result of this section and of the preceding section is that any interests in real property of whatever character shall escheat to the state if the same be taken or held in violation of the provisions of this act; and that this would probably include any property contemplated by the statute which would, except for the statute, be taken by devise or inheritance. Attention is directed to the fact that the seeming mitigation of the severity of these provisions, namely, the stipulation for distribution of a balance "in accordance with the interests of the parties therein"—would probably prove entirely shadowy. Moreover, as no rule is specified as to whom the parties in interest are, it is quite uncertain whether these proceeds would be distributed as realty or as personalty.

J—Provisions of section 9:

"Sec. 9. Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section 2 hereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein."

A *prima facie* presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:

"(a) The taking of the property in the name of a person other than the persons mentioned in section 2 hereof, if the consideration is paid or agreed or understood to be paid by an alien mentioned in section 2 hereof;

"(b) The taking of the property in the name of a company, association or corporation, if the membership or shares of stock therein held by aliens mentioned in section 2 hereof, together with the memberships or shares of stock held by others but paid for or agreed or understood to be paid for by such aliens, would amount to a majority of the membership or the issued capital stock of such company, association or corporation;

"(c) The execution of a mortgage in favor of an alien mentioned in section 2 hereof, if said mortgagee is given possession, control or management of the property.

"The enumeration in this section of certain presumptions shall not be construed as to preclude other presumptions or inferences that reasonably may be made as to the existence of intent to prevent, evade or avoid escheat as provided for herein."

The escheat of property taken or held in violation of the act being provided for in section 7 and section 8, this section *declares* the *transfer* of real property or of any interest therein shall be void if the property be such as the prohibited aliens may not take, thus making the entire transaction void *ab initio*; and the section further specifies certain facts which shall be evidence of such a transfer, though at the same time affirming that these are not exclusive and that other circumstances may be offered to prove the illegal transfer.

Generally the section requires no comment. Two points, however, are worthy of special comment.

1. The section as drawn does not cover merely *transfer* to the prohibited persons, but will make void the *bona fide transfer* by prohibited persons even of property which they may have in a *bona fide* manner acquired,

and even if such transfer were sought to be made to a person not within the prohibited class. For example, if some person were to obtain on a judgment an interest in real property, even as authorized by the statute, it would appear to be impossible under this section for that person to sell such property even to a citizen of the United States and receive the purchase money. Apparently, the state intends to take all property held in prohibited interest by prohibited persons. This provision makes it impossible for prohibited persons to salvage any prohibited property of which they may be possessed. There is ground for contending that this provision is, on this view, contrary to the principle of the Fourteenth Amendment to the Federal Constitution, and therefore invalid.

2. The provisions under subparagraph (c) of the section do not, of course, agree with the general law regarding mortgages, and may likewise be invalid for the same reason.

K—Provisions of section 10:

"Sec. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

L—Provisions of section 11:

"Sec. 11. Nothing in this act shall be construed as a limitation upon the power of the state to enact laws with respect to the acquisition, holding or disposal by aliens of real property in this state."

M—Provisions of section 12:

"Sec. 12. All acts and parts of acts inconsistent or in conflict with the provisions hereof are hereby repealed; provided, that—

"(a) This act shall not affect pending actions or proceedings, but the same may be prosecuted and defended with the same effect as if this act had not been adopted;

"(b) No cause of action arising under any law of this state shall be affected by reason of the adoption of this act whether an action or proceeding has been instituted thereon at the time of taking effect of this act or not and actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as if this act had not been adopted;

"(c) This act in so far as it does not add to, take from or alter an existing law, shall be construed as a continuation thereof."

N—Provisions of section 13:

"Sec. 13. The legislature may amend this act in furtherance of its purpose and to facilitate its operation."

O—Provisions of section 14:

"Sec. 14. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The people thereby declare that they would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional."

This is the final section of the law under consideration.

APPARENT PURPOSE.

The purpose of this statute is perfectly obvious even if it were not a matter of public knowledge. It provides on its face openly, (1) to escheat as rapidly as possible all fee simple and other estates and interests in real property held in California by aliens ineligible to citizenship, save only certain titles authorized by treaty; (2) to prevent such aliens from hereafter acquiring any fee simple titles or any other estate or interest in real property except those authorized by treaty; (3) to prevent such aliens from devising or inheriting real property or any interest therein; (4) to prevent associations, companies, or corporations in which such aliens predominate from having any broader rights than those possessed by such aliens, personally.

It may be remarked in passing, though perhaps of no legal importance, that, while it is not in words expressed, yet it is obvious and is, indeed, a matter of public knowledge and notoriety, that the statute is intended so to operate as (1) to drive such aliens from certain well-known and lucrative occupations in California; and (2), finally, and this is the indirect, though real ultimate, end to be arrived at, practically to expel such aliens from California. It appears, moreover, to be a matter of equal notoriety that "such aliens" spells in this case Japanese subjects.

THE SITUATION UNDER THE TREATY.

The discussion will probably be simplified if we have clearly in mind the pertinent treaty provisions most immediately and directly bearing upon the questions involved.

Article 1 of the treaty of 1911 (omitting portions having only an indirect effect upon the immediate subject) reads as follows:

"The citizens or subjects of the high contracting parties shall have liberty * * * to carry on trade wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops * * * to lease land for residential and commercial purposes, and generally to do *anything incident to or necessary for trade* upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

* * * * *

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same *rights and privileges* as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

* * * * *

It should be noticed that at the time the treaty with Japan was entered into, California had a standing invitation to all foreigners to take, hold, and dispose of real property within this state. (Sec. 671, Civil Code.)

In the discussion of this statute, it will be well to have in mind from the outset certain fundamental propositions, as follows:

"While it is an established principle of the common law that an alien cannot acquire real property by operation of law, it is equally well established that he may take by grant or conveyance, that is, by the act of the parties; but, while he has capacity to take, he has none to hold, and the lands may at once be seized to the use of the state. But until they are seized, the alien has complete dominion over them, and his title cannot be divested except upon office found, or other notorious act equivalent

thereto; that is, until the fact of alienation is authoritatively established by a public officer, upon an inquest held at the instance of the government. The proceeding which contains the finding of the fact upon the inquest of the officer is technically designated in the books as 'office found.' It removes the fact, upon the existence for which the estate is by law divested and transferred to the government, from the region of uncertainty, and makes it a matter of record."

However, the foregoing principles are to be understood in the light of the provisions of the Federal Constitution which reads:

"Art. VI. * * *

"This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Therefore, notwithstanding the principles enumerated above any law concerning the descent or holding of real property which is enacted by a state is void as to aliens, if and in so far as it is not in harmony with a treaty governing the subject. On the other hand, if and where a treaty is silent as to descent or as to holding property, the state law is supreme, subject to certain great principles of the Federal Constitution, covering discriminations, etc., hereinafter discussed.

It is believed too clear for argument that provision for the owning of real property by aliens is within the scope of the treaty-making power of the Federal Government.

Looking at the matter therefore from the standpoint of American law *only*, and disregarding the treaty provisions, the California statutes, in so far as they permit the *holding* of real property, are grants and not restrictions upon the naked powers possessed by aliens at common law; in so far as the statutes limit the *taking* of title by devise or purchase, as between private persons, they are restrictions upon such naked powers possessed by aliens at common law.

The term "real property" is defined by the Civil Code of California as "Coextensive with lands, tenements, and hereditaments." (Code of Civil Procedure, sec. 17.)

Leasehold interests or "terms for years of land" are chattels (Blackstone, Book II, p. 386), and are by the California law, as also by the common law, personal property. (Blackstone, Book II, p. 386; Civil Code of Procedure, sec. 17; and see Kent's Commentaries, Book VI, p. 401.)

Leaseholds are covered in the proposed law by the words "or any interest therein" which follow and are connected with the words "real property."

A clear understanding and recollection of the foregoing principles will assist the study both of the treaty and of the statute.

The provisions of the treaty above quoted give the contracting parties in each of the territories of the other the following *liberties*:

"(a) To enter, travel and reside in the territories of the other to carry on trade, wholesale and retail.

"(b) To own or lease and occupy houses, manufactories, warehouses and shops.

"(c) To employ agents of their choice.

"(d) To lease land for residential and commercial purposes.

"(e) Generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

The treaty authorizes the citizens or subjects of each of the contracting parties "to carry on trade" and "generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects;" it will therefore be well to examine in the first place the scope of the word "trade."

The meaning of the two words "deal" and "trade," and "dealing" and "trading" was considered in the case of *Fleckner vs. U. S. Bank* (1823), 8 Wheaton, p. 338. The question was as to the power of the United States Bank legally to purchase, under its charter, notes in the ordinary course of business, one of its articles declaring that "the said corporation shall not, directly or indirectly, *deal* or *trade* in anything except bills of exchange, gold or silver bullion, or in the sale of goods really or truly pledged for money lent and not redeemed in due time, or goods which shall be the proceeds of its lands." The court said:

"The true interpretation, however, of that rule is that not that it prohibits purchases generally, but that it prohibits buying and selling for the purposes of gain. It aims to interdict the bank from doing the ordinary business of a trader or merchant in buying and selling goods, etc., for profit, and uses the words 'deal' and 'trade' in contradistinction to purchases made for the accommodation or use of the bank or resulting from its ordinary banking operations."

* * * * *

"The words 'dealing' and 'trading' are used as equivalent in meaning, and they are connected with goods, wares, merchandise and commodities, which words, in mercantile language, are always used with reference to corporeal substances, and never to mere choses in action."

The limitation here put by the court that dealing in *choses in action* is not *trading* is not well founded in modern practice. Nothing is more common than *trading* in stocks and bonds of corporations, and dealing in such securities is universally known as trading in them.

In a later case (1879) the court (in *May vs. Sloan*, 101 U. S. p. 231) defined the word *trade* as follows:

"The word 'trade' in its broadest significance, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally."

In an early state case in New York (*People vs. Fisher* [1835], 14 Wend. p. 15) the court said:

"The words *trade* and *commerce* are said by Jacobs in his law dictionary not to be synonymous; that commerce relates to dealing with foreign nations; trade, on the contrary, means mutual traffic among ourselves or the buying, selling or exchange of articles between members of the same community."

This definition is, however, too narrow.

A true, even if somewhat extreme view, was expressed by Putman, circuit judge, in *U. S. vs. Patterson* (55 Fed. 605, 639), who said:

"The court does not feel at all embarrassed by the use of the words 'trade' or 'commerce.' The word 'commerce' is undoubtedly in its usual sense a larger word than 'trade' in its usual sense. Sometimes 'commerce' is used to embrace less than 'trade' and sometimes 'trade' is used to embrace as much as 'commerce.' They are, in the judgment of the court, in this statute synonymous." (The statute was the Act of July 2, 1890, known as the Sherman Anti-Trust Act.)

Morrow, district judge, in his charge to the grand jury on July 13, 1894 (63 Fed. p. 840), gave a reasonably accurate definition, where he said:

"Trade" has been defined as "the exchange of commodities for other commodities or for money; the business of buying or selling; dealing by way of sale or exchange." The word "commerce," as used in the statute (of July 2, 1890, Sherman Anti-Trust Act) and under the terms of the Constitution, has, however, a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities."

This view as to "commerce" was based on Mr. Chief Justice Marshall's earlier definition (*Gibbons vs. Ogden* [1824], 9 Wheaton 1, 1890) in which the great chief justice said regarding the contentions of counsel as to the meaning of commerce:

"The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term applicable to many objects, to one of significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

Definitions of *trade*, as also of *commerce*, might be multiplied indefinitely, but it is believed these are sufficient for the purpose. Those concerning *commerce* have been inserted for two reasons, first to show the distinction which runs in American law between *trade* and *commerce*; secondly, because in liberty (e) above, the meaning of the word *commerce* becomes important since that liberty reads "to lease lands for residential and commercial purposes."

Now the treaty provisions impose no limitations whatsoever upon the right to *trade* which is granted by them, save only those limitations which are implied in the grant to national treatment specified in paragraph (e) above. Therefore, whatever the nationals of one may do as "incident to or necessary for trade" in his own country, may be done by the nationals of the other resident in that same country. This being true, no restrictions may be imposed upon the nationals of the other resident in that same country. This being true, no restrictions may be imposed upon the nationals of one by the other with reference to *trade* which is not likewise imposed upon its own nationals by the other.

The foregoing portions of the treaty as quoted and described above are designed in practically every provision solely to promote trade and commerce between the two countries, and while most of the provisions are framed with a view to fostering and protecting commerce between the two nations rather than the protection of nationals of the one resident in the other, yet the quoted paragraph of the first article deals specifically with the trade liberties granted in the first paragraph of the article. This reads:

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

Therefore, as to the conduct of trade and the acquisition and disposition of the subjects and objects of trade, the treaty places the nationals of the one resident in the other on a basis of strict equality; and the same equality is provided with reference to the protection of the property and

the application thereto of the laws—that is to say, the nationals of one resident in the territory of the other shall receive as to this protection national treatment. This equality clause is of far more import than the usual “favored nation clause.”

The business of dealing in agricultural products is a “trade.” A national can engage in the business of trading in agricultural products, and of course, can raise the products that he sells in his business.

The treaty authorizes the contracting parties in the territories of the other “to carry on trade, wholesale and retail,” and “generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects.”

If, therefore, an American can engage in the business of trading in produce and can raise the produce used in such trade, then perforce of said treaty the Japanese alien can do likewise.

In whatever respect, therefore, the California statute would make a distinction as to matters of trade and the protection and security of the subjects and objects of trade, between Japanese subjects resident in the United States for the purposes of trade and their property on the one hand, and American citizens and their like property on the other hand, such statute runs counter to the treaty and is therefore invalid.

It is true that the Washington case recently decided disproves this theory, but it is not shown by that court's opinion that it had before it for consideration the “equality clause” contained in said treaty.

The treaty between the United States and the King of Italy (concluded 1871) contains an article in the exact verbiage of the equality clause in the treaty with Japan and the Supreme Court of the United States in the case of *Storti vs. Massachusetts*, 183 U. S. 138, in construing the same, said:

“Equality of treatment is only required, and that the same rights and privileges be accorded to a citizen of Italy that are given to United States citizens under like circumstances.”

And to the same effect is *Cantini vs. Tillman*, 54 Fed. 969.

In the case of *People vs. Warren*, 34 N. Y. S. 942, it was held that:

“The Laws of 1894, C. 622, forbidding employment by contractors of aliens on public works, violates the treaty between the United States and the King of Italy, providing that resident Italians in the United States shall enjoy the same rights and privileges as are secured to our own citizens.”

In the case of *J. & P. Baltz etc. Co. vs. Kaiser etc.*, 74 Fed. 222 (C. C. A. 3rd Dist.), the court construing article 17 of the German treaty, which reads as follows:

“With regard to the marks, or labels of goods, or of the packages, and also with regard to patterns and marks of manufacture and trade, the citizens of Germany shall enjoy in the United States * * * the same protection as native citizens.”

The court said:

“The German treaty was intended to secure the same ‘protection’ to German subjects doing business in the United States as is afforded to our own citizens.”

Then again, if clauses of a contract are repugnant or inconsistent, that one which expresses the chief object and purpose of the contract must prevail, while clauses containing provisions subordinate to the chief object and purpose must give way. This is a rule of construction that cannot be questioned. So, therefore, reading the provisions of the treaty, that the subjects of each of the parties shall have liberty to enter, travel and reside in the territories of the other; that they shall not be compelled to

pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects; and that their persons and property shall be respected the same as native citizens or subjects; it must be admitted that these are the more important parts of the contract—the promises that each party made to the other—and should be given prevailing force and effect in the interpretation of the treaty, rather than a matter that is stated by way of recital.

“Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred.” (*Hauenstein vs. Lynham*, 100 U. S. 483.)

The word “property” includes both real and personal property of every kind and description, so, therefore, that the treaty gives to the citizens and subjects of each of the contracting parties the same protection and security for their persons and property, the same rights and privileges as are or may be granted to native citizens or subjects, is conclusive.

At this point we call the court’s attention to the fact that dealing in, that is, buying and selling farming land, may be considered as “trading” (see *Finnigan vs. Noerenberg*, 53 Minn. 239, 53 N. W. 1150), and that under the express terms of said treaty an alien Japanese has the right and authority to buy and sell real estate.

Said law also violates the rights conferred upon Japanese subjects by the treaty guarantee of equal protection, in that—

First: The law does not permit Japanese to inherit property which would be descendable to heirs if owned by American citizens;

Second: It does not permit Japanese subjects to devise property which, if owned by American citizens, would be devisable;

Third: Because it escheats to the State of California real property owned by Japanese which, if owned by American citizens, would not be escheatable.

In none of these cases do Japanese subjects enjoy that equality of protection and security of property to which under the treaty they are entitled; in none of these respects do they enjoy the same *rights* and *privileges* as are enjoyed by American citizens and to which they are under the treaty entitled.

THE SITUATION UNDER THE FEDERAL CONSTITUTION.

The plaintiffs claim that the act under discussion is void because it is in violation of the Fourteenth Amendment of the Constitution of the United States, and the law passed to enforce its provisions known as the Civil Rights Law. The Fourteenth Amendment enacts that “no state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The Civil Rights Bill provides that, all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. (R. S., sec. 1977.)

Section 2164, R. S., Comp. Stats., 4241, provides no tax or charge shall be imposed or enforced by any state upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such state from any other foreign country.

FAVORED. NATION CLAUSE.

It is to be observed that the above provisions of the Fourteenth Amendment and the statutes of the United States constitute practically a “most

favored nation" clause which operates in favor of all aliens within the jurisdiction of the United States, independent of any treaty.

The unusual provisions of the law under consideration naturally excite attention. The state has taken what might be termed a natural class of persons (aliens), split that class in two, and then arbitrarily designated the dissevered factions of the original units as two classes, and enacted different rules for the government of each.

To summarize:

It permits aliens of the favored class to take, hold and dispose of real estate or any interest therein in the same manner and to the same extent as citizens.

It prohibits aliens of the prohibited class from taking real estate or any interest therein unless authorized so to do by treaty.

It is settled law that:

A state may lawfully prohibit aliens from acquiring land within its boundaries, if there is no treaty to the contrary.

Chirac vs. Chirac, 2 Wheat, 259, 272; *Hauenstein vs. Lynham*, 100 U. S. 483, 484; *Clarke vs. Clarke*, 178 U. S. 186; *Blythe vs. Hinckley*, 180 U. S. 333.

Now it is obvious that the subject matter of this law, namely, the control of real estate or any interest therein, in the absence of a treaty on the subject, is entirely within the power of the state, and that it can legally prohibit *all* aliens from acquiring land or any interest therein, within its borders.

The question naturally arises: Can the state permit any alien of any race to exercise that right without at the same time permitting all other aliens the same right? The prime question therefore is: Is this an unreasonable and arbitrary classification?

Although class legislation is prohibited by the federal guaranty as to the equal protection of laws, yet this does not prohibit a reasonable classification of persons and things for the purpose of legislation.

In fact, so says the Supreme Court of the United States in the case of *American Sugar Refining Company vs. Louisiana*, 179 U. S. 89, 21 Sup. Ct. 43, 42 U. S. (L. Ed.) 102:

"Any discrimination is invalid if it is purely arbitrary, oppressive or capricious, and made to depend on difference of color, race, nativity, religious opinion, political affiliations, or other considerations having no proper connection with the object sought by the legislation."

As has already been suggested in what has been said concerning classification, it is clear that this statute runs against aliens ineligible for citizenship in the United States, no matter what their occupation may be, no matter what their condition in life may be, no matter how poor or how rich they may be, no matter what property they may own, and no matter in what location such property is to be found.

It is, moreover, clear that the statute would affect the alien persons subjected thereto to its full limitations, and would leave untouched other aliens not within its purview as also any citizens of the United States, even though such alien or such citizen owned property perfectly identical, in value, in the use to which it is put, in the benefit derived therefrom, and in location. In other words, the discrimination here is not based even upon occupation (as were the laundry cases), which when properly exercised is a legitimate basis of classification. It is based wholly and solely, and that fact should be plainly put, upon the color of the man's skin, that is, his race, and this results from the fact that the statute applies

to persons ineligible to citizenship in the United States under the federal laws which confer such eligibility upon "aliens (being free white persons) and to aliens of African nativity and to persons of African descent." (R. S., sec. 2169.)

Now, the decisions of the courts as well as the expressions of the judges, leave little doubt that such a basis of classification, if arbitrary, is not sanctioned by the Constitution of the United States.

It may be well to observe that, as a matter of fact, the whole purpose of the Fourteenth Amendment, the reason for its framing and adoption, and the spirit of its provisions, were all to prevent discrimination as among citizens and inhabitants of the United States because of race. Inequality because of race was the fundamental inequality which this amendment was designed to reach. It is unnecessary even to refer to what it cost to write this into the organic instrument of our government.

ORIGIN OF EQUAL PROTECTION CLAUSE.

The equal protection clause as embodied in the Fourteenth Amendment was an invention of American jurists, thus creating equality before the law and securing equal laws, a guaranty that never existed prior to the adoption of the Fourteenth Amendment.

In that way, the due process clause was supplemented by a new creation of a broader scope and deeper significance.

Referring to provisions of the Constitution existing prior to the adoption of the new amendments, and particularly the Fifth Amendment, Senator Howard, who introduced the Fourteenth Amendment in the Senate on behalf of the reconstruction committee, said:

"Section 1 is a restriction upon the states and does not, of itself, confer any power upon Congress. I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the states, forever disable any one of them from passing laws trenching upon these fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the races the same rights and the same protection before the law as it gives to the most powerful, the most wealthy or the most haughty."

The moment the amendment passed from the political arena to the supreme court, the manifest historical fact was promptly recognized that the protection of the negro race was the primary and immediate cause of its adoption.

In the *Slaughter House Cases* (16th Wall. 36), Mr. Justice Miller said:

"Nor shall any state deny to any person within its jurisdiction the equal protection of the laws. In the light of history of these amendments, and the prevailing purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of the laws of the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause and by it such laws are forbidden."

ITS PROVISIONS ARE UNIVERSAL.

In the weighty words of Mr. Justice Brawley:

"It is futile to argue that none but persons of the African race are intended to be benefited by this amendment. That may have been the primary cause of the amendment but its language is general."

And in *Yick Wo vs. Hopkins* (118 U. S. 356), Mr. Justice Mathews said:

"These provisions are universal in their application to *all persons* within the territorial jurisdiction without regard to any difference of race, of color, or of nationality; and the equal protection of the law is a pledge of the protection of equal laws."

To the same effect is *Kentucky vs. Powers*, 201 U. S. 1, 50 L. Ed. 633.

The ripe fruit of that wise rule of construction was embodied in the Railroad Tax Case (8 Sawy. 238) by Mr. Justice Field, who said:

"Oppression of the person and spoliation of property by any state were thus forbidden, and equality before the law was secured to all. With the adoption of the amendments, the power of the state to oppress any one under any pretense, or in any form, was forever ended and thenceforth all persons within their jurisdiction could claim equal protection under the laws. No state—such is the sovereign command of the whole people of the United States—no state shall touch the life, the liberty, or the property of *any person* however humble his lot or exalted his station, without due process of law; and no state, even with due process of law, shall deny to any one within its jurisdiction the equal protection of the laws."

The general purpose and scope of these constitutional provisions were thus stated by Mr. Justice Field in delivering the opinion of the Supreme Court of the United States in *Barbier vs. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 359:

"The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons would be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

In *Ah Kow vs. Nunan*, 5 Sawy. 562, 3 Pac. Coast Law Journal 413, Mr. Justice Field observes:

"But in our country hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the Fourteenth Amendment of the Constitution. That amendment, in its first section, declares who are citizens of the United States, and then enacts that no state shall make or enforce any law which shall abridge their privileges and immunities. It further declares that no state shall deprive any person (dropping the distinctive term citizen) of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws. This inhibition upon the state applies to all the instrumentalities and agencies in the administration of its government, to its executive, legislative and judicial departments, and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one while within the United States, from whatever country he may have come, or of whatever race or

color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcements of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others; and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment."

And the same views are expressed with equal emphasis in *In re Ah Fong*, 3 Sawy. 157.

It is to be noted that to enforce these constitutional provisions, Congress enacted the statutes hereinbefore set forth.

It will be perceived that these statutes following in this regard the constitutional provisions themselves embrace within its protection not citizens but "all persons" within the jurisdiction of the United States.

In this connection one cannot but recall the words of Judge Deady in his note to the case of *Baker et al. vs. Portland*, U. S., when he said:

"But the fact is, the anti-Chinese legislation of the Pacific Coast is but a poorly disguised attempt on the part of the state to evade and set aside the treaty of China, and thereby nullify an act of the National Government. Between this and 'the firing on Fort Sumter' by South Carolina there is the difference of the direct and indirect—and nothing more."

Read the Fourteenth Amendment for "treaty with China" and the result would appear to be equally applicable here.

In 1880 there came before the circuit court for the district of California the question as to whether or not an act making it an offense for any officer, director or agent, etc., of a corporation to employ Chinese labor was void, (1) because of the provisions of the treaty between the United States and China which guaranteed to China most favored nation treatment, or (2) because of the provisions of the Fourteenth Amendment. The court, speaking through Hoffman, J., found that the law was contrary to the treaty. However, he then proceeded to discuss the matter under the Fourteenth Amendment, and particularly the last clause of section 1, which prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws." After noting that the amendment drops in this clause the word "citizen" and uses the word "person" the court said:

"In the particulars covered by these provisions, it places the right of every person within the jurisdiction of the state, be he *Christian* or *heathen*, *civilized* or *barbarous*, *Caucasian* or *Mongolian*, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the Constitution;"

* * * * *

"It would seem that no argument would be required to show that the Chinese do not enjoy the equal benefits of the laws with citizens or the equal protection of the laws, which laws forbid their laboring, or making and enforcing contracts of labor and when very large fields of labor are open, without limit, right or hindrance, to all citizens and all other foreigners, without regard to nation, race or color."

Later in the opinion he quotes from Mr. Justice Field in *Ah Kow vs. Nunan*, 5 Sawy. 552, as follows:

"But in our country hostile and *discriminating* legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is *forbidden by the Fourteenth Amendment of the Constitution.*"

Later Mr. Justice Hoffman said:

"Upon reason and these authorities, therefore, it seems impossible to

doubt that the provisions in question are both, in letter and spirit, in conflict with the Constitution and laws of the United States, as well as with the stipulations of the treaty with China. And this *constitutional right* is wholly independent of any treaty stipulations, and would exist without any treaty whatsoever so long as the Chinese are permitted to come into and reside within the jurisdiction of the United States. Protection is given by the Constitution itself, and the laws passed to give it effect, irrespective of treaty stipulations." (Italics ours.) (*In re Parrott*, 1 Fed. 481.)

FUNDAMENTAL FACTS.

The fundamental facts to be gained from these cases are that the court recognized and declared that it was unconstitutional to make race the basis of this classification.

In the same year there was brought before the circuit court of California, for determination as to its constitutionality or its violation of treaty rights, a statute providing that "*all aliens incapable of becoming electors of this state* are hereby prohibited from fishing, or taking fish, lobsters, shrimps or shell fish of any kind, for the purpose of selling or giving to another person to sell." (*Ah Chow*, 2 Fed. 733.)

There is a striking similarity between the provision here in this statute defining aliens falling within it and the discrimination specified in the California land law, in fact, the same principle controlling that case will control the case at bar.

After declaring that this act violated the treaty provisions between the United States and China, Judge Sawyer, after calling attention to the constitutional provision regarding "equal protection of the laws," said:

"To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempted from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains and penalties than those to which others are subjected, and it is to deny to them the equal protection of the laws, contrary to the provisions of the Constitution."

Here, again, the fundamental principle to be obtained from that case is that race is an improper basis of classification or discrimination. The decisions here were not that the purpose of the classification in those cases, that is, an exercise of police protection (see *Soon Hing vs. Crowley*), nor the subject matter of the classification, namely, the occupation in which the persons affected were engaged, were both or either of them improper, but that the classification fell because it was imposed upon persons of one race, only, and did not affect all other persons under like circumstances in the same way.

(The laundry cases, *Barbier vs. Connolly*, *Yick Wo vs. Hopkins*, *Soon Hing vs. Crowley*, all turn upon the proposition that race is an improper basis of classification under the provisions of the Fourteenth Amendment.) It is, moreover, essential to observe that the statute under consideration in the *Yick Wo* case was on its face fair, and involved no discrimination against class, being in that respect fundamentally different from the statute under discussion, but the court found in that case that:

"Though the law itself be fair on its face, yet if it is applied and administered by public authority with an evil eye and uneven hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

If a statute fair on its face is unconstitutional because it is adminis-

tered unequally, and with discrimination against members of a particular class, then *a fortiori* a statute must be unconstitutional which on its face bases its classification upon the question of race of the individual affected. The principle involved in these cases has been announced by the courts at other times. Reference has already been made of the quotation of Judge Sawyer from the language of Mr. Edmunds of Vermont in the argument of the San Mateo case, when he said of taxes:

"The basis of the imposition being *property as such*, the fact that certain property is owned by a corporation or a white man, or a man of bad character, or a clergyman, cannot be made the ground of a levy, that both in form and in effect, and in result is unequal and injurious." (*County of Santa Clara vs. Southern Pacific.*)

Mr. Justice Brewer, in *Gulf etc. R. R. Co. vs. Ellis* (U. S.), said, regarding the same matter of taxation:

"The state may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them, and all black men not; it may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Another striking illustration is the case of *Gandolfo vs. Hartman*, 49 Fed. 181, by the circuit court of the Southern District of California, where it was held:

"A covenant in a deed not to lease to a Chinaman is void as contrary to the public policy of the government, in contravention of its treaty with China, and in violation of the Fourteenth Amendment of the Constitution, and is not enforceable in equity."

In the case of *In re Lee Sing* (C. C.), 43 Fed. 359, the court had before it an ordinance of the City and County of San Francisco prescribing a certain portion of the city for the residence of Chinese.

It was objected that the ordinance was a discrimination against the Chinese residents of the city and contrary to the provisions of the Fourteenth Amendment to the Constitution.

Judge Sawyer, in commenting upon this ordinance, disposed of the question involved with this brief and pointed observation:

"That this ordinance is a direct violation of not only the express provisions of the Constitution of the United States, in several particulars, but also of the express provisions of our several treaties with China and of the statutes of the United States, is so obvious that I shall not waste more time or words in discussing the matter. To any reasonably intelligent and well-balanced mind, discussion or argument would be wholly unnecessary and superfluous. To those minds which are so constituted that the invalidity of this ordinance is not apparent upon inspection and comparison with the provisions of the Constitution, treaties and laws cited, discussion or argument would be useless."

It would seem, in view of these precedents and these expressions, that the proposition that the color of a man's skin is in itself, and without other considerations, a proper basis of classification, is without any legal merit whatsoever, and that any law providing for a classification, and basing such classification on a race and nothing else, is clearly unconstitutional, because

arbitrary and unreasonable and so in violation of the provisions of the Fourteenth Amendment.

It will be observed in the Parrott case and the Ah Chang case, *supra*, that the court found that the discrimination practiced against the Chinese in the matters under discussion in those cases was contrary to the provisions of the treaty between the United States and China, which provided that the Chinese subjects in the United States should have the most favored nation treatment, and that as persons of nationality other than Chinese were permitted to do the things which the Chinese were prohibited from doing, the statutes were in contravention to the treaty and therefore void. But, as has been pointed out, the courts did not stop here, they went further and found that these discriminations were equally obnoxious to the provisions of the Fourteenth Amendment, which guaranteed to Chinese persons the same rights and privileges which were granted to aliens of other nationalities. It is to be observed that under this view of the provisions of the Fourteenth Amendment constitute practically a most favored nation clause which operates in favor of all aliens within the jurisdiction of the United States. It is a curious result of this doctrine that it may well happen in certain cases that an alien will enjoy greater rights under the provisions of our Federal Constitution than he will enjoy by virtue of treaty stipulation.

Of course, it is perfectly clear that if the State of California may make a discrimination against Japanese as a race, it may discriminate against the Germans as a race, the Italians as a race, the Slavs as a race, the French as a race, and so on to the end. It is difficult to perceive to what ends a doctrine permitting arbitrary classification on account of race would lead.

Should it be said that the California statute makes the same essential discrimination as to holding property within its borders that the federal statute makes in the matter of acquiring title to public lands from the government itself; it is sufficient to say, in addition to stating that the situations are quite dissimilar, that the Federal Government as to these labors under no such disability as is imposed by the Fourteenth Amendment upon the powers of the state. Moreover, the disability as to aliens runs not against the alien at all; it is in form an authorization under which all citizens or persons who have declared their intention to become citizens shall be entitled to take lands. This operates against all aliens indiscriminately.

But in spite of these rulings of the supreme court and the expressions of the various judges, the courts, including the supreme court, have permitted classification based wholly and solely upon race. This has been done, to notice some of the most striking examples, in separating white children from colored children, in the public schools, in separating the races in public vehicles ("Jim Crow cars"), in forbidding intermarriage between the two races, etc. It is to be observed, however, in these matters that, in the first place the classification is in each case an exercise of the police powers of the state, and that, secondly, it is designed to promote the "public peace and good order." The purpose of the classification is social, the social welfare. Moreover, in these cases neither race is discriminated against. The laws are equally operative against both races. In the school and vehicle cases the laws required equal accommodations for both races, so that the advantages and inhibitions run equally against the races.

It is believed, however, that there is a clear line of distinction between these cases and the one under discussion for the following, among the more important, reasons: They involve an exercise of the police power

which is practically unbounded save by reasonableness, this case does not fall within an exercise of the police power; those cases involved no property rights whatsoever, this case is grounded on a property right; those cases involved no discrimination, but a mere separation operating as much against one race as the other, this case is based on discrimination; those cases involved no inequality; in those cases there was a substantial and reasonable relation between the purpose, the object sought and the act, the measures taken to accomplish it; in this case there is no proper or substantial purpose and no reasonable or respectable relation between the purpose and the means or act taken.

In the case of *Terrace et al. vs. Thompson*, decided July 25, 1921, by the Washington court, the Washington Alien Land Law which prohibits "all aliens" who have not in good faith declared their intention to become citizens from owning land was recently declared constitutional. In that case the court said:

"The prohibition by this definition is made applicable to all aliens, both those eligible and those not eligible to citizenship, provided they have not declared their intention to become citizens. To this extent the present suit is to be distinguished from that of *In re Ah Chang* (2 Fed. 733)."

In view of the authorities hereinbefore cited, it must be conceded that the State of California may exclude all aliens from owning land, yet if it permits one class or race to enjoy the rights or privileges it must permit all others to enjoy, upon like terms, the same rights or privileges.

To subject one class of aliens to the penalties of said act, while aliens of all other European nations under the same circumstances are exempt, is to subject them to other and entirely different punishments, pains and penalties than those to which others are subjected, and is to deprive them of property without due process of law and to deny them the equal protection of the laws contrary to the provisions of the Federal Constitution.

It is therefore respectfully submitted that for the reasons given, the conclusions already reached and set forth above, that the Alien Land Law is unconstitutional and therefore void, being contrary to the provisions of the Fourteenth Amendment, are sound, and that the discrimination made in this statute against property rights of one class of aliens is obnoxious to the Constitution.

LEASE OF LAND.

The statutory limitation in this state for a lease of agricultural land is fifteen years.

Under a lease, the lessee takes no title whatever and, in fact, is prohibited by law from disputing the title of the lessor, and any law prohibiting the leasing of land to any person for a reasonable term is arbitrary and unreasonable, and consequently void. (See *State vs. Morrison*, 18 Wash. 664, 52 P. 228.)

The language used by Mr. Justice Hoffman in concluding his opinion in the Parrott case (at p. 499), where he said:

"The declaration that 'the Chinese must go, peaceably or forcibly,' is an insolent contempt of national obligations and an audacious defiance of national authority. Before it can be carried into effect by force the authority of the United States must first be not only defied, but resisted and overcome. The attempt to effect this object by violence will be crushed by the power of the government. The attempt to attain the same object indirectly by legislation will be met with equal firmness by the courts; no matter whether it assumes the guise of an exercise of the police power, or of the

power to regulate corporations, or of any other power reserved by the state; and no matter whether it takes the form of a constitutional provision, legislative enactment, or municipal ordinance.” and the language used by Sawyer, C. J., in the Chong case, at p. 739, where he said:

“These various provisions are referred to as instances illustrative of the crudities, not to say absurdities, into which constitutional conventions and legislative bodies are liable to be betrayed by their anxiety and efforts to accomplish, by indirection and circumlocution, an unconstitutional purpose which they cannot effect by direct means.”
can aptly and should be applied to the case at bar.

It would seem that no argument should be required to show that the Chinese and Japanese do not enjoy the equal benefit of the laws with citizens, or “the equal protection of the laws” where the law forbids their leasing real property; which privilege is open, without limit, let or hindrance, to all citizens, and all other foreigners, without regard to nation, race or color.

If the verbiage of the Fourteenth Amendment and the civil rights statutes could be changed to apply to “*any person eligible to citizenship*” instead of the present form, then I apprehend the laws under consideration might be declared valid.

POLICE POWER.

It may be contended that this law is valid under the police power of the state; if so, then a sufficient answer is found in the Ah Chow case, *supra*, and in *Lung vs. Freeman*, 92 U. S. 275, 280, 23 L. Ed. 550. In the latter case it was said:

“Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity.”

SAFE GUIDE.

The circuit courts of the United States are co-ordinate tribunals, constituting a single system, and the decisions of one of them, deliberately made, are usually to be regarded as decisive of the question involved, until otherwise determined by the supreme court.

Wells vs. Oregon Ry., 15 Fed. 561; *Celluloid Mfg. Co. vs. Zylonite Brush & Comb Co.*, 27 Fed. 291.

The facts presented by the record in the case at bar, as well as the principle involved, are so strictly similar to those of *In re Ah Chow* (2 Fed. 733) that the decision there is directly and completely in point here against the unconstitutionality of the law under consideration.

Therefore, we submit, that until this question is settled by the supreme court, these deliberate decisions of co-ordinate tribunals ought to furnish a guide for the decision of this court.

Respectfully submitted,

CHAPIN, TAYLOR & KING,
By D. B. CHAPIN,
Solicitors for Plaintiffs.

Dated, October 24, 1921. Los Angeles.

4. DEFENDANT'S POINTS, BY U. S. WEBB.

STATEMENT OF THE CASE.

The bill of complaint in this case states that Porterfield is a citizen of the United States and of the State of California, and that Mizuno is a subject of the Emperor of Japan and a resident of California. They bring their bill of complaint against the attorney-general of the state and the district attorney of the County of Los Angeles, praying that the defendants be enjoined from bringing any proceeding at law or in equity for the purpose of enforcing the California Alien Land Act of 1920 against the plaintiffs, upon their executing a certain described lease of real estate belonging to Porterfield and to be leased to Mizuno. A temporary injunction is prayed for and it is asked that upon the hearing the said Alien Land Law of California be declared to be unconstitutional, illegal and void, and that a perpetual injunction be issued restraining the enforcement thereof. This hearing is on the petition for a temporary injunction.

The theory of the complaint is that the said California Alien Land Act violates the Fourteenth Amendment to the Constitution of the United States in that it denies to the plaintiffs the equal protection of the law and deprives them of property without due process of law, and also violates sections 1977 and 2164 of the Revised Statutes of the United States and likewise the Treaty of Commerce and Navigation with Japan of February 21, 1911.

The real estate belonging to Porterfield is described as located in the County of Los Angeles, State of California, and as being particularly adapted to raising vegetables. Mizuno is described as a capable farmer and in all respects a desirable person to become a tenant of said real estate. It is stated that Porterfield desires to lease the said real estate to Mizuno for the period of five years and Mizuno desires to accept such lease.

An attempt is made in paragraph V of the complaint to set forth that plaintiff Mizuno is engaged in a trading business, wholesale and retail, in farm products, in addition to being a farmer. This allegation is obviously made for the purpose of claiming that the parties plaintiff are entitled to the protection of those provisions of the treaty with Japan which state that the citizens or subjects of the two contracting parties shall have liberty to carry on trade, wholesale and retail, in the territories of the other. It might be well at this point to quote this statement found in paragraph V of the complaint, and to indicate that it is identical in its language with a similar allegation found in the bill of complaint in the case of "*Frank Terrace and Elizabeth Terrace, his wife, and N. Nakatsuka, Complainants, vs. Lindsay L. Thompson, as Attorney-General of the State of Washington, Defendant*," No. 132, decided by the United States District Court, Western District of Washington, Southern Division, to the decision in which case we shall hereinafter refer at length. The allegation of paragraph V of the bill of complaint in our case is couched in the following language, and this language, with the exception of the names of the parties, is identical with the similar allegation in the Terrace case with the exception of that portion which we shall place in parentheses, which is found in the Terrace case and not in this case, and which, if there be any distinction at all, renders the pleading in this case weaker than that found in the Terrace case:

"That said plaintiff Mizuno, in addition to being a capable farmer, is engaged in the business of trading, wholesale and retail, in farm products, and, instead of purchasing such farm products, he (had produced and)

desires to produce his own farm products for the purpose of selling them in the wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing such farm products for such trade, he will be prevented from engaging in trade and the incidents to trade as he is authorized so to do under the treaty hereinafter mentioned."

ARGUMENT.

SECTIONS 1977 AND 2164, UNITED STATES REVISED STATUTES, ARE NOT VIOLATED BY THE CALIFORNIA ALIEN LAND LAW.

Section 1977 of the Revised Statutes provides that:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 2164 of the Revised Statutes provides that:

"No tax or charge shall be imposed or enforced by any state upon any person immigrating thereto from a foreign country, which is not equally imposed upon any person entering such state from any other foreign country."

Paragraph VIII of the bill of complaint alleges that the act denies to the plaintiffs equal protection of the laws.

Paragraph IX invokes the sanctity of section 1977 of the United States Revised Statutes, which, as pointed out in the opinion in *Terrace vs. Thompson*, simply declares the right of all persons "to make and enforce contracts."

Obviously this section is limited in its scope to what it describes—"Contracts." Though a lease may have contractual features, it is really in law a conveyance of a qualified interest in land. (See *Buchanan vs. Warley*, 245 U. S. 60, 78.)

Section 2164 of the United States Revised Statutes, also invoked by the bill of complaint in paragraph X thereof, simply forbids any state imposing any unequal taxes upon persons immigrating from any foreign state. What this section has to do with agricultural land leases we utterly fail to perceive.

Sections 1977 and 2164 partially enumerate the rights and immunities intended to be guaranteed by the Fourteenth Amendment to the Constitution. The object of section 1977 was to place the colored race, in respect to civil rights, on a level with the whites. In other words, it makes effective in part the Fourteenth Amendment itself, and we need discuss the statutes no further than to refer to our discussion hereinafter contained, which is presented as an argument to show that the Fourteenth Amendment is in no way applicable to the privilege claimed on behalf of an alien ineligible to citizenship to lease lands in this state for agricultural purposes.

THE ALIEN LAND LAW OF CALIFORNIA DOES NOT VIOLATE ANY OF THE GUARANTIES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Fourteenth Amendment to the United States Constitution provides in section 1 thereof that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Plaintiff Porterfield is entitled to claim the protection of all of the Fourteenth Amendment above quoted, and plaintiff Mizuno is entitled to claim the protection only of that portion which prohibits any state depriving any person of life, liberty or property, without due process of law, or denying to any person within its jurisdiction the equal protection of the law.

The Alien Land Act of California, which, it is claimed, violates the provisions of the Fourteenth Amendment, states, in section 1 thereof, that—

"All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

Section 2 provides that

"All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

The decisive answer to any claim, either by a citizen or a non-citizen, to the protection of the Fourteenth Amendment in a case such as is now before the court, is that the amendment was never intended to deprive the states of the Union of their inherent and unquestioned power to control in matters of ownership or other interests in lands, when a question of an alien securing such interests is involved.

This point is very clearly discussed by the District Court of the United States, Western District of Washington, Southern Division, in the case of "*Frank Terrace and Elizabeth Terrace, his wife, and N. Nakatsuka, Plaintiffs, vs. Lindsay L. Thompson, as Attorney-General of the State of Washington, Defendant*," decided July 25, 1921, the decision being written by the Hon. Edward E. Cushman, D. J., and concurred in by the Hon. William B. Gilbert, C. J., and the Hon. Jeremiah Neterer, D. J.

The bill in the Terrace case alleged that the complainants Terrace, owners of certain land, desired to lease such lands to the complainant Nakatsuka, a subject of Japan, who desired to lease said lands from them, and that the subject of Japan was engaged in farming and trading, wholesale and retail, in farm products. The Alien Land Bill of the State of Washington forbade such a lease, and it is alleged in the complaint that this act is contrary to the Fourteenth Amendment to the Constitution of the United States. This Alien Land Law of the State of Washington is chapter 50 of the Laws of Washington, 1921.

COMPARISON OF CALIFORNIA ALIEN LAND LAW AND WASHINGTON ALIEN LAND LAW.

For the purposes of this case the following are the only distinctions of interest between the California and the Washington Alien Land Laws:

Section 1 of the California law provides that all aliens eligible to citizenship under the laws of the United States, whether or not they have applied for citizenship, may "acquire, possess, enjoy, transmit and inherit real property, or any interest therein."

Section 2 provides that all other aliens than those mentioned in section 1, that is, all aliens ineligible to citizenship, may have the same interest in real property as referred to in section 1 only as prescribed by any treaty between this government and another country of which such alien is a citizen or subject.

Section 3 of the California law places companies, associations and corporations of which a majority of the members are aliens ineligible to citizenship or in which a majority of the issued capital stock is owned by such aliens, in the same category as the persons ineligible to citizenship described in section 2.

Section 2 of the Washington act provides that no alien, whether eligible to citizenship or not, shall own land or take or hold title thereto.

Section 1, subdivision a, however, makes an exception in the case of an alien who has in good faith declared his intention to become a citizen of the United States.

Said subdivision a of section 1 also creates the same classification as we have in the California act for corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens, or a majority of whose members are aliens.

Subdivision b of section 1 of the Washington act makes certain exceptions in favor of the alien with which we are not here concerned, referring to lands containing mineral deposits, etc., and also provides, as an exception, the "right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen."

We see, then, that for the purposes of the principles involved in the case at bar, the two statutes cannot be distinguished.

The essential differences between them are:

First: In California only aliens ineligible to citizenship are barred from the right to interests in lands, while in Washington all aliens, including those eligible to citizenship, are so barred. In this respect the Washington act bars a larger general group of aliens than does the California act.

Second: In California an eligible alien may acquire interests in land, even though he has not declared his intention of becoming a citizen. In Washington such an eligible alien would not be entitled to such an interest in land unless he has declared his intention of becoming a citizen. In this respect the Washington act again includes a larger class as not entitled to acquire rights in realty. That is, with reference to eligible aliens, there are some that are barred. In California none are.

Third: In the Washington act leasehold interests limited to ten years are allowed to any alien, provided that the treaty with the country of which the alien is a citizen grants the enjoyment of such land for some purpose. In California, on the other hand, there is no attempted limitation of any kind against aliens who are accorded rights in realty by treaty regulations. Here, again, the Washington act attempts to bar a larger class of aliens than does the California act. In Washington all aliens, citizens of a country accorded by treaty agreement certain rights in realty, are limited in these rights to a term of ten years. In California the identical aliens would not be limited at all but would be accorded every right that the treaty attempts to confer.

Reviewing these distinctions, it is easily shown that in so far as the California statute differs from the Washington act it is supported by the logical reasoning showing the fundamental consideration involved in this entire subject matter as contained in the Terrace case, decided by the United States district court in Washington.

The first distinction above noted is to the effect that in California the only aliens barred from acquiring interest in land are those who are

ineligible to citizenship. This is certainly a natural classification. The fundamental reasoning of the Terrace case is to the effect that the inherent principle that has been handed down throughout the history of international relations from the days of the year books of the common law is the security of all nations in their international relationships. The first rule of each nation must be the rule of self-preservation. This rule demands that each nation be permitted to decree who shall own and have interests in its lands. A country that would permit of its very soil, which is the life-giving foundation of the state, being owned by persons who owe allegiance to a foreign sovereignty would be inviting ultimate annihilation. Of all aliens, therefore, who on this principle should be barred from acquiring interest in land those who cannot renounce their foreign allegiance and become citizens of our country are the ones that the state legislature should deal with. An alien who is eligible to citizenship might be encouraged to become a citizen of this country and such encouragement cannot be better made than by inviting him to acquire land here, set up his home here, and in that way become so interested in the internal affairs of the United States as to lead to a desire that he become a citizen thereof and in this way renounce his allegiance to a foreign state.

This leads us to the second distinction above, which is that in California an alien eligible to citizenship may acquire an interest in land even though he has not declared his intention of becoming a citizen. In Washington he must so declare before he has this right. As noted above, the California law is based on the soundest of reasoning, in that by so permitting the eligible alien to hold lands in this state, even though he has not applied for citizenship, California is encouraging him to finally become a citizen of this country.

Every intendment, in other words, of the California statute is to finally consummate the gathering together of our foreign population into our own American family, to the end that the security of the nation might be guaranteed, which is the first and primary duty of those who would properly guard and perpetuate the national life.

The third distinction above noted is of no immediate interest in this case. We should observe, however, that the California statute so much more carefully respects and recognizes all treaty rights.

The court, in the Terrace case, cited to the point that:

"A state may lawfully prohibit aliens acquiring land within its boundaries, if there is no treaty to the contrary."

Chirac vs. Chirac, 2 Wheat. 259, 272; *Hauenstein vs. Lynham*, 100 U. S. 483, 484; *DeVaughan vs. Hutchinson*, 165 U. S. 566, at 570; *Clarke vs. Clarke*, 178 U. S. 186; *Blythe vs. Hinckley*, 180 U. S. 333.

The court, in the Terrace case, states that:

"Tribal laws of the progenitors of the Anglo-Saxons, while still upon the continent, made an estate in lands, similar to a freehold, a prerequisite to a voice in the tribal government. The 'free-necked man,' or 'freeman' was synonymous with 'freeholder'. They were interdependent. A freeman had a vote in determining tribal policies and no one was a freeman without an estate in lands. (Green's History of the English People, book 1, chap. 1, subhead 'The Land'.) The recognition of this principle has run throughout the history of our race and its government."

Lord Coke, in Book 1-2b of Coke upon Littleton (Gargrave and Butler Edition), states the rule as follows:

"If an alien Christian or infidel purchase houses, lands, tenements, or hereditaments to him and his heires, albeit he can have no heires, yet he is of capacitie to take a fee simple but not to hold. For upon an office found, the king shall have it by his prerogative of whomsoever the land is holden. And so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king. If an alien purchase any estate of freehold in houses, lands, tenements or hereditaments, the king upon office found shall have them."

Blackstone, volume 1 at page 372 of his Commentaries, states the rule as follows:

"An alien born may purchase lands, or other estates; but not for his own use; for the king is thereupon entitled to them. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconsistent with that which he owes to his own natural liege lord; besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences." (1 Blackstone's Commentaries, p. 372.)

See also: 2 Kent's Comm., 14th Ed. 53-64; Kerr, Real Property, 215 *et seq.*; Tiffany, Real Property, 2350; 1 Stimson's Am. St. Law, 6013; Stephens' Comm. on Law of England, vol. I, 1, 330; Sedgewick, Trial of Title, 226; 1 Washburn, Real Property, 131.

The Supreme Court of the United States has also decided this point.

Fairfax vs. Hunter's Lessee, 7 Cranch. 603.

In *Chirac vs. Chirac*, 2 Wheat. 259, the United States Supreme Court accepted, without dissent, the point made by the plaintiff in error, that in the absence of a treaty the property of the deceased went to the state "because it was acquired before he became a citizen of the United States."

See *Orr vs. Hodgson*, 4 Wheat. 453.

In *Hauenstein vs. Lynham*, 100 U. S. 483, *Fairfax vs. Hunter's Lessee*, 7 Cranch. 603, *supra*, is affirmed, and the court says, at page 484:

"The law of nations recognizes the liberty of every government to give to foreigners only such rights to immovable property within its territory, as it may see fit to concede. (Vattel, book 2, c. 8, sec. 114.) In our country this authority is primarily in the states where the property is situated."

In *United States vs. Repentigny*, 72 U. S. 211, it was held that Congress might by a general act divest aliens of any rights which they might have in real estate instead of requiring judicial proceedings.

See also: *Blythe vs. Hinckley*, 180 U. S. 333; *Geofrey vs. Riggs*, 133 U. S. 258; *Donaldson vs. State*, 101 N. E. 485; *Jones vs. Jones*, 234 U. S. 615.

The only exception which the common law made was in cases of leases made for the habitation of a merchant.

Lord Coke, in Coke upon Littleton, Book 12-b, states the rule as follows:

"But as to a lease for yeares, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods and the like. For if he take a lease for yeares of lands, meadows, etc., upon office found, the king shall have it. But of a house for habitation he may take a lease for yeares as incident to commerce; for without habitation he cannot merchandise or trade. But if he depart, or

relinquish the realme, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it, but the king; for he had it only for habitation as necessary to his trade or traffique and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for yeares, albeit it were for his habitation; and so it is if he be an alienemie. And all this was so resolved by the judges assembled together for that purpose in the case of Sir James Croft, Pasch. 29, of the raigne of queene Elizabeth."

The modern application of the common-law rule, dating back to the time of the Year Books, that the only title which an alien could acquire to real property was a title subject to defeasance by the sovereign, could not be better expressed than it is by the court in the Terrace case. After quoting language expressive of the enormous change that has taken place in the last two generations in international relationships the court says:

"The sympathetic and temperate view here expressed, no doubt, should restrain us from forcing our civilization upon alien-types. Yet it lessens no jot or tittle the duty of the court to hold impregnable the barrier erected by Congress to preserve, in its purity, our own type of civilization. The more homogeneous its parts, the more perfect the union. It may be that the changes wrought in the Orient in the last fifty or seventy-five years now warrant a different policy; but there is no law or treaty that yet has said 'the twain shall meet,' or that, if citizenship be accorded these Orientals, the danger is past of our becoming a 'mechanical medley of race fragments.'

"It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a Tower of Babel from which the tenants in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged."

Secretary of State Bryan in his diplomatic correspondence with the Japanese ambassador, following the enactment of the California Alien Land Law of 1913, expressed the necessity for the fundamental doctrine of a nation's control of its land tenure in the following very convincing language, in his communication of July 16, 1913, to the Japanese ambassador. (Papers Relating to the Foreign Relations of the United States, 1913, Department of State, United States of America, at p. 641):

"I am quite prepared to admit that all differences between human beings—differences in appearance, differences in manner, differences in speech, differences in opinion, differences in nationality, and differences in race—may provoke certain antagonism; but none of these differences is likely to produce serious results unless it becomes associated with an interest of a contentious nature, such as that of the struggle for existence. In this economic contest the division no doubt may often take place on racial lines, but it does so not because of racial antagonism but because of the circumstance that the traditions and habits of different races have developed

or diminished competitive efficiency. The contest is economic; the racial difference is a mere mark or incident of the economic struggle.

"All nations recognize this fact, and it is for this reason that each nation is permitted to determine who shall and who shall not be permitted to settle in its dominions and become a part of the body politic, to the end that it may preserve internal peace and avoid the contentions which are so likely to disturb the harmony of international relations."

Again the court, in the Terrace case, addressing itself to the point raised, that the prohibition to the landowner disposing of his property to the alien is a violation of the Fourteenth Amendment, used the following language:

"The citizen landowner may sell to whom he pleases; but he may not sell to one who is rightfully forbidden the right to buy.

"That the Fourteenth Amendment was not intended as an instrument to accomplish the end here sought, is shown by legislation early enacted by Congress to give effect to the Fourteenth Amendment, the primary purpose of which was the enfranchisement of the slaves.

"Slaughter House Cases, 16 Wall. (83 U. S.) 36; *Buchanan vs. Warley*, 245 U. S. 60, at 76 and 78.

"By the amendment members of the enfranchised race were made citizens of the nation and state of their residence, a privilege at present denied to the subjects of Japan.

"In giving legislative aid to these constitutional provisions Congress enacted in 1866, c. 31, sec. 1, 14 stat. 27 (Rev. Stats., sec. 1978), that:

"*All citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.*"

"And in 1870, by c. 114, sec. 16, 16 stat. 144 (Rev. Stats., sec. 1977), that (this section, we saw above, is claimed to support plaintiff in the case at bar):

"*All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other.*" (*Buchanan vs. Warley*, 245 U. S. 60, at 78.) (Italics those of this court.)

"These statutes show that Congress then understood the Fourteenth Amendment did not forbid the state the right to deny ownership of lands within its boundaries to aliens."

Indeed we do not apprehend that any further discussion of the inapplicability of the Fourteenth Amendment to our question is necessary at this time.

Paragraph XI of the bill of complaint charges that the California Land Law is unreasonable, arbitrary, capricious, inequitable and unjust, and that it is made to depend upon difference of race.

We insist, however, that this act in plain terms affords to every alien who is capable of becoming a citizen full rights of ownership and interest in our land, and to every other alien such rights as his nation enables him to obtain by the provisions of any treaty between his country and this country.

Surely there can be no discrimination, inequality, unreasonableness, ca-

priciousness or arbitrary injustice in this method of providing for the rights of aliens in this country, or in the states that compose it.

Surely also the operation of the provisions of this law is in no respect made to depend upon difference of race, for differences of race are entirely eliminated by the liberal provisions of section 2 of the act.

Fully applicable to this contention, and decisive of it, is the judicial determination long since made and continuously maintained, that where all persons of a class are treated alike by any legislative enactment, it is not obnoxious to the provisions of the Fourteenth Amendment of the United States Constitution, or indeed to any other constitutional limitations.

As was most aptly and clearly enunciated by the Supreme Court of the United States, in *Perley vs. North Carolina*, 249 U. S. 510, 514, the general principles applicable to alleged discriminatory statutes and the constitutional inhibition thereof are well defined. In that case the court said:

"We concede the aphorism upon which counsel relies that, 'The equal protection of the laws is a pledge of the protection of equal laws.' We, on March 24th last, by an almost prescience of the contention now based on it, defined its extent and declared that the Fourteenth Amendment, which is the foundation of the aphorism, does not regard the impracticable, and that distinctions may be made by the legislation between objects or persons, and that the power of the state 'may be determined by the degrees of evil already exercised where detriment is especially experienced.' Moreover, we pointed out that the deference due to the judgment of the legislature in the matter had been emphasized again and again. (*Hebe Co. vs. Shaw*, 248 U. S. 297, 307; *Dominion Hotel vs. Arizona*, 249 U. S. 265.)"

TREATY OF COMMERCE AND NAVIGATION WITH JAPAN.

February 21, 1911.

THE ALIEN LAND LAW OF CALIFORNIA DOES NOT VIOLATE THE TERMS OF THE TREATY WITH JAPAN.

This treaty is found in volume 3 of the Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, Supplement 1913 to Senate Document No. 357, Sixty-first Congress, Second Session, at page 77. It is entitled a treaty of "Commerce and Navigation." The introductory language states that the President of the United States of America and His Majesty the Emperor of Japan, "believing that the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries will contribute to the realization of this most desirable result" (that is, a realization of amity and good understanding), "have resolved to conclude a treaty of commerce and navigation for that purpose, etc."

Article I provides: That the citizens or subjects of each of the high contracting parties "shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own, or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice to lease land for residential and commercial purposes * * *."

Article II provides: That the dwellings, warehouses, manufactories and shops of the citizens or subjects of each of the high contracting parties in the territories of the other, and all premises appertaining thereto "used for purposes of residence or commerce, shall be respected."

Article IV refers to the "most favored nation" provision. It is stated that:

"There shall be between the territories of the two high contracting parties reciprocal freedom of commerce and navigation. The citizens or subjects of each of the contracting parties, equally with the citizens or subjects of the most favored nation, shall have liberty freely to come with their ships and cargoes to all places, ports or rivers in the territory of the other which are or may be opened to foreign commerce, subject always to the laws of the country to which they thus come."

An examination of the different articles of this treaty will show throughout that its purpose is to provide essentially and particularly for commerce and navigation between the two contracting parties. In article XIII it is provided: That the coasting trade of the high contracting parties is excepted from the provisions of the treaty and shall be regulated according to the laws of the United States and Japan, respectively. The article continues, however, to state that "it is, however, understood that the citizens or subjects of either contracting party shall enjoy in this respect most-favored-nation treatment in the territories of the other."

Here, again, is an express reference to the most favored nation rule applying particularly to commerce and navigation.

This most favored nation proviso is again contained in article XIV, where it is provided that—

"except as otherwise expressly provided in this treaty, the high contracting parties agree that, in all that concerns commerce and navigation, any privilege, favor or immunity which either contracting party has actually granted, or may hereafter grant, to the citizens or subjects of any other state shall be extended to the citizens or subjects of the other contracting party gratuitously, if the concession in favor of that other state shall have been gratuitous, and on the same or equivalent conditions, if the concession shall have been conditional."

The above italicized language indicates not only that the most favored nation provision has nothing to do with the holding by leasehold or otherwise of land in the respective countries, but also that the treaty is essentially one of commerce and navigation.

In the Terrace case the court refers to the controversy which arose concerning the validity, under the treaty, of the California Alien Land Law passed in 1913. (Statutes of California, 1913, p. 206.) The court states that in the progress of the exchange of views between the department of foreign affairs for the Empire of Japan and the secretary of state of the United States, the secretary of state found that the California act did not violate the treaty. The court refers to a communication addressed by the secretary of state, dated July 16, 1913, to the Japanese ambassador. This communication is described by the court as "Annex No. 7, pages 17 and 18" Controversy—United States and Japan—California Question (Congressional Library J V 6888 C2 J4). This letter is also to be found in "Papers Relating to Foreign Relations of the United States"—7913, at pages 643 and 644.

The court's quotation from said letter of Secretary Bryan is as follows: "This treaty was based upon a draft presented by the imperial government. In article I of this draft there is found the following clause:

"3. They (the citizens or subjects of the contracting parties) shall be permitted to own or hire and occupy the houses, manufactories, warehouses, shops and premises which may be necessary for them, and to lease land for

residential, commercial, industrial, manufacturing and other lawful purposes.'

"It will be observed that in this clause, which was intended to deal with the subject of real property, there is no reference to the ownership of land. The reason of this omission is understood to be that the Imperial Government desires to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation.

"In the treaty as signed the rights of the citizens and subjects of the contracting parties with reference to real property were specifically dealt with (art. I) in the stipulation that they should have liberty 'to own or lease and occupy houses, manufactories, warehouses and shops' and 'to lease land for residential and commercial purposes.' *It thus appears that the reciprocal right to lease land was confined to 'residential and commercial purposes,' and that the phrases 'industrial' and 'other lawful purposes,' which would have included the leasing of agricultural lands, were omitted.*

"The question of the ownership of land was, in pursuance of the desire of the Japanese Government, dealt with by an exchange of notes in which it was acknowledged and agreed that this question should be regulated in each country by the local law and that the law applicable in the United States in this regard was that of the respective states. This clearly appears from the note of Baron Uchida to Mr. Knox of February 21, 1911, in which, in reply to an inquiry of the latter on the subject, Baron Uchida said:

"In return for the rights of land ownership which are granted Japanese by the laws of the various states of the United States (of which, I may observe, there are now about thirty) the Imperial Government will by liberal interpretation of the law be prepared to grant land ownership to *American citizens from all the states, reserving for the future, however, the right of maintaining the condition of reciprocity with respect to the separate states.*

"In quoting the foregoing passage I have italicized the last clause for the purpose of calling special attention to the fact that the contracting parties distinctly understood that, in conformity with the express declaration of the imperial Japanese ambassador, the right was reserved to maintain as to land ownership the condition of reciprocity in the sense that citizens of the United States, coming from states in which Japanese might not be permitted to own land, were to be excluded from the reciprocal privilege in Japan.

"From what has been pointed out it appears to result first, that the California statute, in extending to aliens not eligible to citizenship of the United States the right to lease lands in that state for agricultural purposes for a term not exceeding three years, may be held *to go beyond the measure of privilege established in the treaty, which does not grant the right to lease agricultural lands at all*; and, secondly, that, so far as the statute may abridge the right of such aliens to own lands within the states, the right has been reserved by the Imperial Government to act upon the principle of exact reciprocity with respect to citizens of the individual states. In a word, the measure of privilege and the measure of satisfaction for its denial were perfectly understood and accepted." (Letter of William Jennings Bryan to Viscount Chinda, July 16, 1912, 'Annex No. 7,' p. 17 and 18, 'Controversy—United States and Japan—California Question'—Congressional Library JV 6888 C2 J4.) (Italics ours.)

In a communication from the Japanese minister for foreign affairs to the Japanese ambassador at Washington, in the matter of this diplomatic

correspondence, the minister referred as follows to the remarks of Mr. Bryan above quoted (Papers Relating to the Foreign Relations of the United States, 1913, Department of State, United States of America, at pages 652-653):

"It is unnecessary, it seems to me, to follow Mr. Bryan in his remarks concerning the negotiations connected with the conclusion of the treaty of 1911. It is sufficient to say that the reason why no stipulation regarding land ownership was inserted in the treaty is because neither contracting party desired at that time such a stipulation, the United States equally with Japan."

Here is an admission by the Japanese minister that neither of the contracting parties desired any stipulation regarding land ownership.

With reference to any claim that the California Alien Land Law of 1913 discriminated against Japanese subjects as such "in the matter of ownership of lands and houses," the "Aide Memoire" attached to Secretary of State Bryan's letter No. 7 in the "Resume of the Controversy between Japan and the United States" and found at page 645 in the "Papers Relating to the Foreign Relations of the United States," states that "it may be repeated that the statute contains no discrimination against Japanese as such, but applies equally to all aliens not eligible to citizenship."

Additional references to the said "Resume of the Controversy between Japan and the United States" arising out of the California question might here be called to this court's attention. There is a note written in ink on the fly leaf of this document, on a memorandum paper of the "Department of State, Bureau of Rolls and Library," as follows: "This is said to be an official Japanese publication printed at Tokyo." At page 2 of the document this statement appears:

"It is true that under the law, Japanese are granted the right to lease agricultural lands for a short term—a right which is not expressly secured by the treaty—etc."

Here is a confession that the treaty does not cover agricultural leases. Also at page 8 of the document there is a description of an audience had between the President of the United States and the Japanese ambassador. The Japanese ambassador read a memorandum referring to the California Land Law and the treaty, and in reply the President stated:

"That if, on further study, the law should be found to be in conflict with treaty provisions, the administration would be prepared to seek a judicial remedy, and that, even in case a suit should not be instituted, means would be sought to compensate Japanese for any loss which they might have actually sustained."

This statement clearly illustrates an executive construction of the treaty, since the Government of the United States has never made any effort to seek a judicial remedy on behalf of the Japanese affected by the California Alien Land Law, nor has it attempted to compensate them.

The first letter in the correspondence set forth in this document and labeled "Number 2" is a letter from the Japanese ambassador to Secretary of State Bryan, under date of May 9, 1913. While in this letter the ambassador does not protest against the California Alien Land Law upon grounds not here in question, it is to be noted that he does not raise the point that agricultural leases are included within the treaty. This letter is also to be found at page 629 of the "Papers Relating to the Foreign Relations of the United States—1913." Number 6 of the document is an "Aide-Memoire, in Explanation and Support of Viscount Chinda's Note of June

4, 1913." It is dated July 3, 1913. This Aide-Memoire is also to be found at page 635 of the "Papers Relating to the Foreign Relations of the United States."

It appears from this letter of Secretary of State Bryan that the treaty, as originally drafted by the Imperial Japanese Government, provided expressly for leases for "industrial, manufacturing and other lawful purposes," but that this clause was omitted in the treaty as finally agreed upon, leaving the language as we now have it—"to lease land for residential and commercial purposes."

The court then follows this quotation with a citation of the case of *Sullivan vs. Kidd*, decided January 3, 1921 (No. 6 United States Supreme Court Advance Opinions, p. 192, at 195), and quotes therefrom as follows:

"While the question of the construction of treaties is judicial in its nature, and the courts, when called upon to act, should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the executive department of the government, charged with the supervision of our foreign relations, should be given much weight."

The court then continues in the following convincing language to show that by merely withholding in the treaty the right to lease real estate, the states were granted the right to determine this question for themselves, while Congress, had it wanted to, might have absolutely prohibited it.

"Aliens may only come to the United States upon such conditions and terms as our government sees fit to impose. By the treaty, the rights to lease real estate in the United States for agricultural purposes is withheld. (*Haucenstein vs. Lynham*, 100 U. S., 483). It might have been, by congressional enactment, prohibited (*U. S. vs. Repentigney*, 72 U. S., 211); but by the treaty it was neither granted nor prohibited. It was merely withheld, which left the state free to prohibit it. The United States might have excluded all of the subjects of Japan; but rather chose to admit them, withholding the right to lease agricultural lands, thereby recognizing the right of the state to prohibit it, or regulate it. That purpose is not to be defeated by allowing the citizen landowner the broad construction of his rights under the Fourteenth Amendment for which contention is made."

The treaty with Japan expressly and positively limits in article I thereof the interests that any of the citizens of either country may have in lands "to lease land for residential and commercial purposes."

By elementary rules of construction of phraseology used in such public documents as treaties between nations there can be no claim to any greater interest in realty under the treaty than to so "lease land for residential and commercial purposes."

It should be borne particularly in mind that the problem of California, as well as of other Western states of the Union at the time of the negotiation of this treaty, was an agricultural problem, and we assume, therefore, that the expression "to lease land for residential and commercial purposes" was used advisedly.

The subsequent history of the matter of alien land legislation in California sustains this view. In 1913 the legislature of the state adopted an act prohibiting agricultural leases by aliens for a term of more than three years. (Stats. 1913, p. 206 [See Sec. 2].)

Secretary of State Bryan protested the passage of this law and attended the legislative session in California to urge his objections thereto. (Congressional Record, Sixty-sixth Congress, 3rd Edition, vol. 60, p. 4148.)

Neither Secretary of State Bryan nor the representatives of Japan urged, at any time, that the treaty with Japan gave the right to Japanese to lease lands for agricultural purposes.

HISTORICAL ANALYSIS OF THE TREATIES BETWEEN JAPAN AND THE UNITED STATES SHOWS THAT LEASEHOLD INTERESTS HAVE ALWAYS BEEN RESTRICTED TO LANDS DEVOTED SOLELY TO TRADE AND COMMERCE.

1. The treaty of 1854 (I Malloy's Treaties, etc., p. 996).—This was a commercial treaty, which for the first time opened the ports of Japan to the ships of the United States. It was negotiated by the celebrated U. S. Commodore Matthew Calbraith Perry, and is his chief title to fame.

It contains no reference whatever to the extraterritorial rights of either party.

2. The treaty of 1857 (I Malloy's Treaties, etc., p. 998).—This was a commercial and consular treaty, and does not refer to any extraterritorial rights.

3. The treaty of 1858 (II Malloy's Treaties, etc., p. 1000).—This was also a commercial and consular treaty. It opened certain specified ports and settlements to Americans and closed others. In article III thereof this appears:

"In all the foregoing ports and towns American citizens may permanently reside; they shall have the right to lease grounds and purchase the buildings thereon and may erect dwellings and warehouses."

It contained no provisions granting to Japanese citizens any right to reside in America or purchase or lease land there for any purpose. As will be seen below this treaty and all others were superseded and repealed by the treaties of 1894 and 1911.

4. Treaty of 1864 (I Malloy's Treaties, p. 1010).—This was called "Convention for the reduction of import duties," and it deals with that subject only.

5. Second treaty of 1864 (I Malloy's Treaties, p. 1011).—This settled the payment of the so-called "Shimonoseki Indemnities," and did not cover anything else.

6. Treaty of 1866 (I Malloy's Treaties, p. 1012).—This was a treaty between Japan, the United States, Great Britain, France and The Netherlands, and was designed to establish certain tariff duties between these nations. There was nothing in it concerning territorial rights.

7. Treaty of 1878 (I Malloy's Treaties, p. 1021).—This was called a "Commercial Convention." It related to tariff and export duties. It opened two additional ports which it declared should "be open to citizens and vessels of the United States for the purpose of residences and trade."

8. Treaty of 1880 (I Malloy's Treaties, p. 1024).—This covered the reimbursement of expenses incurred by either country in consequence of the shipwreck on the coast, of the vessel of the other country.

9. Treaty of 1886 (I Malloy's Treaties, p. 1025).—This was an extradition treaty only.

10. Treaty of 1894 (I Malloy's Treaties, p. 1028 *et seq.*)—This was a broad and comprehensive treaty relating to commerce and navigation. For the first time it touched the subject of extraterritorial rights. It remained in force until the adoption of the treaty of 1911 under consideration in the case at bar.

Article I of this treaty, for which article I of the treaty of 1911 became substituted, reads as follows:

"Article I.

"The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property.

"They shall have free access to the courts of justice in pursuit and defense of their rights; they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects.

"In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects of the most favored nation. The citizens or subjects of each of the contracting parties shall enjoy in the territories of the other entire liberty of conscience, and, subject to the laws, ordinances and regulations, shall enjoy the right of private or public exercise of their worship, and also the right of burying their respective countrymen, according to their religious customs, in such suitable and convenient places as may be established and maintained for that purpose.

"They shall not be compelled, under any pretext whatsoever, to pay any charges or taxes other or higher than those that are, or may be paid by native citizens or subjects, or citizens or subjects of the most favored nation.

"The citizens or subjects of either of the contracting parties residing in the territories of the other shall be exempt from all compulsory military service whatsoever, whether in the army, navy, national guard, or militia; from all contributions imposed in lieu of personal service; and from all forced loans or military exactions or contributions.

"Article II.

"There shall be reciprocal freedom of commerce and navigation between the territories of the two high contracting parties.

"The citizens or subjects of each of the high contracting parties may trade in any part of the territories of the other by wholesale or retail in all kinds of produce, manufactures, and merchandise of lawful commerce, either in person or by agents, singly or in partnership with foreigners or native citizens or subjects; and they may there own or hire and occupy houses, manufactories, warehouses, shops and premises which may be necessary for them, and lease land for residential and commercial purposes, conforming themselves to the laws, police and customs regulations of the country like native citizens or subjects.

"They shall have liberty freely to come with their ships and cargoes to all places, ports, and rivers in the territories of the other, which are or may be opened to foreign commerce, and shall enjoy, respectively, the same treatment in matters of commerce and navigation as native citizens or subjects, or citizens or subjects of the most favored nation, without having to pay taxes, imposts or duties, of whatever nature or under whatever denomination levied in the name or for the profit of the government, public func-

tionaries, private individuals, corporations, or establishments of any kind, other or greater than those paid by native citizens or subjects, or citizens or subjects of the most favored nation.

"It is, however, understood that the stipulation contained in this and the preceding article do not in any way affect the laws, ordinances and regulations with regard to trade, immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two countries."

Article III of this treaty provided:

"Article III.

"The dwellings, manufactories, warehouses and shops of the citizens or subjects of each of the high contracting parties in the territories of the other, and all premises appertaining thereto destined for purposes of residence or commerce, shall be respected.

"It shall not be allowable to proceed to make a search of, or a domiciliary visit to such dwellings and premises, or to examine or inspect books, papers, or accounts, except under the conditions and with the forms prescribed by the laws, ordinances and regulations for citizens or subjects of the country."

In article XIV of this treaty is set forth "the most favored nation" clause, which here for the first time appears in any treaty between Japan and the United States. It is as follows:

"Article XIV.

"The high contracting parties agree that, in all that concerns commerce and navigation, any privilege, favor or immunity which either high contracting party has actually granted, or may hereafter grant, to the government, ships, citizens or subjects of any other state, shall be extended to the government, ships, citizens, or subjects of the other high contracting party, gratuitously, if the concession in favor of that other state shall have been gratuitous, and on the same or equivalent conditions if the concession shall have been conditional; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other upon the footing of the most favored nation."

Article XVII contained the significant provision that the several

"Foreign settlements in Japan should be incorporated within the respective Japanese communes, and that when such incorporation takes place, existing leases in perpetuity, upon which property is now held *in such settlements*, shall be confirmed, and no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property."

11. The Treaty of 1897 (I Malloy's Treaties, p. 1037)—This was a convention as to patents, trade-marks and designs.

12. The Treaty of 1905 (I Malloy's Treaties, p. 1037)—This was a copyright convention.

13. The Treaty of 1906 (I Malloy's Treaties, p. 1039)—This was a supplementary extradition treaty.

14. The Treaty of 1908 (I Malloy's Treaties, p. 1040)—This was a treaty by which the parties agreed to submit to the arbitration of the permanent court of arbitration at The Hague, "differences which may arise of a legal nature or relating to the interpretation of treaties between the two contracting parties."

15. Second Treaty of 1908 (I Malloy's Treaties, p. 1041)—This relates to protection of trade-marks in Korea.

16. Third Treaty of 1908 (I Malloy's Treaties, p. 1043)—This related to the protection of trade-marks in China.

Thus it will be seen from this chronological review of the various treaties between the two powers, beginning with the celebrated Commodore Perry Treaty of 1854, that when these powers negotiated the treaty of 1911 they were aware that all their previous conventions had related, almost without exception, solely to matters connected with trade and commerce; and that any extraterritorial claims or rights of the Japanese were hardly considered at all.

As to personal property their rights were limited "to the succession of personal property by will or otherwise"; and as to acquiring and holding real property their rights were so limited that at the places where they should trade and carry on commerce either alone or with foreigners or native citizens they might "*there own or hire or occupy houses, manufactories, warehouses, shops and premises which may be necessary for them, and lease land for residential and commercial purposes.*"

Thus we see a clear distinction was made by this treaty as to owning, hiring or occupying erections upon the land for trade purposes; but when it came to the question of leasing land this right was strictly and definitely limited to leasing land for *residential and commercial purposes*.

Clearly then this treaty as to extraterritorial rights in land covered only those persons who were engaged in trade and commerce at wholesale and retail, and the only lands they could own or hire were lands necessary for them for those purposes and located "there"; i. e., where they carried on such strictly trade operations. They might lease land for residences and for commercial purposes connected with their trading operations; but if the language employed in any solemn agreement between parties or nations was ever designed or used to limit the rights of the parties to it in respect of leasing lands so that it would exclude agricultural lands such is the language employed in this treaty—"expressio unius exclusio alterius est."

This treaty apparently opened the whole of the Japanese Empire to our traders who had before that been confined in their business enterprises and residences to certain specified ports and settlements. It was never intended, and no one has ever claimed that it was intended, to permit the subjects of either of the high contracting powers to own or to lease any lands or premises for any other purposes.

Japan would never have conceded any greater rights to our citizens. In view of the opposition and apprehensions of our countrymen to settlements here of excessive numbers of the Mongolian race, American statesmen would never have conceded any other or further rights or privileges than trading or commercial rights and privileges to Japanese citizens. This is the more apparent when we note that even in the "most favored nation" clause (art. XIV), all rights awarded to either party are especially restricted to those that "concerned commerce and navigation."

So, also, the provision concerning the confirmation to Americans in Japan of their leases in perpetuity covered only property then held in the settlements which were to be incorporated with the communes, and affected only residence, business and commercial properties, leases to Americans for which were the only properties which Americans had or could have had under the preceding treaties, in Japanese ports and settlements.

Furthermore, it was indeed then well known to both parties that there

had been and was most serious objection on the part of the people of the Pacific Coast states, if not elsewhere, to any further extension of any rights or privileges to the citizens of Japan.

Fresh, indeed, in their minds must have been the trying and exciting incident concerning the ordinance of the City of San Francisco, providing for separate schools for Japanese children in that city, which had created nation-wide excitement and discussion, in which the Chief Executive of the nation had taken part. The diplomatic representatives of both powers interested knew all of these conditions and must have been moved to draft the treaty of 1911 in such manner that it would not grant any other or more extensive extraterritorial rights as to land holding or land leasing to the subjects of either power.

This was no time for "weasel words, nor for machiavellian tergiversations." If either party desired or intended to permit the subjects of the other power to acquire or hold any land for agricultural purposes or any except the small parcels necessary for residences, shops and warehouses such party would have caused clear and certain provisions to that effect to be inaugurated in the new treaty.

Furthermore, as seen below in this brief, under Japanese laws foreigners could not then and cannot now acquire leases of agricultural lands as such. They could acquire leases of lands for residential and commercial purposes which may be valuable, and also what are termed "superficies" or occupancy rights of houses and surface rights, but these must always be for residence, or shops, warehouses, stores, etc.

The Civil Code of California sets forth two rules for the interpretation and construction of contracts, which admirably and clearly declare the accepted canons on that subject.

"Section 1647: Contract explained by circumstances.—A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.

"Section 1648: Contract restricted to its evident object.—However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

Applying the canons of construction to the circumstances and conditions which confronted the high contracting parties at the time they entered into the treaty of 1911; reviewing the history of their conventions and their own interpretation by their own acts at these conventions, is it not clearly manifest, that when they negotiated and finally executed the treaty of 1911 neither of them could have intended, as neither of them desired, to grant to the subjects of either country any absolute right to acquire leasehold interests in any lands but those devoted principally, if not exclusively, to wholesale and retail trading and merchandising?

It becomes entirely certain that they could not have intended to impose upon their subordinate states or provinces, or permit as nations, the creation of an obligation to permit leases of tracts or parcels of any kind of and of any considerable size, much less so of any agricultural lands. Both must have recognized with abiding conviction the enormous difficulties and dangers to their political autonomy which might ensue from any such arrangement.

Hence, while each willingly extended the right hand of welcome to those subjects of the other who desired to engage in commercial and manufacturing pursuits, each withheld it from those who might desire and attempt to take away from their own citizens the agricultural lands of their country.

This conviction must have been more compelling, and, indeed, the history

herein recorded of the various treaties shows that it was so compelling, in Japan, because that country had a comparatively small area of land fitted for and devoted to agriculture—far from enough land even with all the intense and intensive cultivation practiced there to support its teeming population.

It is a fact sufficiently well known to warrant this court in taking judicial notice of it, that but for her extended coastline and her productive fisheries, Japan would never have been able to feed one-half of her large population.

See International Encyclopedia, article on Japan, page 573.

On every theory or consideration upon which we survey the question before the court it becomes more certain that it was for the best interest of both these nations that their subjects should not be granted any rights to acquire leases of agricultural lands in either country, but it was to their interest that their subjects should be enabled to enter into commercial ventures in each country, and should have in connection therewith land for their residences, shops, stores, warehouses and factories.

All of these rights of the last-mentioned character and extent Japan had granted to American subjects in certain limited areas known as ports and settlements, ever since the shotted guns of Commodore Perry's war fleet forced open the gates of the ports of Nippon to the commerce, the ships and the traders of the Occidental world. Any more extensive rights to land holding she had sedulously and continuously withheld from the subjects of every nation of that world. The treaty of 1911 but crystallized and enforced this policy, by the use of limiting words which restricted leases of land to leases for "*residential*" and "*commercial*" purposes.

FOREIGNERS HAVE NO RIGHT TO OWN OR LEASE LANDS FOR AGRICULTURAL PURPOSES
UNDER THE LAW OF JAPAN.

The "Commentary on the Commercial Code of Japan" was written by J. E. DeBecker, "Solicitor and Legal Translator and Advocat-Conseil of the Swiss Legation in Tokyo." He is also the author of the "Annotated Civil Code of Japan." This last work includes an introduction by Count Hayashi, late Japanese minister for foreign affairs and formerly ambassador extraordinary and plenipotentiary for Japan in London.

The "Commentary on the Commercial Code of Japan," in volume 1, at page vii thereof, contains a summary of the "Disabilities of Foreigners Resident in Japan."

This summary reads in part as follows:

"(A) Foreigners cannot own land as individuals, but can become superficial holders for exceedingly long periods. While a superficies is by no means equal to ownership, if care be taken in drawing and recording it is a fairly valuable class of holding; but it has weak and inconvenient points which are gradually being discovered and is still somewhat of an unknown quantity. A company formed under the Japanese law by foreigners can own land, but not perpetual leases of lands in the former settlements;

"A measure has been introduced and passed by the Diet having for its object the granting of ownership of land to aliens; but, to be perfectly candid, it is a half-hearted piece of legislation, and even if it is put in force it will never satisfy the requirements of foreign legal experts, because (from a lawyer's point of view) its provisions are highly unsatisfactory—not to say delusive and perhaps dangerous. Before the law can be accepted

by foreign investors it will certainly have to be radically revised and its weak points remedied."

(Note—The writers of this brief understand that even this act has not yet been promulgated by the Emperor of Japan.)

"(B) Foreigners cannot become owners of ships flying the Japanese national flag. * * *

"(C) Foreigners cannot at present become shareholders in Japanese national banks, the 'Bank of Japan,' the 'Yokohama Specie Bank,' or the 'Agricultural and Industrial Bank.'

"(D) Foreigners cannot as individuals engage in mining. * * *

"(E) Foreigners cannot become members, shareholders or brokers of the various exchanges. * * *

"(F) Foreigners cannot engage in the emigration business either as individuals or as shareholders in emigration companies."

At page 5 of volume 1 of the Civil Code "foreigners" are described as "persons who do not possess Japanese nationality. Such persons are foreigners by nationality even though they may belong to the Japanese race. Persons who possess no nationality are also considered as foreigners."

An explanation follows after a general statement of the adoption by the Japanese law of the principle of international equality in accordance with the modern tendency. This explanation is as follows:

"But, as in most other countries, it is considered, either rightly or wrongly, that if foreigners were permitted to absolutely enjoy the same private rights as natives the safety and peace of the state or other public interests might be endangered, so it is therefore provided in effect that foreigners cannot enjoy those private rights forbidden to them by laws and ordinances.' The more important private rights which cannot be enjoyed by foreigners are the following:

"(1) Foreigners cannot enjoy the ownership of land, and they do not enjoy the franchise even in purely local matters."

(And then follow the other classifications, generally, as above.)

At page viii of volume I of the "Commercial Code," DeBecker says:

"It must be remembered that the Japanese courts are apt to construe laws somewhat narrowly and strictly, and that therefore it is unsafe to depend upon receiving the benefit of any liberal interpretation which would extend rather than narrow the rights of litigants. There are no 'equity courts' in Japan, and the ordinary judges adjudicate strictly and absolutely upon the transactions themselves *in rem* and not *in personam*. 'Judicial legislation' is, at present, forbidden, and the result is a distinct tendency to foster a system of authority and rigid routine, based on technical considerations, rather than a flexible one dictated by the requirements of natural justice and practical public needs."

With reference to the above statement in the "Commentary on the Commercial Code," that foreigners "can become superfiary holders for exceedingly long periods," these "superficies" are more particularly described in DeBecker's "Civil Code of Japan." In volume 1, page 238, of the "Civil Code" the author states that "Superficies is a real right in virtue of which land belonging to another person can be used for the purpose of owning thereon structures, trees and bamboos." At page 239, article 265 reads.

"A superfiary has the right of using the land of another person for the purpose of owning thereon structures or trees and bamboos."

The author continues with this explanation:

"This article defines the nature of superficies. Superficies is the right of using the land of another person for the purpose of constructing struc-

tures, buildings or artificial mounds or digging ponds and wells, or owning trees and bamboos thereon. Therefore even though such works or trees and bamboos may have no actual existence, this right can be created all the same provided that the object and intention is to use the land for such purpose."

Article 269, at page 242, states that:

"The superfiiciary can, when his right is extinguished, take away his structures or trees and bamboos on restoring the land to its original state; but when the owner of the land gives notice that he desires to purchase them and offer to pay their current value, the superfiiciary cannot refuse such offer without adequate reason."

This does not include the right to possess land for agricultural purposes.

PLAINTIFF MIZUNO IS NOT "CARRYING ON TRADE, WHOLESALE AND RETAIL," OR LEASING LAND FOR "COMMERCIAL PURPOSES" WITHIN THE SCOPE OF THE "TREATY OF COMMERCE AND NAVIGATION WITH JAPAN."

As noted above in the "Statement of Facts," paragraph V of the complaint in this action, stating that the plaintiff Mizuno, in addition to being a farmer, "is engaged in the business of trading, wholesale and retail, in farm products," etc., is in the identical language of paragraph III of the bill of complaint in the Terrace case, which was passed on by the court in said case, with the exception that in the Terrace case the pleader stated not only that the Japanese "desires to produce his own farm products for the purpose of selling them in the wholesale and retail trade," etc., but also, that he theretofore "*had produced and*" still desires to so produce, etc., his own farm products. This difference is probably immaterial, but if anything, the pleader has stated his case stronger in the Terrace case than in the case at bar.

In the Terrace case the district court addressed itself to the claim that the complainant Nakatsuka's business of farming was incidental to his business as a wholesale and retail trader in farm products and used the following language with reference to this argument:

"A clear intention being shown not to supersede, in the particular now in question, the state's authority to regulate the rights of title and possession in lands within its boundaries, that intent may not be defeated by the claim now made that complainant Nakatsuka's business of farming is incidental to his business as a wholesale and retail trader in farm products, for there is no more reason for considering farming an incident of the latter than for considering the latter an incident of the former. The language of the treaty is: 'and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects * * *.' (37 Stats. at L. 1504.)

"In the most liberal construction of this language that may be indulged in, it cannot fairly be said that truck farming is incidental to trading, either wholesale or retail, in the products of a farm, any more than conducting a sheep ranch or growing mulberry trees is incidental to the dry-goods trade.

"*Kidd vs. Pearson*, 128 U. S. 1; *U. S. vs. E. C. Knight Co.*, 156 U. S. 1; *Joyce vs. Auten*, 179 U. S. 591, at 594; *Capital City Dairy Co. vs. Ohio*, 185 U. S. 238, 245."

None of the allegations contained in paragraph V include the allegation that Mizuno intends to use the agricultural land described in paragraph IV for any purpose except for agricultural purposes; and after all is said, it is clearly shown that the land is agricultural land and is not

sought to be leased for residential or commercial purposes. The bill does not attempt to allege, even by inference, that Mizuno intends to erect a warehouse or a store on the land or to continue his business of selling his products on said land. Hence, the allegations of paragraph V clearly do not in any way change or qualify the allegation of paragraph IV, from which it clearly appears that the lease in question is solely for agricultural purposes and is not for "residential and commercial purposes," which is the only kind of lease mentioned in and permitted by the terms of the Japanese treaty.

In the case of *Kidd vs. Pearson*, 128 U. S. 1, the court held that a state could prohibit the manufacture of intoxicating liquors even though such liquors were intended thereafter to be transported in interstate commerce. It was urged in the case that since Congress had power to regulate commerce the state therefore could not interfere with the manufacture of articles which were used in that commerce. The court denied the contention in the following language:

"No distinction is more popular to the common mind or more clearly expressed in economic and political literature, than that between manufacturers and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term as given by this court in *County of Mobile vs. Kimball*, 102 U. S. 691, 702 (26: 238, 241), is as follows: 'Commerce with foreign nations and among the states, strictly considered, consists in intercourse and traffic, including in these terms, navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the states, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multifarious, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management."

In *United States vs. Knight*, 156 U. S. 1, the court upon the authority of the *Kidd* case, *supra*, held that the Sherman Anti-Trust Act did not apply to a combination formed by a number of sugar refining companies to restrain competition for the reason that the court said the manufacture of sugar was not a part of that commerce. The court in that case observed, page 12:

"Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, does not con-

trol it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it."

This doctrine is adhered to in the subsequent cases of *Hopkins vs. United States*, 179 U. S. 394; *Capital City Co. vs. Ohio*, 183 U. S. 245.

Just as the manufacture of sugar and of intoxicating liquors to be thereafter transported in interstate commerce is not a part of such commerce within the provision of the commerce clause of the United States Constitution, so by the same reasoning the pursuit of a farmer in raising agricultural products is not the pursuit of commerce within the terms of our treaty with Japan.

A pertinent inquiry which we would address to counsel for plaintiffs in this case is:

Of what value is the federal statute which bars Japanese from the right of naturalization in this country, if such Japanese may nevertheless acquire all of the advantages and benefits which a naturalized citizen is entitled to?

It is respectfully submitted that the plaintiffs' motion for a temporary injunction should be denied, and the defendants' motion to dismiss should be granted.

Respectfully submitted,

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5. PLAINTIFFS' REPLY BRIEF, BY D. B. CHAPIN.

The defendants in their opening brief make the point that section 1977 of the Revised Statutes of the United States has no applicability to the case at bar.

They say:

"Obviously this section is limited in its scope to what it describes—'contracts.' Though a lease may have contractual features, it is really in law a conveyance of a qualified interest in land."

This I deem to be an admission on the part of the defendants that by virtue of said section an alien within its description has the right to make and enforce contracts, but, they contend, a lease of land is not a "contract." Now then, the question naturally arises—What is a contract? Or, to state it differently—Is a lease of land a contract?

The word "contract" has a well defined legal meaning.

Blackstone defines a contract to be an "agreement upon a sufficient consideration, to do or not to do a particular thing."

It is defined by Chitty as "a mutual assent of two or more persons competent to contract, founded on a sufficient and legal motive, inducement, or consideration, to perform some legal act, or to omit to do anything, the performance of which is not enjoined by law."

Story defines a contract to be "a deliberate or voluntary agreement between competent parties upon a legal consideration to do or not to do some act."

California Civil Code, section 1549, defines contract as "an agreement to do or not to do a certain thing."

And Civil Code, section 1728, provides that an agreement to buy or sell is a contract.

LEASE.

A lease is defined by Bouvier to be:

"A species of contract for the possession and profits of lands and tenements, either for life or for a term of years, or during the pleasure of the parties."

In 18 Am. & Eng. Ency. of Law (2d ed.) 597, a lease is defined as:

"A contract for the possession and profits of lands and tenements on the one side, and the recompense or rents on the other, or, in other words, a conveyance to a person for life, years, or at will, in consideration of rent or recompense."

In the case of *Ward vs. Am. Health Food Company*, 119 Wis. 12, 96 N. W. 388, it was said:

"A lease is a contract for the possession and profits of land."

To the same effect, see:

Weirleen vs. Janssen, 36 So. 216, 112 L. A. 31; *Feaster vs. Fagan*, 113 N. W. 478, 135 Iowa 633; *Moorshead vs. U. S. Railway Co.*, 96 C. W. 61, 203 Mo. 121; *Higgins vs. Street*, 92 Pac. 153, 19 Okla. 45; *Ashur vs. Johnson*, 82 S. W. 300, 118 Ky. 702; *Israelson vs. Wallenburg*, 116 N. Y. Supp. 626.

Civil Code, section 1624, provides what contracts must be *written*. The following contracts are invalid unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged or by his agent:

"(5) An agreement for the leasing of a longer period than one year, or for the sale of real property."

Even deeds are contracts.

Negaunee Iron Company vs. Iron Cliffs Co., 96 N. W. 468, 473, 131 Mich. 264; *In re Millers and Mfg. Ins. Co.*, 106 N. W. 485, 493, 97 Minn. 98, 4 L. R. A. (N. S.) 231; *Grubbe vs. Grubbe* (Ore.), 38 Pac. 182.

A judgment is a contract under the laws of California.

Weaver vs. San Francisco, 148 Cal. 728, 81 Pac. 119.

In view of the authorities defining the word "contract" we respectfully submit that the right conferred by said section is ample authority for the consummation of the lease involved in the case at bar.

SECTION 2164, REVISED STATUTES.

The defendants next contend that section 2164 has no application to the case at bar, in that it "simply forbids any state from imposing unequal *taxes* upon persons immigrating from any foreign country."

It is to be here noted that sections 1977 and 2164 were passed by Congress to enforce the provisions of the Fourteenth Amendment. The latter section reads:

"No tax or charge shall be imposed or enforced by any state upon any person immigrating thereto from a foreign country, which is not equally imposed upon any person entering such state from any other foreign country."

The words "tax" and "charge" have different meanings.

In the case of *Ah Fong*, 1 Fed. Cases, No. 102, Circuit Justice Field, in delivering the opinion, said:

"By the term 'charge,' as here used, is meant any onerous condition, it being the evident intention of the act to prevent any such condition from being imposed upon any person immigrating to the country which is not equally imposed upon all other immigrants, at least upon all others of the same class. It was passed under and accords with the spirit of the Fourteenth Amendment. A condition which makes the right of the immigrant to land depend upon the execution of a bond by a third party, not under his control, and whom he cannot constrain by any legal proceedings, and whose execution of the bond can only be obtained upon such terms as he may exact, is as onerous as any charge which can well be imposed, and must, if valid, generally lead, as in the present case, to the exclusion of the immigrant."

In *Darling vs. Rogers*, 22 Wend. (N. Y.) 491, Cowan, J., said:

"The word *charge* in its legal acceptation has a very broad meaning. It includes payments *charged* upon land by devise, as legacies; those by deed, as rents, annuities, and mortgages; those by operation of law for public purposes, as taxes and assessments; those by effect of law, in private suit, as judgments. In the dictionaries and digests of the common law, by no means the best expounders of the reason of the law, but of necessity the best interpreters of its vocabulary, the word *charge* is used in this latitude. I cite Jacob's Law Dict., word *charge*, and refer to the authorities there enumerated. 'Lands may be *charged* divers ways, as by grant of rent out of it, by statutes, by judgments, conditions,' etc. See also Tomlin's L. Dict. to the same effect."

We respectfully submit that any oppressive act or deprivation of a right, or discrimination, or burdensome provision as to a right, is an onerous condition and therefore a charge.

CLASSIFICATION.

The defendants in their brief contend that the classification is a natural one and they say:

"Surely there can be no discriminations, inequality, unreasonable capriciousness, or arbitrary injustice in this method of providing for the rights of aliens in this country or in the states that compose it."

But the legislature cannot arbitrarily create a class, and when thus created, make it binding on the courts so that they will be bound to accept such classification as a proper one. *Van Harlingen vs. Doyle*, 134 Cal. 53, 66 Pac. 44.

Arbitrary selection can never be justified by calling it classification, and this is forbidden by the equal protection demanded by the Fourteenth Amendment. *Gulf etc. R. Co. vs. Ellis*, 165 U. S. 150.

It is to be here observed that the legislature cannot take what might be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered factions of the original unit as two classes; and thereupon enact different rules for the government of each.

State vs. Julow, 129 Mo. 163, 31 S. W. 781, 50 A. S. R. 443, 29 L. R. A. 257; *State vs. Walsh*, 136 Mo. 400, 37 S. W. 1112, 35 L. R. A. 231; *State vs. Mik Sicek*, 225 Mo. 561, 125 S. W. 507, 135 A. S. R. 597.

A law relating to particular persons or things as a class is said to be general, while a law relating to particular persons or things of a class is deemed special and private. *Wagner vs. Milwaukee Co.*, 88 N. W. 577, 578,

112 Wis. 601; *Johnson vs. City of Milwaukee*, 88 Wis. 383, 390, 392, 60 N. W. 270, 272; *State vs. Julow, supra*; *State vs. Walsh, supra*.

In the case of *State vs. Julow, supra*, it was ruled that while the legislature might legislate in regard to a class of persons, yet they would not be permitted to take what might be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered factions of the original unit as two classes and thereupon enact different rules for the government of each.

THIS IS PRECISELY WHAT HAS BEEN DONE IN THE CASE AT BAR.

In this connection we call the court's attention to what Judge Cooley says:

"A statute would not be constitutional * * * which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality or class are exempt. * * * Everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court, and the countryman at plough.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments."

Cooley, *Const. Lim.*, 6th ed., 481-483.

And Locke, in his admirable work on *Civil Government*, sec. 142, says:

"Those who make the laws are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for the rich and poor, for the favorite at court and the countryman at plow."

To the same effect is *Strader vs. W. Va.*, 100 U. S. 303.

PORTERFIELD'S CONSTITUTIONAL RIGHT.

The defendants in their brief concede that the plaintiff Porterfield is entitled to claim the protection of all of section 1 of the Fourteenth Amendment, and plaintiff Mizuno is entitled to claim the protection only of the due process and equality clause.

The defendants, in this connection, make the following assertion:

"The decisive answer to any claim, either by a citizen or a non-citizen, to the protection of the Fourteenth Amendment in a case such as is now before the court, is that the amendment was never intended to deprive the states of the Union of their inherent and unquestioned power to control in matters of ownership or other interests in lands, when a question of an alien securing such interests is involved."

A sufficient answer to the foregoing contention is to be found in the case of *Buchanan vs. Warley*, 245 U. S. 60. In that case the court said:

"True it is that dominion over property springing from ownership is not absolute and unqualified. The disposition and use of property may be controlled, in the exercise of the police power, in the interest of the public health, convenience or welfare."

It is not and cannot be consistently contended that the act comes within the objects to which the police power of the state extends.

In the face of these constitutional and statutory provisions (secs. 1977 and 2164) can the plaintiff Porterfield be denied, consistently with due process of law, the right to lease his property to his co-plaintiff simply be-

cause he is ineligible to citizenship? We contend and respectfully submit that the law under consideration was not enacted merely to regulate a business or the like, but was enacted to destroy a right of the individual to acquire, enjoy, and dispose of his property, and being of this character, it is void as being opposed to the due process clause of the Constitution.

DISCRIMINATION.

A state has the right to discriminate between persons within its jurisdiction, but such discrimination must be along just and reasonable lines. A discrimination that is without a just or reasonable basis is purely arbitrary. And as said by Justice Matthews in the Yick Wo case, the principles upon which the institutions of our government are supposed to rest "leave no room for the play and action of purely personal and arbitrary powers." He said further therein, as follows, to-wit:

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

As a rule, at least, discrimination by a state between classes of persons within its jurisdiction is unjust and unreasonable.

Ky. vs. Powers, 139 Fed. 461.

Justice Matthews, in the Yick Wo case, in referring to the ordinance involved therein, which left the question as to who might carry on the laundry business in San Francisco in wooden buildings, to the arbitrary consent of a board of advisers, who, in administering it, refused consent to Chinese, said:

"The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the Fourteenth Amendment of the Constitution."

In the case of *Holden vs. Hardy*, 169 U. S. 366, in referring to a discrimination by a state through legislative action, Justice Brown said:

"The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

In the case of *Ho Ah Kow vs. Lunan*, Justice Field, in referring to a similar discrimination, said:

"But in our country hostile and discriminating legislation by a state against persons of any class, sect, creed, or nation, in whatever form it may be expressed, is forbidden by the Fourteenth Amendment."

And in the case of *Gibson vs. Miss.*, 162 U. S. 565, Justice Harlan said:

"In the administration of criminal justice no rule can be applied to one class which is not applicable to all other classes."

In the case of *Yick Wo vs. Hopkins*, Justice Matthews said, speaking of the Fourteenth Amendment, that it was "A pledge of the equal protection of the laws."

In the case of *Strauder vs. W. Va.*, Justice Strong said:

"The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right."

And in the Civil Rights cases, 109 U. S. 3, Justice Bradley said:

"Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment, but they are secured by way of prohibition against state laws and state proceedings effecting those rights and privileges and by power given to Congress to legislate for the purpose of carrying such prohibition into effect."

As to the protection afforded by said clause of the amendment, Justice Field had this to say in the case of *Santa Clara vs. So. Pac. R. Co.* (C. C.), 18 Fed. 398:

"This protection attends every one everywhere, whatever be his position in society or his association with others—either for profit, improvement, or pleasure. It does not leave him because of any social or official position which he may hold, or because he may belong to a political body or to a religious society, or be a member of a commercial, manufacturing, or transportation company. It is the shield which the arm of our blessed government holds at all times over every man, woman and child in all the broad domain, wherever they may go, and in whatever relation they may be placed."

TERRACE CASE.

The defendants seem to rely absolutely upon the decree rendered in the Terrace case, recently decided in the district of Washington.

In our opinion, that case is more of an authority sustaining plaintiffs' contention than that of the defendants.

It is to be noted that the Washington act does not discriminate against the Japanese, for it provides that "'alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States."

In rendering the decree, the court said:

"The prohibition by this definition is made applicable to all aliens, both those eligible and those not eligible to citizenship, provided that they have not declared their intention to become citizens. To this extent, the present suit is to be distinguished from *In re Ah Chong* (2 Fed. 733)."

The defendants, in concluding their brief, address to the counsel for the plaintiffs the following question:

"Of what value is the federal statute which bars Japanese from the right of naturalization in this country, if such Japanese may nevertheless acquire all of the advantages and benefits which a naturalized citizen is entitled to?"

And our answer to this query is: To subject the Japanese to the pains and penalties of said law, while aliens of all European nations are exempt, is to subject the Japanese to other and entirely different punishments, pains and penalties than those to which other aliens are subjected, and it is to deny them the equal protection of the laws, contrary to the provisions of the Constitution.

And in further answer to said query, I quote from the Parrott case. In delivering the opinion, Hoffman, J., said:

"The declaration that 'the Chinese must go, peaceably or forcibly,' is an insolent contempt of national obligations and an audacious defiance of national authority. Before it can be carried into effect by force the authority of the United States must first be not only defied, but resisted and overcome. The attempt to effect this object by violence will be crushed by the power of the government. The attempt to attain the same object indirectly by legislation will be met with equal firmness by the courts; no matter whether it assumes the guise of an exercise of the police power,

or of the power to regulate corporations, or of any other power reserved by the state; and no matter whether it takes the form of a constitutional provision, legislative enactment, or municipal ordinance."

Changing the word "Chinese" as used above to the word "Japanese", the quotation fits this case like a glove.

Therefore, plaintiffs respectfully submit that in the light of the authorities in this and in the opening briefs filed on behalf of the plaintiffs, that it is clearly shown, first, that said law violates treaty rights, and, second, that it violates the Constitution of the United States and the laws enacted by Congress to enforce the same, and is null and void, and that the plaintiffs are entitled to the relief prayed for in their complaint.

Respectfully submitted,

D. B. CHAPIN,

Solicitor for Plaintiffs.

Los Angeles, November 11, 1921.

6. SUPPLEMENTARY BRIEF FOR PLAINTIFFS, BY ALBERT H. ELLIOT.

THE QUESTIONS INVOLVED IN THE CASE.

We shall approach the argument of the questions involved in this case through two separate channels which lead to separate and distinct rights of each plaintiff: (1) the rights of the plaintiff Porterfield as a citizen of the United States and of the State of California; (2) the rights of Mizuno as an alien Japanese resident of California.

In view of the printed brief of plaintiff already served and filed herein, we shall confine ourselves as briefly as possible to a demonstration of the following propositions of law which are raised by the record in the case.

TOPICAL ANALYSIS OF THE ARGUMENT.

THE CITIZEN PLAINTIFF.

I. The Alien Land Law of California in so far as it denies to plaintiff Porterfield the right to lease his land to plaintiff Mizuno:

(a) abridges his privileges or immunities under section I of article XIV of the Constitution of the United States;

(b) deprives him of his property without due process of law under the same section of the same Constitution;

(c) denies to him the equal protection of the laws under the same section of the same Constitution; and

(d) denies to him his inalienable right to acquire, possess and protect property and not to be deprived thereof without due process of law under sections 1 and 13, article I, of the constitution of California.

THE ALIEN PLAINTIFF.

II. The Alien Land Law of California in so far as it denies to the plaintiff Mizuno the right to lease land from plaintiff Porterfield:

(a) denies to him the equal protection of the law under section I of article XIV of the Constitution of the United States; and

(b) denies to him the same rights and privileges "granted to native citizens" under article I of the treaty between Japan and the United States.

I.

THE ALIEN LAND ACT DOES DENY TO PLAINTIFF PORTERFIELD THE RIGHT TO LEASE LAND TO PLAINTIFF MIZUNO.

If we admit *arguendo* that plaintiff Mizuno is ineligible to citizenship

under the laws of the United States and also admit *arguendo* that the treaty between United States and Japan, proclaimed April 5, 1911, does not qualify plaintiff Mizuno to execute a lease of agricultural land for farming purposes, then the Alien Land Act prohibits plaintiff Porterfield from entering into a lease with plaintiff Mizuno as set forth in the bill in equity.

The sections of the Alien Land Act which constitute this prohibition are as follows:

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Sec. 2. All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

"Sec. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

There can be no doubt but that a lease is a transfer from the lessor to the lessee of an "interest" in real property.

Syllabus. "A 'lease' is a conveyance of an estate or interest in real property for life, for years, at will, or for a term less than the grantor had in the real property. The term is not satisfied by a contract by which a landowner gives to another a right to convey water from a spring. (*Clark vs. Strong*, 93 N. Y. Supp. 514, 516, 105 App. Div. 179.)"

"A 'lease' is a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own, and it passes a present interest in the land for the period specified. (*Chandler vs. Hart*, 119 Pac. 516, 519, 161 Cal. 405, Ann. Cas. 1913 B, 1094.)"

It is clear that the above quoted sections of the Alien Land Act attempted to restrict plaintiff Porterfield in the use of his property. Notwithstanding it appears in the bill that his property is peculiarly adapted to agricultural purposes and notwithstanding that it further appears that plaintiff Mizuno is a capable farmer, plaintiff Porterfield is prevented by the act from making a contract affecting his property to his advantage, as he thinks. There is here a clear interference by a state with the right of private contract and unless such interference can be justified under the so-called police powers of the state the act cannot be sustained.

The Supreme Court of the United States has gone very far in denying to any state or political subdivision thereof the right to interfere with a person's enjoyment of private property.

Buchanan vs. Warley, 245 U. S. 60 (November 5, 1917.)

This case involves the constitutionality of an ordinance of the city of Louisville, Kentucky, known as a segregation ordinance, which prevented either white persons or colored persons from moving into and occupying as a residence, a house in any block in which a greater number of houses were already occupied by persons of the opposite race. Buchanan, the plaintiff, and the white man, brought an action for specific performance against the colored man of a contract for the sale of certain real estate

situated in Louisville and within the segregated block. The defendant set up in his answer that he was a colored person and could not occupy the property and, therefore, should not be compelled to perform his agreement. The plaintiff in reply alleged amongst other things that the ordinance was in conflict with the Fourteenth Amendment to the Constitution of the United States and hence no defense to the action for specific performance.

Justice Day, in deciding the case, said:

"The assignments of error in this court attack the ordinance upon the ground that it violates the Fourteenth Amendment to the Constitution of the United States (9 Fed. St. Ann. 416), in that it abridges the privileges and immunities of citizens of the United States to acquire and enjoy property, takes property without due process of law, and denies equal protection of the laws. * * *

"The right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property and had obligated himself to take it. * * *

"This drastic measure is sought to be justified under the authority of the state in the exercise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color. * * *

"But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases.

"The Federal Constitution and laws passed within its authority are by the express terms of that instrument made the supreme law of the land. The Fourteenth Amendment protects life, liberty, and property from invasion by the states without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. (*Holden vs. Hardy*, 169 U. S. 366, 391; 18 S. Ct. 383; 42 U. S. [L. Ed.] 780, 791.) Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. (1 Blackstone Commentaries [Cooley's Ed.] 127.)

"True it is that dominion over property springing from ownership, is not absolute and unqualified. This disposition and use of property may be controlled in the exercise of the police power in the interest of the public health, convenience, or welfare. Harmful occupations may be controlled and regulated in the interest of the public. Certain uses of property may be confined to portions of the municipality other than the resident district. Such as livery stables, brickyards and the like, because of the impairment of the health and comfort of the occupants of neighboring property. Many illustrations might be given from the decisions of this court, and other courts, of this principle, but these cases do not touch the one at bar.

"The concrete question here is: May the occupancy, and necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented

makes it pertinent to inquire into the constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and occupant.

"While a principal purpose of the latter amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the states. This is now the settled law. In many of the cases since arising the question of color has not been involved and the cases have been decided upon alleged violations of civil or property rights, irrespective of the race or color of the complainant.

"What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? * * *

"The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any state action that denies this immunity to a colored man is in conflict with the Constitution."

"In the face of these constitutional and statutory provisions, can a white man be denied, consistently without due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?

"These enactments did not deal with the social rights of men, but those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. (Civil Rights Case, 109 U. S. 3; 22, e S. Ct. 18; 27 U. S. [L. Ed.] 835, 843.) The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.

"That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

"As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given, but in view of the rights secured by the Fourteenth Amendment to the Federal Constitution such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us.

"The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.

"It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

"It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results."

We have cited quite at length from this case, because it seems to us to answer by anticipation every argument which can be made in the instant case in support of the Alien Land Act. If the expression "ineligible to citizenship" is simply a device of arbitrary classification on a race basis, and if we substitute the words "Chinese" and "Japanese" for the word "Negro" wherever used in the above case, it is apparent that the case becomes an authority in support of the right of plaintiff Porterfield to lease his land to a Japanese—a right guaranteed under the Fourteenth Amendment and of which he may not be deprived by state legislation. -

The case of *Buchanan vs. Warley*, *supra*, has been cited with approval, as follows: *Glover et al. vs. City of Atlanta* (August 13, 1918), 148 Ga. 285:

The judgment in this case was reversed strictly on the authority of *Buchanan vs. Warley*, it appearing that the ordinance of the City of Atlanta was substantially the same as the ordinance of the City of Louisville, Ky., involved in the *Buchanan vs. Warley* case. No opinion written.

Jackson vs. State of Maryland, 132 Md. 311 (February 27, 1918):

This case cites the opinion of Mr. Justice Day in *Buchanan vs. Warley* quite fully and the opinion proceeds as follows:

"In the case of *Carey vs. City of Atlanta*, 143 Ga. 192, an ordinance similar in principle to the Louisville and Baltimore ordinances was held to be unconstitutional and void. That decision was cited by the Supreme Court in the Louisville case, with a quotation from it which concludes as follows: 'The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy and dispose of his property. Being of this character, it was void as being opposed to the due-process clause of the Constitution.' * * *

"The principle is broad enough to invalidate any ordinance or statute which speaks to make the ownership or occupancy of property in particular localities depend upon the color of the persons by whom the right may be asserted. This is just as distinctly the object of the Baltimore ordinance as of the one directly involved in the decision of the Supreme Court. The fact that the former deals with city blocks which are occupied wholly by white or colored residents, while the latter relates to blocks in which white or colored inhabitants are merely in the majority, does not create any essential difference in principle or purpose between the two ordinances. In each instance there is an attempted limitation of the property rights of individuals on account of their color, and this ground of constitutional objection is equally present whether the residential sections to be regulated are occupied wholly or only in part by the members of the respective races. The Baltimore segregation ordinance is clearly opposed to the principles declared and enforced by the Supreme Court in holding the Louisville ordinance to be invalid, and we can, therefore, have no hesitancy in deciding that the present ordinance is likewise unconstitutional. The same conclusion, in reference to this ordinance, has been reached by Judge Rose, in the

United States district court for the district of Maryland, in the case of *United States use of Coleman vs. Henry*, recently decided."

Irvine vs. City of Clifton Forge, 124 Va. 781 (November 14, 1918):

"On the main constitutional question, the ordinance here involved is not materially different from the segregation ordinance of the City of Richmond, which was upheld as a valid enactment by this court in *Hopkins vs. City of Richmond*, 111 Va. 692; 86 S. E. 139 Ann. Cas. 1917 D. 1114. Since that case was decided, the Supreme Court of the United States has decided that an ordinance of the City of Louisville substantially the same as the one under consideration is in conflict with the Fourteenth Amendment of the Constitution of the United States, and is therefore null and void. (*Buchanan vs. Warley*, 245 U. S. 60; 38 Sup. Ct. 16; 62 L. Ed. 149.) That case was very fully argued by able counsel, and several cities, including the City of Richmond, Va., were also permitted as *amici curiae*, to file briefs in the case. The opinion of the court fully covers the case at bar. The judgment aforesaid of the circuit court of the City of Clifton Forge must, therefore, be reversed, and the case remanded to said court, with directions to remit the fine imposed upon the plaintiff in error and dismiss the prosecution."

A. M. Holter Hardware Co. vs. Boyle, 263 Fed. 154, District Court of Montana (Jan. 13, 1920):

"* * * It is true the Constitution is not a barrier to changes in state policy and law to suit new circumstances and conditions, not a barrier to new application of its principles, but it does oppose all changes that would avoid or supplant its principles with others, however, calculated to suit the needs of the hour and the temper of the times. Its generic terms are open always to include newly created species. (See *Merrick vs. Halsey & Co.*, 242 U. S. 587, Sup. Ct. 227, 61 L. Ed. 498.) Hence public opinion, prevailing morality, emergencies, may warrant denouncement as a crime today what was lawful yesterday; may do in behalf of public welfare today what could not be done yesterday, may regulate a business or employment today that could not be regulated yesterday.

"Whether, in view of the Constitution, legislation in exercise of a state's police power (which is nothing mysterious, but only another name for the state's power of self-government) is a newly created species, or is of a new genus, is a new application of old principles, or is creation of a new and repugnant principle, is in final determination for the courts." (Here are cited many cases, including *Buchanan vs. Warley*, *supra*.)

O'Neil vs. Providence Amusement Co., Rhode Island Supreme Court (January 29, 1920), 8 A. L. R., p. 1590:

"* * * As the amusement business is a private business, and not a business affected with a public interest, it may be exercised under the police power of the state. But the police power of the state is subject to the limitations and provisions of the Federal Constitution as the Supreme Court of the United States has held in several cases. * * *

"The Fourteenth Amendment to the Constitution of the United States provides: 'Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"The meaning of this provision has been interpreted and defined by the Supreme Court of the United States in a number of cases. In *Allgeyer vs. Louisiana*, 165 U. S. 578, 41 L. Ed. 832; 17 Sup. Ct. Rep. 427, the court said: 'The liberty mentioned in that amendment means not only the right,

of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion all purposes above mentioned.'

"And in *Coppage vs. Kansas*, 236 U. S. 1, 59 L. Ed. 441, L. R. A. 1915 C, 960, 35 Sup. Ct. Rep. 240, the word 'liberty', as used in the Fourteenth Amendment, is defined as follows: 'Including the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense.'"

Plaintiff Porterfield as a citizen of the State of California, as well as of the United States, may well claim protection for his property rights under sections 1 and 13, art. I, of the constitution of the State of California.

We do not see how it can be successfully maintained that Porterfield is not denied the right to acquire, possess and protect his property and also the right not to be deprived of his property without due process of law under the said sections, which read as follows:

"Section 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.

"Sec. 13. * * * No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law. * * *

Syllabus: "The right of property antedates all constitutions. This right is invaded if the owner is not at liberty to contract with others respecting the use to which he may subject his property, or the manner in which he may enjoy it. (*Stimson Mill Co. vs. Braun*, 136 Cal. 122, 89 Am. St. Rep. 116, 57 L. R. A. 726, 68 Pac. 481).

"A provision in the specifications for public street work that no unnaturalized alien should be employed in the work, except with the permission of the highway commission, is invalid. (*City Street Imp. Co. vs. Kroh*, 158 Cal. 308, 110 Pac. 933.)

"Section 384 of the Penal Code, subdivision 3, declaring it a misdemeanor to willfully and negligently build a fire on one's own land for the purpose of burning brush, etc., is violative of the Federal and State Constitutions as an unreasonable and oppressive interference with the right to use and enjoy property. (*In re McCapes*, 157 Cal. 26, 106 Pac. 229.)

"The right of property includes the right to dispose of such property in such manner as the owner pleases, and to sell it for such price as he can obtain in fair barter. (*Ex parte Quarg*, 149 Cal. 79, 117 Am. St. Rep. 115, 89 Ann. Cas. 747, 5 L. R. A. [N. S.] 183, 84 Pac. 766.)

"The provision of section 1203 of the Code of Civil Procedure that failure to comply with the section by filing a good and sufficient bond with the building contract in an amount equal to at least twenty-five per cent of the contract price shall render 'the owner and contractor jointly and severally

liable in damages to any and all material men, and subcontractors entitled to liens upon property affected by said contract,' is an unreasonable restraint upon the owner of the property in the use thereof, and is an unreasonable restriction upon the power to make contracts, and is, therefore, unconstitutional. (*Martin vs. McCabe*, 21 Cal. App. 658, 132 Pac. 606.)

"When a lawful business is of beneficial character, and not dangerous to the public, it cannot be subjected to police regulation. (*Ex parte Dickey*, 144 Cal. 234, 103 Am. St. Rep. 82, 1 Ann. Cas. 428, 66 L. R. A. 928, 77 Pac. 924.)

"It is always a judicial question whether any particular regulation of the constitutional right of the citizen to engage in an innocent and useful business is a valid exercise of the legislative power. (*Ex parte Hayden*, 147 Cal. 649, 109 Am. St. Rep. 183, 1 L. R. A. [N. S.] 184, 82 Pac. 315.)"

While we concede that upon this branch of this argument we are asking this court to declare an act in conflict with the constitution of the state from which said act issued, yet we believe that in a suit in equity we may petition for such relief, on behalf of plaintiff Porterfield.

II.

THE ALIEN LAND ACT DENIES TO PLAINTIFF MIZUNO THE EQUAL PROTECTION OF THE LAW UNDER THE CONSTITUTION OF THE UNITED STATES AND THE RIGHTS AND PRIVILEGES GRANTED TO NATIVE CITIZENS, WHICH HE IS ENTITLED TO UNDER THE TREATY BETWEEN THE UNITED STATES AND JAPAN.

Section 1 of article XIV of the Constitution reads as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We think that from the brief already filed the following propositions are clear:

(a) The expression "any person" used in the Fourteenth Amendment includes both resident aliens and corporations;

(b) The "privileges or immunities" of citizens refer to those privileges or immunities of citizens of the United States which arise out of the Federal Constitution and the Federal laws.

(c) A resident alien is protected under the above section of the Constitution from discriminatory legislation not justified under the police powers of the state and based upon an arbitrary classification.

We wish to note some cases, particularly *In re Ah Chong*, 2 Fed. 733:

This case has already been cited quite fully, and without going into it further we wish to call attention to the fact that it has been referred to some sixteen times and has been cited with approval as follows:

Railroad Tax Cases (*County of San Mateo vs. Southern Pacific Railroad*), September 5, 1882, 13 Fed. 722:

In citing the *Ah Chong* case and also the *Parrott* case (6 Sawy. 349) the court said, speaking through Mr. Justice Field:

"A whole race, not African, large numbers of whom come to our shores under the solemn guarantees of stipulations in a treaty suggested and sought, and in a great part framed, by ourselves, to promote our then supposed interests, were among the first to invoke this very provision of the Fourteenth Amendment to protect them but under the word 'person', in the right

to earn an honest living, by honest labor, and its protecting power was not invoked in vain. (Parrott's Chinese case, 6 Sawyer, 349; *In re Ah Chong* [Chinese fishermen case], Ind. 451.) Who, in view of past experience, shall say there was no occasion to extend the signification of the word 'person' beyond the negro? And are all other races, including our own, to be now withdrawn from its protecting power by so narrow and unnatural a construction. I apprehend not. If a line cannot be drawn at the negro, then no other can be adopted that will not embrace every human being in his individual character, or in his legal association with his fellows, for the more convenient administration of his property, and more successful pursuit of happiness. I apprehend that it would have struck the world with some astonishment, when this amendment was proposed to the people of the United States for adoption, if it had read: 'Nor shall any state deprive any person of the negro race of life, liberty, or property without due process of law; nor deny to any person of the negro race within its jurisdiction the equal protection of the laws.' Yet so it must, in effect, be read if its operation is to be limited to that race. The rights of the negro are, certainly, no more sacred or worthy of protection than the rights of the Caucasian or other races; and the security of the rights of corporations, and, through them, the rights of the real parties—the corporators—is as of great public importance as the security of any other private interests."

The *Ah Chong* case was cited in *United States vs. Balsara* (July 1, 1910), 180 Fed. 694.

This case decided that a Parsee was entitled to naturalization under section 2169 of the Revised Statutes, and makes the point that—

"Of course between 1873 and 1875 Congress having adopted the Revised Statutes, any alien was eligible to naturalization." (*In re Ah Chong*, C. C. 2 Fed. 733, 739.)

The *Ah Chong* case was also cited in the *Taika Maru* (Sept. 4, 1911), 190 Fed. 45.

But in reference to this case the court says at page 454:

"The authorities here cited do no more than affirm the fundamental principles that state laws and municipal ordinances may not override national treaties; and they give no sanction to an argument questioning the validity of a national law. The power of Congress to enact laws for subsequent observance is not restricted by prior treaties with foreign nations."

The *Ah Chong* case was also cited in the case of *Raich vs. Truax*, 219 Fed. 273 (January 7, 1915), in which the court says at page 276:

"In the case of *In re Ah Chong* (C. C.), 2 Fed. 733, the constitutionality of a law enacted by the State of California prohibiting aliens who were incapable of becoming qualified electors, from fishing in the waters of the state was called in question, and the law was declared to be in violation of the Fourteenth Amendment to the Constitution and void."

The *Ah Chong* case was also cited in *Commonwealth vs. Hana* (May 13, 1907), 195 Mass. 262, being a hawker's and peddler's case in which, according to the syllabus the case decided that—

"The requirement of R. L. C. 65, section 19, that a license as a hawker and peddler shall be granted only to a person who is or has declared his intention to become a citizen of the United States, is constitutional as a reasonable exercise of the police power."

The *Ah Chong* case was cited in *Trageser vs. Gray* (December 5, 1890), 73 Md. 251.

This is a case involving the police power of the state in the regulation

or prohibition of the sale of intoxicating liquors. The Ah Chong case is cited on page 258, together with the other Chinese case (*Re Parrott*, 6 Sawy. 349; *Yick Wo vs. Hopkins*, 118 U. S. 356), and after the court calls attention to the anti-Chinese character of the legislation both in the constitution of California and the statute, the court says, speaking of the anti-Chinese cases:

"They struck at those inalienable rights which belong to human beings at all times and in all places. They deny them the equal protection of the laws in particulars essential to other means of existence. Very often affecting a purpose to accomplish an unconstitutional result, and therefore they were necessarily void."

The Ah Chong case is also cited in *Commonwealth vs. Cosick*, 36 Pa. County Court Reports 637 (December 1, 1909), as follows:

"*In re Ah Chong*, 2 Federal Reports 736, the right to take fish from the waters of the state being analogous to the taking of game birds or animals, a law may apply to the latter as to the former" (this to be noted, however, that this case which held that a statute passed for the purpose of prohibiting hunting or capture of wild birds and which forbade the ownership or possession of a shotgun or rifle "by an unnaturalized foreign-born resident" and enforcing the statute by fine or imprisonment and confiscation of property was held to be unconstitutional under the Fourteenth Amendment to the Constitution and also void under the treaty between the United States and Italy. This case may have been overruled by the *Patsone* case, but it is interesting because the provision of the Italian treaty is exactly the same as the provision in the Japanese treaty).

The Ah Chong case is also cited in *Harper vs. Galloway*, 58 Fla. 255 (June, 1909).

At page 265 to justify the conclusion of the court that

"The unjust discrimination against residents of other counties in the state who have rights as to the game in the state, as imposed by section 8 of the act, is in effect a denial to the residents of the state who are not residents of Marion County the equal protection of the laws of the land, and such section 8 is inoperative as to residents of this state."

Plaintiff Mizuno is protected in his right to make and enforce a contract of lease with plaintiff Porterfield under the so-called civil rights statute.

Section 10 of chapter 114 of the act of Congress, of date May 31st, 1870 (being R. S. 1977, U. S. Compiled Statutes, sec. 3925), reads as follows:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Act May 31, 1870, c. 114 § 16, 16 Stat. 144.

Syllabus: "This section, so far as it confers rights, is not limited to negroes and colored persons. It confers rights upon white persons, and puts in the form of statute what has been substantially ordained by the Constitution."

Kentucky vs. Powers (C. C. 1905), 139 Fed. 452.

We think it self-evident that a lease is a contract involving an interest in real property. Many writers speak of a lease as personal property and Blackstone calls it a chattel real. No attempt is made in the statute above cited to limit the expression "contracts" to any particular persons or any

particular subject matter. Obviously a contract between two persons must involve either rights of person or rights of property and we have been unable to find any authority for limiting the word "contracts" in the above quoted section to any particular kind of personal or property rights. If we admit that historically considered the civil rights statutes were passed for the protection of the negro it should require the citation of no authority further to prove that the expression "all persons" as used in the civil rights statutes have been extended to include all inhabitants of the United States, citizens or aliens.

Does the theory that states have control over the devolution of the title of the real property situated within the states to the extent of proscribing arbitrarily certain classes of aliens who may or may not acquire the same by purchase or descent, limit the right of an alien person under the civil rights statutes "to make and enforce contracts" involving an interest in real property in the nature of a chattel?

The cases usually cited to support the doctrine that states may lawfully prohibit alien ownership of land are—

Chirac vs. Chirac, 2 Wheat. 259, 272; *Hauenstein vs. Lynham*, 100 U. S. 483, 484; *DeVaughan vs. Hutchinson*, 165 U. S. 566, 570; *Clarke vs. Clarke*, 178 U. S. 186; *Blythe vs. Hinckley*, 180 U. S. 333.

We have critically examined these cases and shall, when the question is properly raised in another case, express our views thereon. All of these cases, except one, were decided before the adoption of the Fourteenth Amendment, we may say incidentally, and the question as to how far the state's control of real estate or any interest therein has been limited, if at all, by the Fourteenth Amendment, is an interesting one.

But granting *arguendo* the right of a state to control by statute the devolution of real estate, the point is that the state's control of the ownership of real property does not give it the right to create a discriminatory classification *between aliens themselves* as is done under the Alien Land Act.

As a matter of classification, if we concede that the state in the protection of its sovereignty might classify those who may own real property, or any interest therein, into citizens and aliens, we are still unable to conceive a justification for an arbitrary classification between aliens themselves. It is of course thinkable that a state might deem it unwise as a matter of political policy to allow its real estate to be held in ownership by persons owing no direct allegiance to the government. But why should a state in its legislation divide aliens into classes on the basis of racial distinctions which seem to have no relation to any end sought other than the carrying out of a plan either to deprive certain races of aliens of their right to earn a livelihood or even to drive them out of the state.

As a writer on this subject has well said:

"Either property is controlled with equal care by the state; each may be taxed with equal facility; and real estate is the more easily reached by the courts and executive powers. Moreover, the ownership of real property carried with it neither social nor economic privileges to any greater extent than does the ownership of personal property. Aside, therefore, from the mere judicial tradition, no reason appears why real property should any longer be regarded as so different from personal property as to justify treatment so arbitrary as appears in this case. If this be sound, then the classification in this case is obnoxious to the provisions of the Fourteenth Amendment and must fail. Moreover, as will be more fully developed hereinafter, there is not a word in the cases dealing with discrimination upon

the basis of race which would lead one to believe that this case was not within the inhibition of the amendment.

"It is moreover clear that the statute would affect the alien persons subjected thereto to its full limitations, and would leave untouched other aliens not within its purview as also any citizens of the United States, even though such alien or such citizen owned property perfectly identical both in value, in the use to which it is put, in the benefit derived therefrom, and in location. In other words, the discrimination here is not based even upon occupation (as were the Laundry cases), which, when properly exercised, is a legitimate basis of classification. It is based wholly and solely, and that fact should be plainly put, upon the color of the man's skin, that is his race, and this results from the fact that the statute applies to persons ineligible to citizenship in the United States under the Federal laws which confer such eligibility upon 'aliens (being free white persons) and to aliens of African nativity and to persons of African descent' (R. S., sec. 2169)."

Whitfield vs. Hanges, 222 Fed. 745:

"An alien, as well as a citizen, is protected by the prohibition of deprivation of life, liberty or property without due process of law and the equal protection of the law. This principle is universal. It applies to all persons within the territorial jurisdiction of the United States without regard to any differences of race, of color, or of nationality."

Claybrook vs. City of Owensboro, 16 Fed. 297:

Syllabus: "The equal protection of the laws guaranteed by this amendment must and can only mean that the laws of the states must be equal in their benefits as well as equal in their burdens, and that less would not be 'the equal protection of the laws.'"

Santa Clara County vs. S. Pac. R. R. Co., 18 Fed. 118 U. S. 394:

"The basis of the imposition being *property as such*, the fact that certain property is owned by a corporation or a white man, or a man of bad character, or a clergyman, cannot be made the grounds of a levy, that both in form and in effect, and in result is unequal and injurious."

The police powers of a state while authorizing the creation of classifications in legislation with a view to promoting public health, the public morals, the public safety and the public welfare, do not justify the legislature in passing an act which neither promotes the public health, morals, safety nor welfare nor exhibits a real and substantial relation between the classification and the end sought.

We are anticipating the argument that the classification and discrimination in the Alien Land Act will be sought to be justified under the so-called police powers of the state. In all legislation of this character justification is attempted on a plea that the police powers of a state are so broad as to include nearly everything which a legislature wishes to do regardless of the Fourteenth Amendment. The question, then, is as follows:

Has a state the right, in view of the Fourteenth Amendment and the Civil Rights acts, to pass an act prohibiting certain aliens from acquiring a leasehold estate in real property while permitting it to other aliens?

Brannon, *The Fourteenth Amendment*:

"Wide as is this power, everything and anything done under state authority cannot be justified under it. The act done must fall within the legal bounds of the police power. If it exceeds those bounds, and prejudices life, liberty, property, equality before the law, or privilege or immunity,

it justifies Federal intervention under the Fourteenth Amendment, because it violates that amendment." (P. 171.)

"* * * To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under guise of protecting public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination of what is a proper exercise of the police power is not final or conclusive, but is subject to the supervision of the courts." (P. 172.)

"It has been criticized as endangering the irretrievable loss of the Fourteenth Amendment 'in the illimitable or indescribable bounds of the police power'; but I am unable to see how that amendment wrought the slightest change in the state." (P. 175.)

"These are rights of liberty, inhering in and sheltered by the word 'liberty' expressed in the Constitution, as above shown. Legislation for the high public behest of public safety and welfare can justly detract from those rights, but not otherwise. No call but a necessary public want can do so. The public must have, in the instance of the particular act of government, a right to demand it. All the law of police as shown in preceding pages tells us this. As Webster said, every act of legislature, though such in form, is not due process of law; so every act claiming to be an act of police, is not necessarily one of legitimate police." (pp. 200-201.)

Freud, Police Power:

"Sec. 706 * * * In view of the expressions as to the right to sell liquor, to be found in *Crowley vs. Christenson*, it is not improbable that the exclusion of aliens would be sustained by the Supreme Court; but with regard to other occupations, even those requiring special skill, or moral qualifications, discrimination against resident aliens ought not to lie in the discretion of the states. The analogy of the disability to hold land, a survival of feudal conceptions, should not be extended. It has, accordingly, been held in Michigan that citizenship may not be made a requirement for engaging in the avocation of a barber."

People vs. Holder, 199 Pac. 832:

"It is well settled that the police power cannot be made a cloak under which to overthrow or disregard constitutional rights. It is only when the general welfare, the interests of the public as distinguished from those of individuals, will be protected that the rights of contract may be limited by a general exercise of the police power."

Mr. Justice Brewer said in the recent case of *Brannon vs. City of Titusville* (April 30, 1894, S. C. Reporter's ed. 289-308), in declaring an ordinance unconstitutional which sought, under the police powers of the state, to levy a tax upon manufacturers selling goods into the state:

"There is no charge in dealing in obscene or indecent pictures, or that the pictures, or the frames, were in any manner dangerous to the health, morals, or general welfare of the community. It must also be borne in mind that the ordinance is not one designed to protect from imposition and wrong either minors, habitual drunkards, or persons under any other affliction or disability. There is no discrimination except between manufacturers and licensed merchants on the one hand, and the rest of the community on the other, and unless it be a matter of just police regulation.

to tax for the privilege of selling to manufacturers and merchants it cannot be to tax for the privilege of selling to the rest of the community. * * * *'Definitions of the police power must, however, be taken, subject to the condition that the state cannot, in its exercise, for any purpose whatever encroach upon the powers of the General Government, or rights granted or secured by the supreme law of the land.'*

"In *Walling vs. Michigan*, 116 U. S. 446, 460 (29:691, 695), in the opinion delivered by Mr. Justice Bradley, it was said: *'The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States Government created thereby.'*

"* * * ; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution." (Italics ours.)

In the very recent case of *Corvallis Creamery Co. vs. Van Winkle*, District Court, Oregon (July 5, 1921), 274 Fed. 454, Judge Wolverton, in holding an Oleomargarine Act of Oregon constitutional, suggested this as a touchstone for determining when an act is within the police powers of the state:

"The single question presented is whether the act constitutes a reasonable exercise of the police power; or, putting it conversely, whether it is merely arbitrary denunciation of an act or supposed practice without any reasonable basis for its promulgation as a law or regulation. The act can be sustained only upon the ground that it is reasonably calculated in some way to promote the health, comfort, safety, or welfare of society."

We submit that to justify the Alien Land Act so far as it prohibits the plaintiffs in the instant case from entering into a contract of lease, on the ground of assumed police powers of the state would be to deprive both plaintiffs of the protection afforded by the Federal Constitution.

The state has the power to classify the objects of legislation affecting either persons or property, but such classification must be reasonable and just and free from arbitrary discrimination in respect of the persons affected thereby.

Certain discriminations against aliens as an entire class have been justified in legislation passed by states upon the theory either: (a) that the state was legislating concerning the devolution of real property; (b) the right to take the common property of the state such as fish and game; (c) the right to employ citizens alone on public works; and (d) the right to exercise the elective franchise.

In the case of *Raich vs. Truax*, 239 U. S. 33 (Nov. 1, 1915), Mr. Justice Hughes, in holding an act passed under the initiative provision of the constitution of Arizona unconstitutional, which act compelled an employer working over five men to have not less than eighty per cent "qualified electors or native-born citizens of the United States," said on the subject of discrimination and in answer to the argument that the act could be justified as a reasonable discrimination under the police powers of the state:

"The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against (40) both aliens and the citizens of other states. Thus in *McCready vs. Virginia*, 94 U. S. 391, 396 (24 U. S. [L. Ed.] 248), the restriction of the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the state, and an analogous prin-

ciple was involved in *Patson vs. Pennsylvania*, 232 U. S. 138, 145, 146 (34 S. Ct. 28), 58 U. S. [L. Ed.] 539), where the discrimination against aliens upheld by the court had for its object the protection of wild game within the states, with respect to which it was said that the state could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein vs. Lynham*, 100 U. S. 483 (25 U. S. [L. Ed.] 628); *Blythe vs. Hinckley*, 180 U. S. 333, 341, 342 (21 S. Ct. 390, 45 U. S. [L. Ed.] 557); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise. * * *

Grainger vs. Douglas Park Jockey Club, U. S. Circuit Court of Appeals, Sixth Circuit—October 2, 1906, 148 Fed. Rep. 513.

"In the *Gulf, C. & S. F. R. Co.* case Mr. Justice Brewer said:

"Arbitrary selection can never be justified by calling it classification."

"* * * 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that the differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations.'

"There must be a real and substantial relation between the classification and that for which the statute or ordinance making it was enacted—the object which it was intended to accomplish, to-wit, the public welfare. Just as a deprivation of liberty or property to be valid must have a real and substantial relation to the public welfare, so classification to be valid also must have such a relation thereto.

"The mere classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment. That in all cases it must appear not only that a classification has been made but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection.

"'Classification, to be valid, must rest upon some reason of public policy, some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified.'"

Under the principles suggested in these citations we cannot see how a classification among aliens between those eligible to citizenship and those not eligible can be justified under the police powers of the state. There has been in some of the decided cases a justification of a classification of the races in respect of their social as distinguished from their political and legal rights. Even in these cases, however, there has been an insistence that the legislation must secure to the respective races involved equal, though not identical, rights. We cite a few cases on page 34 *et seq.* of this brief illustrative of these distinctions, although it is obvious that there is but little parallelism between them and the instant case. We cite these cases because they are sometimes spoken of mistakenly as furnishing exceptions to the Fourteenth Amendment.

Classification.

State etc. vs. Railroad Commission of Wisconsin (July 13, 1921), 183 Mo. 687:

In this case a so-called war emergency act attempting to empower a commission to fix rents on property in counties having a population of two

hundred and fifty thousand or more, was held to be unconstitutional as an unlawful discrimination, and in the course of the opinion the court says:

"Did the legislature in exercising its (police) power in the manner prescribed by the act, violate any of the rights guaranteed to plaintiff by the Federal and State Constitutions? At the threshold of this inquiry the claim is made by the plaintiff that the act is invalid because it deprives him of the equal protection of the law. Equality of rights and privileges is the underlying purpose to be accomplished by our constitutional system of government; 'if special privileges are granted or special burdens or restrictions are imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government.'

"This principle was aptly stated by Mr. Cooley in his *Constitutional Limitations*, and approved by the court in *Colting vs. K. C. Stock Yards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, in the words following: 'Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation but would be such an arbitrary mandate as is not within the province of free government. * * * It is emphasized in that clause of the Fourteenth Amendment which prohibits any state to deny to any individual the equal protection of the law. * * * A law which makes unjust discrimination, which deprives one person of the right in dealing with his property and grants it to another of the same class under like circumstances and conditions, is a denial of the equal protection of the law, and offends against the constitutional principles guaranteeing these rights. * * * 'Such command does not require that all property of persons shall be treated exactly alike, but permits separation of them into classes of property or of persons similarly conditioned or situated, having characteristics legitimately distinguishing the members of one class from those of another in respects germane to some general and public practice and object of the particular legislation.'

"While this right to classify must be fully recognized it must nevertheless be borne in mind that the equal protection of the laws is guaranteed, and that if any classification, made in a statute seeking to regulate property and contract rights, denies to one class rights and privileges which are granted to another under the same conditions and circumstances, it offends against the principles of equal protection of the law. * * * The classification made by the act violates, in 'that it is not based on characteristics legitimately distinguishing the members of one class from those' others in respects germane to the public practice and object of this legislation, and results in depriving the owners of 'rental property' within the terms of the act of constitutional rights accorded owners of like property who are not subject thereto. The result is that the liberty of the person subject to the act has been infringed upon, and the personal and property rights guaranteed them by the Constitution have been discriminated against in a way which deprives them of the equal protection of the law. Upon these grounds the act must be held to be invalid and of no effect. * * *

Tiedeman State and Federal Control of Persons and Property, 9:

Section 101, page 331:

"The states, however, have by legislation undertaken to protect native labor against alien labor. But in each case the legislation has been declared to be an invasion of the jurisdiction of the United States Government and an unconstitutional interference with the rights of resident aliens."

Section 136, page 641:

"It has not been the policy of individuals and of the states of this country to deny to the alien the right to own lands within their borders. In many of the Western states statutes have been passed granting to the alien the unlimited right to purchase and own lands, and many miles of acres are now the property of foreign capitalists, who have never lived in this country and never expect to.

"But while an absolute prohibition against the acquisition of lands by a particular person or class of persons would be unconstitutional, it would not be impossible to impose limitations upon the quantity of land which any one person may own. * * *"

Section 145, page 727:

"The reasonable enjoyment of one's real estate is certainly a possessed right, which cannot be interfered with or limited arbitrarily. A constitutional guarantee of protection for all private property extends equally to the enjoyment and the possession of lands. An arbitrary interference by the government, or by its authority, with the reasonable enjoyment of private lands is a taking of private property without due process of law, which is inhibited by the Constitution. But it is not every use which comes within this constitutional protection. One has a vested right to only a reasonable use of one's land. It is not difficult to find the rule which determines the limitations upon the lawful ways or manner of using lands. It is the rule, which furnishes the solution of every problem in the law of police power, and which is comprehended in the legal maxim *sic utere tuo, ut alienum non laedas*."

Survey of the cases involving the power of a state under the Fourteenth Amendment to the United States Constitution to deny to aliens the right to engage in a lawful occupation.

Templar vs. State Examiner, 131 Mich. 254 (100 A. L. R. 610):

It was held that a provision of the statute regulating the examination and licensing of barbers, which prohibited the examining board from issuing a certificate to an alien, was in conflict with the alien's rights under the Fourteenth Amendment to the Federal Constitution.

Re Tiburcio Parrott, 6 Sawy. 349, 1 Fed. 481:

The provision in the Constitution of California which prohibited corporations from employing Chinese or Mongolians, was held unconstitutional. Judge Sawyer said that—

"To deprive a man of the right to select and follow any lawful occupation * * * is to deprive him of both liberty and property, within the meaning of the Fourteenth Amendment."

Re Ah Chong, 6 Sawy. 451, 2 Fed. 733, holds that although aliens have no property right which entitles them to fish against the will of the state, a statute prohibiting aliens incapable of becoming electors of the state, from fishing, the same not being applicable to aliens of all nations, but clearly intended to apply to the Chinese alone, denies to them the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment.

Fraser vs. McConway & T. Co., 82 Fed. 257:

It was held that the statute which imposed upon employers of unnaturalized male persons a tax of three cents per day for each day such person was employed, was void under the Fourteenth Amendment since it discriminated against such persons by interposing an obstacle to the pursuit by them of their lawful avocations and imposing a burden upon them which was not laid upon others in the same calling.

People vs. Warren, 34 N. Y. Sup. 942:

It was held that a statute which made it a crime for a contractor with a

municipal corporation for the construction of public works to employ an alien as a laborer on such work, was unconstitutional under the Fourteenth Amendment to the Constitution, and *this decision was based on the right of the employer rather than the right of the alien employee.*

Trageser vs. Gray, 73 Md. 250:

It was held that where the calling or occupation is injurious or liable to become so to the community the state under its police power can limit it to its own citizens and deny the right to all others. This case involved the right of a state to deny to persons not citizens of the United States the right to obtain liquor licenses, and it was held that this was not a discrimination against them, nor an abridgement of their rights within the prohibitions of the Fourteenth Amendment.

Commonwealth vs. Hana:

The decision in this case (a hawkers' and peddlers' case) seems to be based upon the case of *Trageser vs. Gray*, *supra*, but in the case of *State vs. Montgomery*, 94 Me. 192, the court, in holding a statute similar to the Massachusetts statute unconstitutional (hawkers' and peddlers' act), said:

"Nor can this discrimination be sustained as a constitutional exercise of the police power of the state. It must be noticed that the discrimination is not against a class, as criminals, as paupers, as intemperate, as disqualified by character or habits, or as harmful to society, but against a class solely as aliens. Such a discrimination is forbidden."

Re Admission to the Bar, 61 Neb. 58; *Re O'Neill*, 90 N. Y. 584; *Ex parte Thompson*, 10 N. C. 355; *Re Yamashita*, 30 Washington 234.

These cases hold that admission to the bar may be closed to aliens upon the theory that—

"This is a privilege and not a right; and the power which grants the privilege can deny it to aliens. The applicant, upon his admission to the bar, becomes an officer of the court."

Syllabus: "And the privilege may be denied him although he has been admitted to practice in all the courts of another state and has been given a certificate of naturalization in the other state. (*Re Hong Yen Chang*, 84 Cal. 103.)"

It is no reply to the argument to suggest that California in the Alien Land Act did not invent ineligibility to citizenship as a basis of classification, but took the basis ready made from the United States statutes.

This argument is suggested in two forms in the case of *Terrace vs. Thompson*, *infra*, to-wit: (a) certain United States statutes (U. S. Comp. Stats. 3490-3495; U. S. Comp. Stats. 3491) withhold ownership of land in the territories of the United States to all aliens except those who become *bona fide* residents of the United States; (b) Congress might exclude all Japanese from admission into the country and has set up a standard in section 2169, R. S., for citizenship which does in fact exclude Japanese therefrom.

The obvious reply to this argument is that the United States Government is not limited by the terms of the Fourteenth Amendment which are exclusively a restraint upon state action. Likewise Congress may, in the administration of the public lands, set up bases of classification which a state may not do under the Fourteenth Amendment. In passing we may note further that no statute even of the United States Government has been called to our attention which attempts to discriminate between aliens on the basis of race distinction. There is a vast distinction between endowing aliens with the full political rights of citizenship and protecting them in their civil rights so far as contracts and property are concerned. The basic

principles underlying these two matters are so essentially dissimilar that we cannot understand how an argument can be based on R. S. 2169 or upon the Government's policy with respect to public lands. Nor can we understand how an arbitrary and artificial classification can be adopted by a state under the Fourteenth Amendment simply because the Federal Government, not affected by the prohibitions of the Fourteenth Amendment, has seen fit so to do. In other words, the fact that the arbitrary and discriminatory classification used by the state in the Alien Land Act is picked from the United States Statutes, does not make it a constitutional classification under the prohibitions of the Fourteenth Amendment.

In the case of *Sacramento O. & C. Home vs. John S. Chambers*, 25 Cal. App. 536 (September 26, 1914), wherein an act of the State of California was held unconstitutional under the constitution of California on the ground that a citizen child of California was denied his rights as a citizen because his parents had not been naturalized and could not be (they being dead), the court, referring to the attempted artificial, discriminatory and unjust classification in the proposed statute, said:

"The distinguishing quality or condition relates not to him but to his parents. It would be a strange construction of the constitutional provision that would permit privileges to be conferred upon one citizen of the state and withheld from another for the reason that there was a difference in the political status of the parents. * * * To affirm the proposition contended for by respondent, that one citizen is, and another is not, entitled to this privilege in consequence of the difference in the citizenship and residence of their parents is to deny all efficacy to the constitutional mandate that privileges and immunities must be granted to all citizens upon the same terms."

There then follows in the opinion the best short statement of the argument applicable to the situation in the instant case which we have found, and with this statement we wish to close this branch of the argument (*italics ours*):

"No such arbitrary and extraneous discrimination is sanctioned by our fundamental law."

The internal and external evidence show clearly that the object and purpose of the California Alien Land Act are to discriminate against Chinese and Japanese, and under the doctrine of the case of Ah Chong (supra), this court may consider such evidence.

Are we justified in arguing to this court that the Alien Land Act is only one of a series of acts passed by the legislature and the people of the State of California evidencing "hostile and discriminating legislation by a state against persons of any class, sect, creed or nation." (*Ah Kow vs. Newman*, 5 Sawy. 562.)

The external evidence that "these acts are in *pari materia*; and, being so, indicate and illustrate the motive or purpose of the passage of any one of them," is not before this court, although it is abundant in character and could be easily presented.

The internal evidence may be presented by an examination of the act itself, wherein it is sought, contrary to the constitution, as we contend: (a) to prevent Japanese and Chinese from owning land or any interest therein; (b) to prevent Japanese and Chinese from leasing land for any term whatever and probably to prevent them from making a crop contract on land; (c) to prevent Chinese and Japanese from being guardians of the property of their own children (a right given to all other aliens and citizens); (d) to prevent Chinese and Japanese from owning any stock in any cor-

poration which owns agricultural land; (e) and to prevent Japanese and Chinese from inheriting real property from either a citizen or an alien and from transmitting by succession any real property to either a citizen or an alien.

We assume that other acts of the State of California, which we contend are hostile and discriminatory against Japanese, may be looked to by the court and some of them are as follows:

1. The Alien Land Act, approved May 19, 1913, in effect August 10, 1913, Statutes of 1913, page 206;
2. The Alien Land Act of 1920, Statutes of 1921;
3. The Alien Poll Tax Law of 1921;
4. The act approved May 9, 1921, in effect July 29, 1921, Statutes 1921, page 76; being a new section added to the Penal Code, numbered 931;
5. An act approved May 23, 1921, in effect July 29, 1921, Statutes 1921, page 546.

It is idle to deny that most, if not all, of the above acts show a legislative purpose to discriminate against Japanese and Chinese aliens. We can find no essential difference between the present situation and the anti-Chinese class legislation with which California is familiar and practically all of which was held to be unconstitutional and void.

The Anti-Chinese Legislation in California.

Article 19 of the state constitution of 1879 is devoted to the Chinese race, *eo nomine*, and consists of four sections, in three of which at least no attempt is made to conceal the race prejudice which forms the basis of the legislation.

At least four separate acts were passed in which more or less clumsy attempts were made to conceal the fact that the Chinese race was aimed at, in the hope that the provisions of the United States Constitution could be evaded, but all of these acts were held unconstitutional.

In re Tiburcio Parrott, 1st Fed. 481; *In re Ah Chong*, 2 Fed. 733; *Yick Wo vs. Hopkins*, 118 U. S. 356; *Ah Kow vs. Newman*, 5 Sawy. 562; *Lin Sing vs. Washburn*, 20 Cal. 534; *Quong Wo*, 13 Fed. 229; *Lee Sing*, 43 Fed. 359; *Gandolfo vs. Hartman*, 49 Fed. 181.

We must remember that Chinese as such were not mentioned in most of the above legislation, but arbitrary and discriminatory bases of classification were set up in the hope that the provisions of the United States Constitution could be circumvented. For example, in the *Ah Chong* case the act under consideration was aimed at "aliens not eligible to become electors of the State of California." The fatal parallelism between this combination of words and the device used in the Alien Land Act, to-wit: "aliens ineligible to citizenship," is evidence of the fact that race prejudice legislation has not changed the style of its raiment much between 1879 and 1921.

Section 4 of article 19 of the constitution also uses the expression "foreigners ineligible to become citizens of the United States."

We are not surprised therefore in this cursory examination of the anti-Chinese prejudice as it is found in the early legislation of California, to note what Mr. Justice Field said in summing up the situation (*Ah Kow vs. Newman*, 5 Sawy. 562):

"But in our country, hostile and discriminatory legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the Fourteenth Amendment to the Constitution. * * * And the equality of protection thus assured to every one while within the United States, from whatsoever country he may have come,

or whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others; and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment."

Or to note what Mr. Justice Sawyer said (*In re Ah Chong, supra*):

"The Fourteenth Amendment of the National Constitution provides that 'no state shall * * * deny to any person within its jurisdiction the equal protection of the laws.' To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains and penalties than those to which others are subjected, and it is to deny to them the equal protection of the laws, contrary to those provisions of the Constitution. (*Parrott's Case*, 21 Alb. L. J. 387, 1 Fed. Rep. 481; *Strauder vs. West Virginia*, 10 Cent. L. J. 227.) It is obvious, also, from a consideration of these various provisions of the new state constitution, and the several statutes in *pari materia* referred to, considered in connection with the public history of the times, that the act relating to fishing in question was not passed in pursuance of any public policy relating to the fisheries of the state as an end to be attained, but simply as a means of carrying out its policy of excluding the Chinese from the state, contrary to the provisions of the treaty. The end to be accomplished being unlawful, as we held in *Parrott's case*, it is unlawful to use any means to accomplish the unlawful object, however proper the means might be if used in a proper case and for a legitimate purpose."

(It is interesting to know that the *Ah Chong* case has been cited and referred to with approval sixteen times, and is considered a well-established authority.)

Or what Judge Deady said in the very early case of *Chapman vs. Toy Long et al.*, Circuit Court, District of Oregon, 1876 (re Sawy. 28):

"Nominally, these acts discriminate against the alien generally, but in fact against the dreaded Chinaman only; because all aliens, including the Congo negro, except the Mongolian, are permitted to become naturalized, and therefore qualified to locate and occupy mining lands under them.

"Article VI of the treaty with China, of July 28, 1868 (U. S. Pub. Treat. 148), provides that citizens and subjects of the two nations shall respectively enjoy the same privileges, immunities or exemptions, in respect to travel or residence 'within the country of the other,' as may there be enjoyed by the citizens or subjects of the most favored nation.

"The right to reside in the country with the same privileges as the subjects of Great Britain or France implies the right to follow any lawful calling or pursuit which is open to the subjects of these powers. Therefore the provisions in the mining regulations of Poorman Creek, which, in effect, forbid Chinamen from working in a mining claim for themselves or others, as well as the clause of the state constitution, *supra*, to the same effect, seem to be in direct conflict with this article of the treaty; and if so, are therefore void. Practically the latter has always been a dead letter. Both it and the similar prohibition in relation to free negroes (art. 1, sec. 35, Or. Con.) were generally regarded, at the time of the formation of the state constitution, as a mere piece of *brutum fulmen*, intended to quiet the fears and placate the prejudices of a certain class

of voters who were supposed to stand in dread of being over-slaughed by an influx of these black and yellow people."

Courts have gone further than the Fourteenth Amendment in holding that a covenant in a written instrument inter partes restraining one of the parties thereto from alienating his property to a person of a given race, is void.

We call particular attention to the fact that these cases proceed from the doctrine that all restraints on alienation based upon race or color are contrary to the policy of the law and will not be upheld by courts of equity. Surely a statute of a state which attempts to restrain a citizen from alienating his property or an interest therein to any person on the basis merely of ineligibility to citizenship should have no greater force in a court of equity, in view of the Fourteenth Amendment, than a contract between parties which attempts to accomplish the same result. If a court of equity can hold such a restraint on alienation based upon race alone, void as being *against the general* policy of the law, *a fortiori* a court of equity should hold a state statute void which creates a restraint upon alienation on the basis of a race distinction contrary to the specific provisions of the Fourteenth Amendment and the statutes and decisions issuing therefrom.

Gandolfo vs. Hartman et al. (Cir. Court, Sou. Dist. Cal., Jan. 24, 1892), 49 Fed. Rep. 181:

This was a suit in equity brought for the purpose of enjoining one Hartman from leasing real property to a Chinaman contrary to a covenant in a deed under the terms of which the predecessor of Hartman covenanted that he would "never rent any of the property hereby conveyed to a Chinaman or Chinamen."

In deciding the case Judge Ross said:

"The deed was duly recorded in the county in which the property is situate, and subsequently the portion of the lot retained by Steward was purchased of him by the defendant Hartman, who was thereafter about to lease it to the defendants Fong Yet and Sam Choy, who are Chinamen, when the present suit was commenced to enjoin him from so doing.

"The Federal courts have had frequent occasion to declare null and void hostile and discriminating state and municipal legislation aimed at Chinese residents of this country. But it is urged on behalf of the complainant that, as the present does not present a case of legislation at all, it is not reached by the decisions referred to, and that it does not come within any of the inhibitions of the Fourteenth Amendment to the Constitution of the United States, which, among other things, declares that no state shall 'deny to any person the equal protection of the laws.' This inhibition upon the state, as said by Mr. Justice Field in the case of *Ah Kow vs. Nunan*, 5 Sawy. 552,

"Applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative and judicial departments; and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one whilst within the United States, from whatever country he may come, or of whatever race or color he may be, implies that not only the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others. * * *

"It would be a very narrow construction of the constitutional amendment

in question and of the decisions based upon it, and very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other. This would seem to be very clear.

"Moreover, it is by the treaty between the United States and China of November 17, 1880, provided that—

"'Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and the Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.' (Art. 2, Treaty Nov., 1880 [22 U. S. St. p. 13].)

"* * * But the principle governing the case is, in my opinion, equally applicable here, where it is sought to enforce an agreement made contrary to the public policy of the Government, in contravention of one of its treaties, and in violation of a principle embodied in its Constitution. Such a contract is absolutely void, and should not be enforced in any court—certainly not in a court of equity of the United States."

Title Guarantee & Trust Company vs. Garrott (July 10, 1919), Cal. App. Court, vol. 29, C. A. D., p. 200:

In this action suit was brought to compel a reconveyance of certain property on the theory that the owner had broken a covenant in a deed of his predecessor in interest which provided "that neither the said party of the second part nor her heirs or assigns shall or will * * * lease or sell any portion of said premises to any person of African, Chinese, or Japanese descent."

In holding the above covenant in the deed void as a restraint upon alienation, the court said:

"If the continuation of the estate in the grantee may be made to depend upon his not selling or leasing to persons of African, Chinese or Japanese descent, it may be made to depend upon his not selling or leasing to persons of Caucasian descent, or to any but Albinos from the heart of Africa or blond Eskimos. It is impossible, on any known principle, to say that a condition not to sell to any of a very large class of persons, such as those embraced within the category of descendants from African, Chinese or Japanese ancestors, shall not be deemed any unreasonable restraint upon alienation, but that the proscribed class may be so enlarged that finally the restriction becomes unreasonable and void. Where shall the dividing line be placed? What omniscience shall tell us when the restraint passes from reasonableness to unreasonableness? Who can know whether he has title to the land until the question of reasonableness has been passed upon by the court of last resort? No matter how large or how partial and infinitesimal the restraint may be, the principles of natural right, the reasons of public policy, and that principle of the common law which forbids restraints upon the disposition of one's own property, are so effectually overthrown by the one as by the other. The difference is of degree, not principle."

The court then proceeds to announce the well-known doctrine that the Fourteenth Amendment to the Constitution of the United States is aimed

exclusively at "state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment (Civil Rights Cases, 109 U. S. 18)."

The court then proceeds further to say:

"A different question would be presented if the court, while sanctioning such a provision against persons of African descent as we find in the deed in question here, were subsequently to hold to be invalid a similar provision directed against Hindoos, Cingalese and Maoris, or any other class of persons except negroes. The equal protection clause of the Fourteenth Amendment makes but one demand upon the state, and gives to the state but one right. It is that the state shall make, execute and interpret its laws without discrimination. It must not grant a right to one which, under similar circumstances, it denies to another. Upon this phase of the question, see the note to *Queensborough Land Co. vs. Cazeaux*, *supra*, L. R. A. 1916 B, p. 1208."

Los Angeles Investment Co. vs. Gary, 181 Cal. 680 (December 11, 1919):

Practically the same point arose in this case under a similar deed and the court, speaking through Mr. Justice Olney, after commending the opinion of Judge Finlayson in *Title Company vs. Garrott* (*supra*) as "scholarly", said:

"The condition that the property be not sold, leased, or rented to one not of Caucasian birth is clearly a restraint on alienation. The deed likewise purports to convey the fee, and an incident of an estate in fee is the right of free disposal or transfer. The condition is, therefore, repugnant to the interest created by the deed except for the condition, and falls within a literal reading of section 711 of the Civil Code, whose language is:

"Conditions restraining alienation, when repugnant to the interest created, are void."

We submit that the United States courts sitting in an equity case, such as the instant case, are fully justified in prohibiting the enforcement of a state act which restrains a citizen from alienating by lease his real property, under the doctrine of the case of *Gandolfo vs. Hartman* (*supra*). Especially should this be so when we find that the State of California through its code and its decisions makes void any attempt by the parties to a contract to create in the contract a restraint based upon distinction of race. If the expression in the Alien Land Act "eligible to citizenship" were changed to mean "Japanese and Chinese" and if the prohibitions of the said act were incorporated into a deed *inter partes* as a covenant thereof we submit that such a covenant would be void under California law. How then can it be argued, in view of the clear provisions of the Fourteenth Amendment, that a state act which contains the same restraint on alienation can be sustained?

It will be argued that the recent case of Terrace et al. vs. Thompson, 274 Fed. 841 (July 25th, 1921), furnishes an answer to the arguments herein made but a critical examination of the case shows that its principal thesis supports the contention of the plaintiffs herein.

Plaintiff Terrace in this case was suing to secure the right to enter into a lease with plaintiff Nakatsuka, an alien Japanese, and was seeking an injunction under the Anti-Alien Land Act of Washington. The said act is vitally different from the California Alien Land Act in that it provides a definition of an alien as follows:

"'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all

other aliens and all corporations and other organized groups of persons a majority of whose members are aliens." (Sec. I [a].)

Most of the opinion is concerned with the question as to whether or not the Japanese plaintiff had the right to enter into the lease under the terms of the treaty. The court then proceeds to distinguish the case from *In re Ah Chong*, quoting the portion of the act which has been above quoted and the opinion reads:

"The prohibition by this definition is made applicable to all aliens, both those eligible and those not eligible to citizenship, provided that they have not declared their intention to become citizens. To this extent the present suit is to be distinguished from *In re Ah Chong* (C. C.), 2 Fed. 733."

The court then cites fully from the *Ah Chong* case and apparently approves of the doctrine of it and then proceeds to reiterate that the case is to be distinguished from the *Ah Chong* case "because of the fact that the present law is made applicable to all aliens and there is no punishment by imprisonment or a fine of the alien grantee of the lands, but the case is to be further distinguished because of the fact that the treaty with Japan does not contain, as to land ownership, the 'most favored nation' clause or any language of such import."

The court forgets for the moment that the Fourteenth Amendment is itself tantamount to a most favored nation clause. The corollary from the decision in this case would be that an act like the California act, which disqualified from leasing and owning land only those amongst aliens who are ineligible to citizenship, would under the authority of the *Ah Chong* case be invalid. Obviously if the filing of a declaration of intention to become a citizen would take an alien out of the prohibited class, he could not complain that he was arbitrarily discriminated against. We know of no law which would prevent an alien from declaring in good faith his intention to become a citizen of the United States, even though he might not be able to ever become such a citizen because of the inhibition of section 2169 R. S. In any event if by his voluntary act he could comply with the terms of the Washington act, and that is certainly the assumption underlying the decision, then obviously he could not complain under the Fourteenth Amendment of discrimination. There is no other way in which we can reconcile the court's citation of the cases of *Ah Chong* and *Buchanan vs. Warley* with the opinion in this case, and a careful reading of these two cases will show that this case must be distinguished from the instant case in order that it can be understood. As we read this case we conclude that the learned court would have held the act unconstitutional under the *Ah Chong* case and *Buchanan vs. Warley* had the California act been before them. In view of this analysis the court's conclusion "that the citizen landowner may sell to whom he pleases; but he may not sell to one who is rightfully forbidden the right to buy", presents the logical condition of a vicious circle and begs the entire question which is: Does the alien Japanese have the right to buy land or lease land under the Fourteenth Amendment? This question we may answer in the negative and still demonstrate that under the California act the Japanese alien is unjustly discriminated against under the Fourteenth Amendment in that other aliens are permitted by the act both to lease and buy land.

CONCLUSION

We submit that the California Alien Land Act unduly and arbitrarily discriminates against the alien Japanese plaintiff and is therefore void under the Fourteenth Amendment to the Constitution of the United States. We

submit further that, as to the plaintiff citizen, the said act deprives him of his property without due process of law under both the Constitution of California and the Constitution of the United States. Therefore plaintiffs are entitled to the relief prayed for.

Dated, San Francisco, November 16, 1921.

Respectfully submitted,

ALBERT H. ELLIOT,

Of Solicitors for Plaintiffs.

7. DECISION OF THE COURT.

ON APPLICATION FOR A PRELIMINARY INJUNCTION.

Before Hon. Wm. H. Hunt, circuit judge, and Hon. Benj. F. Bledsoe and Hon. M. T. Dooling, district judges.

Dooling, district judge. The bill of complaint herein avers that the plaintiff Porterfield is a citizen of the United States, and the plaintiff Mizuno a subject of the Emperor of Japan lawfully residing in the State of California. Porterfield is the owner of 80 acres of land particularly adapted to raising vegetables which he desires to lease to Mizuno and which Mizuno desires to rent from him for a period of five years, but they are prevented from entering into such lease because of the provisions of the act adopted at the election in November, 1920, known as the "California Alien Land Law," and the threat on the part of the defendants U. S. Webb, attorney-general, and Thomas Lee Woolwine, district attorney, to enforce said act in all of its terms against them if the desired lease is executed. This action is brought to restrain such enforcement. It is claimed that the act violates certain provisions of the Constitution of the United States, and is in conflict with treaty guarantees and with certain named sections of the Revised Statutes.

The act provides in sections 1 and 2 as follows:

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Other sections provide penalties by escheat and imprisonment for its violation. It will readily be seen that the act itself violates no treaty provision because section 2 thereof expressly protects aliens not eligible to citizenship in their relation to real property to the extent and for the purpose prescribed by any treaty between the United States and their own country, so that whatever is guaranteed by such treaty is excluded from the operation of the act. The leasehold interest intended to be conveyed by Porterfield to Mizuno is an interest in agricultural land, and there is nothing in the treaty with Japan that secures to Japanese subjects resident in this country the right to acquire, possess or enjoy agricultural land or

any interest therein. The constitutional, statutory and treaty provisions involved in this action were considered at length by Circuit Judge Gilbert and District Judges Cushman and Neterer in the recent case of *Terrace et al. vs. Thompson*, 274 Fed. 841, upon an application for a temporary injunction to restrain the attorney-general of the State of Washington from enforcing a statute of that state of the same general character as the law of California now under consideration. The plaintiffs in that case advanced, urged and argued practically the same contentions that are made by plaintiffs here, all of which were rejected by the court. As we fully agree with the reasoning and conclusions in the Terrace case, it is unnecessary for us to restate them or to go over them in detail. It is urged, however, that this case differs from the Terrace case in that the Washington law excludes from ownership of land all aliens except those who have in good faith declared their intention to become citizens, while the California law excludes only such aliens as are ineligible to citizenship and that the designation of this limited class is arbitrary, unreasonable, unwarranted and therefore invalid. Or, as stated by counsel, the legislature cannot take what might be termed a natural class of persons (i. e., aliens), split that class in two, and then arbitrarily designate the dis severed fragments of the original unit as two classes; and thereupon enact different rules for the government of each. As a matter of fact, however, the Washington law does split up the natural class of persons (aliens) into aliens who have and aliens who have not in good faith declared their intention to become citizens of the United States, and enacted different rules for the government of each, in that the former may and the latter may not own land.

It is true that Congress has the power arbitrarily to say who may be naturalized and that exercising such power it has limited the right of naturalization to "aliens being free white persons; and to aliens of African nativity and to persons of African descent." This limitation excludes three of the five great races of the world, the yellow, the brown and the red. And while such exclusion is in a sense arbitrary, it is not without foundation in reason, and has been in effect, except for a brief period, practically during the existence of our government. In any event, once established, however arbitrarily, and so long as it continues, it furnishes a fundamental and important distinction which may well be adopted by a state in determining who may not own land within its borders. That fact was clearly recognized by the court and given expression in the Terrace case in the following language:

"It is obvious that one who is not a citizen and can not become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a Tower of Babel from which the tenants in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged."

If there be anything in the case of *Ah Chung*, 2 Fed. 733, which may be held to prohibit a state from lawfully preventing persons ineligible to citizenship from owning land therein, to that extent we are not disposed to follow it.

The application for a preliminary injunction is denied.

IN THE UNITED STATES SUPREME COURT.

OCTOBER TERM, 1922. No. 299.

1. APPELLANTS' POINTS, BY LOUIS MARSHALL.

This is an appeal from an order denying an interlocutory injunction, the application for such order having been heard by Honorable William H. Hunt, circuit judge, and Honorable Benjamin F. Bledsoe and Honorable Maurice T. Dooling, district judges, pursuant to statute, the purpose being to restrain the defendants from directly or indirectly permitting any proceeding in law or in equity to be brought against the appellants for the enforcement of the Alien Land Law submitted by the initiative and approved by the electors of California November 2, 1920, from causing the appellants to be arrested for violating the terms and provisions of the act, and from taking any action interfering with the appellants in executing and delivering a lease described in the bill of complaint, the appellants contending that the act is unconstitutional, in that it denies to them the equal protection of the laws and deprives them of their property without due process of law and is in conflict with section 1977 of the Revised Statutes of the United States and repugnant to the treaty between the United States of America and the Empire of Japan (Rec., pp. 5-9).

THE BILL OF COMPLAINT.

The appellant Porterfield is a citizen of the United States and of the State of California; the appellant Mizuno, a Japanese and a subject of the Emperor of Japan, and a resident of California. The defendant Webb is the attorney-general of the State of California, and the defendant Woolwine is the district attorney of the County of Los Angeles in that state.

Porterfield is and for some years past has been the owner of a farm in Los Angeles County containing eighty acres of land, which is particularly adapted to raising vegetables. For some years past it has been and is now devoted to that and other agricultural purposes. Mizuno is a capable farmer and is in all respects a desirable person to become a tenant of this real estate. Porterfield desires to lease the land to Mizuno for a term of five years, and Mizuno desires to accept the lease, and, but for the acts of the defendants, the appellants would execute it (Rec., pp. 2, 3). Mizuno, in addition to being a farmer, is engaged in the business of trading at wholesale and retail in farm products, and instead of purchasing them desires to raise his own products for the purpose of selling them in the wholesale and retail trade, and he desires to lease the farm as an incident to his business (Rec. p. 3).

Assuming to act under the Alien Land Law, the defendants have threatened to enforce its provisions against the appellants in the event that they should enter into the proposed lease of the Porterfield farm, and will attempt to forfeit the leasehold interest to the State of California and prosecute the appellants criminally for an alleged violation of the act.

The statute is in its terms so drastic and the penalties attached to a violation of it so great that the appellants may not even execute this lease for the purpose of testing the constitutionality and validity of the act, so that unless the court shall pass upon the validity of the statute in this action the appellants will be compelled to submit to it whether it be valid or otherwise, and thereby be deprived of their liberty and property without due process of law and denied the equal protection of the laws, in contravention of the Fourteenth Amendment to the Federal Constitution (Rec., p. 4).

THE CALIFORNIA ALIEN LAND LAW

The full text of this statute is to be found in Appendix A of this brief. The controlling provisions applicable to this case will be briefly quoted.

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Sec. 2. All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Section 7 provides for the escheat of any real property acquired in fee in violation of the provisions of the act by any alien mentioned in section 2.

Section 8 provides that "any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section 2 of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to the State of California. The attorney-general or district attorney of the proper county shall institute proceedings to have such escheat adjudged and enforced as provided in section seven of this act."

Further provisions are made as to the procedure to be followed.

Section 10 reads:

"If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

In order to give significance to the language of section 2 of this statute, in so far as it refers to any treaty between the United States and the nation or country of which an alien is a citizen or subject, it is desirable to have before the court the language of article I and II of the Treaty of Commerce and Navigation with Japan, dated February 21, 1911:

"Article I.

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

"They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions.

"Article II.

"The dwellings, warehouses, manufactories and shops of the citizens or subjects of each of the high contracting parties in the territories of the other, and all premises appertaining thereto used for purposes of residence or commerce, shall be respected. It shall not be allowable to proceed to make a domiciliary visit to, or a search of, any such buildings and premises, or to examine or inspect books, papers or accounts, except under the conditions and with the forms prescribed by the laws, ordinances and regulations for nationals."

When the Alien Land Law was submitted to the electorate of California at the general election on November 2, 1920, in accordance with the provisions of law regulating such an election, arguments for and against the proposed law were presented in pamphlet form to the voters. From these arguments it appears that this legislation was aimed especially at the Japanese.

STATISTICS OF 1920 RELATING TO THE POPULATION OF AND LAND OWNERSHIP IN
THE PACIFIC COAST STATES.

The total population of California was 3,426,861. The Japanese population was 70,196.

The total population of the State of Washington was 1,356,621. The Japanese population was 17,114.

The total population of the State of Oregon was 783,389. The Japanese population was 4022.

	Acres
The total land area of California is.....	99,617,280
The farm land area of California is.....	27,931,144
California land owned by Japanese individuals.....	26,928
Land owned by American corporations with Japanese shareholders	47,781
Land cultivated by Japanese under leases	192,150
Land cultivated by Japanese under crop-sharing contracts.....	121,000
Land cultivated by Japanese under labor contracts.....	70,137
The total land area of the State of Washington is.....	42,745,040
The farm land area of Washington, exclusive of federal domain, is.	6,573,540
Land operated by Japanese under lease.....	20,500
The total land area of Oregon is.....	61,188,280
Farm land operated by Japanese.....	10,096

The land thus owned in California by Japanese individuals and American corporations with Japanese shareholders aggregates 74,769 acres, or one-fourth of one per cent of the farm land area of the state. The land cultivated by Japanese under leases amounts to about two-thirds of one per cent of the farm land area of the state, and that operated under crop and labor contracts approximately two-thirds of one per cent of the farm land area of the state.

The total farm land in Washington operated by Japanese under lease is approximately one-eighth of one per cent of the farm land area of the state; and the farm land operated by the Japanese in Oregon is less than one-fiftieth of one per cent of the farm land area of the state.

These figures would seem to dissipate the idea that the pursuit of agri-

culture by the Japanese in the Pacific Coast states is a menace. This is further demonstrated by the fact that California's food products are valued at \$507,000,000 in a single year, of which the Japanese produced \$67,145,000, of which thirty-five per cent goes to the landowners, forty-five per cent to labor, in the form of wages, leaving only twenty per cent to Japanese owners, tenants or croppers.

It is also important to note that, of the farm lands of California, 16,511,550 acres are unimproved, and only 11,389,894 acres are improved.

To a considerable extent the lands cultivated by the Japanese were unimproved lands or lands the cultivation of which was abandoned by their former occupants.

The acreage cultivated by Japanese in California is principally devoted to the production of berries, celery, asparagus, seeds, onions, tomatoes, cantaloupes, sugar beets, green vegetables, potatoes, rice, grapes, beans, cotton, corn, fruit and nuts.

These facts, derived from official sources, are contained in "The Real Japanese Question," by Mr. K. K. Kawakami, 1921 (The Macmillan Company), and in "Japanese in America," by Mr. E. Manchester Boddy, published at Los Angeles in 1921.

The Chinese population of California amounted to approximately 36,000, who are but little concerned in the land question.

QUESTIONS TO BE DISCUSSED.

First. Without intending to waive the appellants' rights in a proper case to litigate any questions arising under the treaty between the United States and Japan, we shall confine our argument in this case to those arising under the Fourteenth Amendment to the Constitution of the United States.

Second. It will be assumed, but not admitted, in the course of this argument, that the Japanese are not eligible to citizenship under the laws of the United States. In view of the fact that the question of their eligibility is now under advisement by this court in *Ozawa vs. United States* and *Yamashita vs. Hinkle*, it would be inadvisable to reargue that proposition. Should it be held that they are eligible, then, under section 1 of the California Alien Land Law, Japanese, as well as Greeks, Bulgarians, Czechoslovakians, Germans, Hungarians, Poles, French, Spaniards, British and African negroes, being eligible to citizenship, would have the unquestioned right to "acquire, possess, enjoy, transmit and inherit real property or any interest therein" in the State of California, "in the same manner and to the same extent as citizens of the United States."

Third. It is well to premise, that we do not question the right of any state, by its constitution or statutes, to forbid an alien to acquire the ownership of real property within its jurisdiction. We contend, however, that under the Fourteenth Amendment, it cannot permit some aliens to acquire such property and prohibit others from doing so on account of their race, color or nationality; for, as we shall show, that would violate the equal protection clause of the Constitution.

ASSIGNMENTS OF ERROR.

Stated in abbreviated form, they are as follows:

(1) That the court below erred in adjudging the California Alien Land Law a constitutional act.

(2) That it erred in adjudging that that act did not deprive the appellant Porterfield of his liberty or property without due process of law, or deny him the equal protection of the laws.

(3) That it erred in adjudging that the act did not deny the appellant

Mizuno of the equal protection of the laws in violation of section 1 of the Fourteenth Amendment.

(4) That it erred in adjudging that it did not deprive the appellant Mizuno of the liberty of pursuit of a lawful occupation, to-wit, that of agriculture under a lease of land located in California, in violation of section 1 of the Fourteenth Amendment.

(5) That it erred in adjudging that the Fourteenth Amendment did not give to the appellant Porterfield, who is a citizen of the United States, the right to lease land belonging to him in the State of California to the appellant Mizuno, who is an alien of the Japanese race.

(6) That it erred in adjudging that the Fourteenth Amendment did not give the appellant Mizuno, who is an alien of the Japanese race, the right to acquire, possess and enjoy an interest in real property in the State of California under a lease thereof for a term of years.

(7) That it erred in refusing to decide that the California Alien Land Law is unconstitutional and in violation of section 1 of the Fourteenth Amendment, in that it discriminates against the appellant Mizuno on the ground of color, race and nationality.

(8) That it erred in refusing to decide that the California Alien Land Law deprived the appellant Porterfield of his liberty and property without due process of law, and that it denied to him the equal protection of the laws.

(9) That it erred in refusing to decide that the California Alien Land Law denied the appellant Mizuno of the equal protection of the laws and deprived him of the liberty to pursue a lawful occupation, to-wit, that of agriculture under a lease of land located in California (Rec., pp. 14-16).

POINTS.

I.

The California Alien Land Law forbids aliens ineligible to citizenship under the laws of the United States to lease real property in the state, although the right to do so has been conferred on all other aliens. The former are thus deprived of the equal protection of the laws within the meaning of the Fourteenth Amendment.

THE DISCRIMINATORY FEATURES OF THE LAW.

Section 671 of the Civil Code of California provides:

"Any person, whether citizen or alien, may take, hold and dispose of property, real or personal, within this state."

Section 672 reads:

"If a nonresident alien takes by succession, he must appear and claim the property within five years from the time of succession or be debarred. The property in such case is disposed of as provided in title eight, part three, Code of Civil Procedure."

By the General Laws of 1913 of California, page 206, Act No. 113, a statute in many respects similar to the law now under consideration, but by no means so drastic, was adopted. It permitted even aliens who were ineligible to citizenship to lease lands in the state for agricultural purposes for a term of three years.

The initiative act of 1920 eliminated the provision as to leasing, and added to the act of 1913 the last sentence now appearing in section 3 of the amended act, also the whole of sections 4 and 5, the last sentences of the present sections 7 and 8, all of sections 9 and 10, subdivisions a, b and c of section 12, and all of sections 13 and 14.

The phrase to be found in sections 1 and 2 of the act of 1913, as well as

in the present Alien Land Law, "all aliens eligible to citizenship under the laws of the United States," which apparently is expressive of the basic thought running throughout the statute, undoubtedly refers to section 2169 of the United States Revised Statutes. This is supposed to constitute a part of the Naturalization Law, and reads:

"The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent."

The persons eligible to citizenship are, therefore, all aliens who come within the description of free white persons and all aliens of African nativity and of African descent. That would include, broadly speaking, the natives of every European country, without exception, all of the white and black people of North, Central and South America; Armenians born in Asiatic Turkey; Mexicans, Parsees, Syrians born in Damascus or at Beirut; all native-born Africans from the Mediterranean to the Cape of Good Hope. It excludes Chinese, Japanese and Malaysians.

Under the California Alien Land Law it is not necessary that the aliens who may acquire real property shall reside in California. So long as they come within the test of section 2169 of the United States Revised Statutes as to color or nativity, they are eligible to citizenship, and, therefore, entitled to acquire real property in California.

This right of acquisition thus affirmatively conferred upon the aliens described in section 1 of the act, and which inures to their benefit whether resident within the state or not, includes any interest in real property, whether it be a leasehold or a title in fee simple absolute. It is not limited as to the character of the property—it may be adapted to residential, commercial, mining or agricultural purposes. Nor does the state limit the quantity of real property that any alien described in the first section may acquire—it may be all of the land of the state, or any part of it.

Thus nonresident Germans, Russians, Poles, Italians, Scandinavians or British might at any time since 1913 have become the owners of unlimited acreage in the state and may still do so, without let or hindrance.

We say this advisedly, because section 1, article XVII, of the California Constitution does not stand in the way. It is not prohibitive in its terms. So far as it goes, it is merely permissive. It excludes nobody. It reads:

"Foreigners of the white race or of African descent eligible to become citizens of the United States under the naturalization laws thereof, while *bona fide* residents of this state, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission and inheritance of all property, other than real estate, as native born citizens; provided, that such aliens owning real estate at the time of the adoption of this amendment *may remain such owners*; provided further, that the legislature *may*, by statute, provide for the disposition of real estate which shall *hereafter* be acquired by such aliens by descent or devise."

The legislature is not, however, prohibited by this provision from conferring the right to hold real property upon any "foreigners" or "aliens."

The district court of appeal of California in *Re Turner's Estate*, 196 Pac. Rep. 807, has distinctly so held on the authority of *Blythe vs. Hinckley*, 127 Cal. 431. An application for a writ of *certiorari* to review this decision was denied by this court on January 11, 1922, under title *Herrick vs. Basletta*, 237 U. S. 658.

The provision of the California Constitution, just quoted, contains no words of prohibition. Nor was the grant of permission to foreigners of the white race or of African descent to acquire personal property necessary. Under the due process clause of the Fourteenth Amendment that right

existed and could not be taken away from any foreigner or alien though not of the white race or of African descent. The reference in this constitutional provision to real property did not constitute a prohibition to the foreigners mentioned, or any other foreigner, to acquire it. The distinguished framers of the Civil Code did not so interpret the Constitution; nor did the draftsmen of the Alien Land Law of 1913 or of 1920 so interpret the Constitution. They properly regarded the entire subject as left by the Constitution within the unhampered jurisdiction of the legislature. The legislative power of the state is vested in the senate and assembly (art. IV, sec. 1), and in the exercise of that power the provisions of the Civil Code and of the Alien Land Law of 1913 and of 1920 were enacted.

We repeat, therefore, that, under the legislation of California, aliens described in section 1 of the Act of 1920 may acquire the whole or any part of the lands of California, even though they may never have set foot on the soil of that state.

At all events, even were this statement disputed, there can be no doubt that were the aliens described in section 1 actually domiciled in California they could undoubtedly acquire the title to and hold all of the agricultural lands in the state, even were the nations to which they may be subject actually at war with the United States. The Japanese, however, who are the subjects of a friendly and honorable nation, with which we were associated during the late war, some of whom fought side by side with our citizens, because of their color or racial stock, and regardless of their economic value, their intellectual qualities and their moral virtues, are sought to be debarred of the right which is freely bestowed on other aliens, who may have been arrayed against us in arms and who in every way may be inferior to the Japanese.

Without in any way seeking to belittle the men of other races or nationalities, it is difficult to understand the basis of discrimination under this statute between the illiterate Portuguese, the inhabitants of Paraguay, Mexico or Venezuela, the Russian mujik, Slovenes and Hungarians, Montenegrins and Croatsians, Sicilians and Syrians, and the industrious, enterprising and intelligent Japanese, who while cultivating land occupied by them in California have converted burning deserts into smiling oases and regions infested with malaria into marvels of fertility.

DISTINCTION BETWEEN POWERS OF CONGRESS AND STATE LEGISLATURES.

(a) We are not now considering the subject of immigration. That does not come within the legislative power of the state. It is a subject with which the Federal Government alone can deal. It undoubtedly has the power to restrict, or even to prohibit, immigration. The state, however, cannot interfere with it, either directly or indirectly, whether it be by the adoption of prohibitive or regulatory measures. *Chy Lung vs. Freeman*, 92 U. S. 275; *People vs. Compagnie Generale Transatlantique*, 107 U. S. 59; *Fong Yue Ting vs. United States*, 149 U. S. 698, 713.

(b) Nor are we here concerned with the subject of naturalization. Here, too, Congress is supreme. (Const. U. S., art I, sec. 8, cl. 4.) Its action is subject to no limitation in that regard. The right of naturalization may be granted or withheld. It may be conferred generally or to certain categories only. Congress has seen fit, by section 2169 of the United States Revised Statutes, to define those who are entitled to naturalization. That limitation, however, extends no further than to the subject to which it is in express terms confined.

(c) In like manner, Congress is given sole authority "to dispose of and

make all needful rules and regulations respecting the territory or other property belonging to the United States." (Const. U. S., art. IV, sec. 3, cl. 2.) Under this authority it may legislate as it chooses with regard to the disposition of the public domain, and as to those who may acquire lands or an interest in real property belonging to the United States. Whatever limitation upon the right to acquire such property Congress may decide to adopt is controlling. There is no constitutional limitation restrictive of its power.

The state, however, can only legislate subject to the conditions prescribed by the Federal Constitution, and especially those contained in the Fourteenth Amendment.

(d) We may, therefore, freely concede that in conformity with the common law it was within the power of California to confine the ownership of land or of an interest therein to citizens. It has expressly refrained from exerting that power. Far from asserting it, it has in its Civil Code affirmatively recognized the right of all aliens to acquire real property and by the acts of 1913 and 1920 has recognized the right of one class of aliens without restriction of any kind to own any interest whatsoever in California lands and has at the same time forbidden another class to acquire any interest at all in realty except as permitted by treaty. This, we earnestly contend, denies to the latter that equal protection of the laws guaranteed by the Fourteenth Amendment "to any person within the jurisdiction of the state."

(e) What section 1 of the act of 1920 confers upon some aliens is by section 2 denied to others, solely because in one case the aliens are white or black and in the other they are red, yellow or brown. It is not made dependent upon character, morals, economic position, intellectual or physical capacity, ability to increase the wealth of the state or the value of its taxable property, or a willingness to serve the state. It is merely the result of arbitrary selection, and as between aliens coming from fifty different lands those from forty are given the unqualified and unconditional right to acquire real property or an interest in it, while those coming from ten other countries are absolutely prohibited, under the penalty of escheat, imprisonment and fine, from taking even a lease for a single year of realty devoted to uses other than for residential or commercial purposes. Can this be said to constitute the equal protection of the laws?

YICK WO VS. HOPKINS AND TRUAX VS. RAICH, AND THEIR APPLICATION.

The noble utterance of Mr. Justice Matthews in *Yick Wo vs. Hopkins*, 118 U. S. 368, reiterated by Mr. Justice Hughes in *Truax vs. Raich*, 239 U. S. 39, rings in one's ears:

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by sec. 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' The questions

we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court. * * *

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights of life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

In that case a municipal ordinance of San Francisco, to regulate the carrying on of public laundries within the limits of the municipality, was held to be violative of the guaranties of protection contained in the Fourteenth Amendment, because it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places without regard to the competency of the persons applying or the propriety of the place selected, for the carrying on of the business. There the petitioners, who were Chinese, had been arrested upon the charge of conducting laundries within a specified district without the special consent of the board of supervisors first obtained. They showed that others who were not Chinese and who were conducting upwards of eighty laundries under similar conditions, were left unmolested and free to enjoy the enhanced trade and profits arising from this discrimination.

It was these facts to which these memorable words were applied, and which led to this further remark:

"In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial

by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In the case at bar the equal protection of the law was not denied by those who administered an ordinance fair upon its face, but the inequality, the oppressiveness, the discrimination sought to be practiced, is written all over the statute. It absolutely denied to the Japanese alien what is freely conferred on the German, Austrian, Bulgarian and Turk; just as it would have done had the act, in so many words, conferred the right to acquire property on Germans, Austrians, Bulgarians and Turks, and denied it, in so many words, to the Japanese. If *Yick Wo vs. Hopkins* had presented a classification similar to that made in the present case, of prohibiting Japanese or Chinese from conducting laundries and permitting other aliens who were free white persons or of African nativity or descent to carry on the business, can there be any doubt but that the same result would have been reached?

In *Truax vs. Raich, supra*, a statute of Arizona undertook to differentiate between citizens and aliens by providing, under penalties of imprisonment and fine, that any company, corporation, partnership, association or individual, who then was or might thereafter become an employer of more than five workers, at any one time, in the State of Arizona, regardless of kind or class of work, or sex of workers, should employ not less than eighty per cent *qualified electors or native-born citizens of the United States or some subdivision thereof*. Raich was a native of Austria and an inhabitant of Arizona, but was not a qualified elector. He was employed as a cook by Truax, who had nine employees, of whom seven were neither native-born citizens of the United States nor qualified electors. A threat having been made to enforce the provisions of this statute, Raich filed his bill in the Federal court, asserting, among other things, that the act denied to him the equal protection of the laws. That contention was sustained, Mr. Justice Hughes saying:

"Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union. (See *Gegiow vs. Uhl, Commissioner*, 239 U. S. 3.) Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of the laws. The description—'any person within its jurisdiction'—as it has been frequently held, includes aliens. * * * The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states. (Citing *McCready vs. Virginia*, 94 U. S. 391, 396, and *Patson vs. Pennsylvania*, 232 U. S. 138, 145, 146.) * * * The case now presented is not within these decisions, or within those relating to the devolution of real property; and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private

enterprise. * * * The purpose of an act must be found in its natural operation and effect (*Henderson vs. Mayor*, 92 U. S. 259, 268; *Bailey vs. Alabama*, 219 U. S. 219, 244), and the purpose of this act is not only plainly shown by its provisions, but is frankly revealed in its title. * * * It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. (*Butchers' Union Co. vs. Crescent City Co.*, 111 U. S. 746, 762; *Barbier vs. Connolly*, 113 U. S. 27, 31; *Yick Wo vs. Hopkins*, *supra*; *Allgeyer vs. Louisiana*, 165 U. S. 578, 589, 590; *Coppage vs. Kansas*, 236 U. S. 1, 14.) If this could be refused solely on the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens unless restrained was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. (*Fong Yue Ting vs. United States*, 149 U. S. 698, 713.)"

In the case just considered the prohibition of the statute applied equally to all aliens, and it was held to offend against the fundamental law. In the case at bar it applies merely to some aliens. The vast majority are given the unrestricted right to acquire, possess and enjoy any possible interest in land; while a minority of aliens is denied the right of acquiring any interest whatsoever in land. Those eligible to citizenship, even though they may never apply for the right, even though they may solemnly have disavowed the purpose of ever becoming American citizens, are placed on a complete footing of equality with native-born citizens. On the other hand, those ineligible, however ardently they may yearn for the rights of citizenship, however useful they may be to the state, however great an instrumentality for the development of its resources they may prove to be, are, by reason of the discrimination created by this legislation, literally turned off the land, unless, perchance, they should be willing to labor in a menial capacity. In fact it is only for residential and commercial purposes, it is claimed by the appellees, that land may be leased under the terms of the treaty with Japan by its subjects in the United States, as a matter of right. That would not only exclude Japanese from owning or leasing lands for agricultural purposes, but likewise for mining and other undesignated objects.

It is even contended on behalf of the state that not only are Japanese prohibited from acquiring a leasehold or other interest in lands, but that they may not enter into a cropper's agreement, which, as is shown in our brief in *Webb vs. O'Brien*, submitted herewith, is a contract of employment.

The question is thus squarely presented, as to whether or not the state, having conferred the right upon aliens to acquire an interest in real property, may deny that right to some aliens, solely on the ground of race, color and nationality, without offending against the command of the organic law,

which pledges to all persons within the jurisdiction of the state "the protection of equal laws."

The language of Mr. Justice Matthews was likewise approved and followed in *United States vs. Wong Kim Ark*, 169 U. S. 649, where Mr. Justice Gray said:

"Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are 'subject to the jurisdiction thereof,' in the same sense as all other aliens residing in the United States."

TWO RECENT DECISIONS BY THE SUPREME COURT OF CALIFORNIA.

As indicative of the attitude of the Supreme Court of California, we believe it to be helpful at this stage of the argument to refer to two recent decisions of that tribunal, both based on *Yick Wo vs. Hopkins and Truax vs. Raich*, and both declaring legislation discriminatory of aliens invalid under the Fourteenth Amendment; one, requiring the payment of an annual poll tax, and the other decided on May 1, 1922, involving section 4 of the Alien Land Law of 1920.

In *Ex parte Kotta*, 62 Cal. Dec. 315, 200 Pac. Rep. 957, the validity of a statute of California, which provided for the collection of an annual poll tax of not less than \$4 on every alien male inhabitant of the state over twenty-one and under sixty years of age, except paupers, idiots and insane persons, was involved. The act was held to be violative of the equal protection clause of the Federal Constitution. In the course of the opinion of Chief Justice Angellotti, he said:

"It is settled that the word 'person' as used in this amendment includes aliens (quoting from *Yick Wo vs. Hopkins*).

"The rights of subjects of the Emperor of China were here being discussed. In *Truax vs. Raich*, 239 U. S. 33, decided November 1, 1915, the rights of an alien who was a citizen of Austria and resident of the State of Arizona, were involved. * * *

"The court then quoted approvingly the portion of the opinion in *Yick Wo vs. Hopkins*, *supra*, that we have quoted above. (See also *Fraser vs. McConway* [C. C.], 82 Fed. 257.) Petitioner, therefore, though an alien inhabitant of California, is by this provision of the Federal Constitution guaranteed the equal protection of the laws of California."

"The meaning of 'the equal protection of the laws' thus guaranteed by the Federal Constitution to every person within the jurisdiction of a state is not left in doubt by the decisions in so far as such an act as the one here involved is concerned. In *Yick Wo vs. Hopkins*, *supra*, it is said that 'the equal protection of the laws is a pledge to the protection of equal laws.' This was approvingly quoted in *Truax vs. Raich*, *supra*. In *Barbier vs. Connolly*, 113 U. S. 27, 31, the Supreme Court of the United States declared that it was undoubtedly intended thereby: 'That equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and * * * enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should

*be laid upon one than are laid upon others in the same calling and condition,' etc. (Italics ours.) * * **

"What is said in *Barbier vs. Connolly, supra*, and the Federal statute just quoted sufficiently shows the subject-matter as to which the alien inhabitant is given by the Constitution 'a pledge of the protection of equal laws,' laws free from discrimination based solely on his alien character. Stated very generally, the requirement is for equal protection and security for all, citizens and aliens alike, under like circumstances in the enjoyment of their personal and civil rights, and in the imposition of burdens, such as penalties, taxes, etc. * * * No question of discriminatory taxation laws was directly involved in the decisions of the Supreme Court that we have cited but the rule of these decisions is clearly applicable to such a case. In the Railroad Tax Cases (C. C.), 13 Fed. 722, Justice Field, in his opinion in the circuit court, said: 'The Fourteenth Amendment to the Constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. Whatever the state may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws. * * * Unequal exactions in every form, or under any pretense, are absolutely forbidden, and of course unequal taxation, for it is in that form that oppressive burdens are usually laid.'"

See also *Ex parte Herkich Terui*, 200 Pac. Rep. 954, decided with *Ex parte Kotta*, and especially the concluding paragraphs of the opinion.

In *In re Tetsubumi Yano's Estate*, 63 Cal. Dec. 515, 206 Pac. Rep. 995, it was held by the supreme court of California that section 4 of the Alien Land Act of 1920, now under consideration, which disqualified an alien, who cannot acquire land because he cannot acquire citizenship, from acting as guardian of a ward who owns land, denied the alien the equal protection of the laws, since it deprived him of the privilege given by the Code of Civil Procedure, section 1751, which entitled a father to preference for appointment as guardian of his minor child unless he is incompetent. The fact that an alien cannot acquire citizenship was regarded as not forming a reasonable basis for classification with respect to the right of a parent to be appointed the guardian of his minor child. In the course of its opinion the court in terms equally applicable to all other parts of the statute, said:

"The Initiatory Act of 1920, by its terms, forbids the appointment of any alien not eligible to citizenship as guardian of a minor, with respect to property of the minor of a character which such alien cannot acquire for himself, that is to say, with respect to agricultural land belonging to such minor. Its effect is that a citizen of Japan, who is the parent of a native-born child, cannot be appointed guardian of the property of the child where that property consists entirely of agricultural land. *This restriction is not put upon a citizen of any country whose citizens are eligible to citizenship here, nor upon any other class of residents of this state who are not citizens thereof. It is clearly a discrimination against citizens of Japan residing in this state. * * ** It needs no argument to demonstrate the proposition that a law which gives to one person the right or privilege of becoming the guardian of his child and withholds it from another, both being alike competent in all respects, is not equal as between the two persons. The person from whom it is withheld is not in such a case accorded the protection of equal laws. In this respect the Initiative Act of 1920 is clearly a violation by this state of the guaranty contained in

the Fourteenth Amendment, that no state shall deny to any person the equal protection of its laws. It cannot be successfully contended that the law may be declared valid in this respect on the ground that persons who are ineligible to citizenship under the laws of the United States form, by reason of that fact alone, a class by themselves, for which the state may enact peculiar legislation, depriving them of rights or privileges which are accorded to others not of that class. * * *

"The right or privilege of a father to be the guardian of his own minor child does not in any respect depend upon or arise out of his nationality or his eligibility to citizenship in this country. It has no relation thereto. Such privilege is no doubt as much prized by a Japanese resident of good character, who is not a citizen of this country and cannot become such, as by any other father of like character, who is a citizen or is eligible to become one. A law denying the privilege to one class and giving it to the other cannot be said to be a law justified by a classification based on a distinction which calls for such peculiar legislation. Such attempted classification does not relieve the act from the charge that it violates the Fourteenth Amendment."

CASES INVOLVING DISCRIMINATION AGAINST THE CHINESE

Immediately after the adoption of the Fourteenth Amendment in various of the states, and especially in California, laws were enacted directed against the Chinese inhabitants of those states, the constitutionality of which was passed upon in the Federal courts, and in which the Fourteenth Amendment became the rock of refuge.

In *Ho Ah Kow vs. Nunan* (1879), 5 Sawy. 562, Mr. Justice Field had before him an ordinance of the City and County of San Francisco which declared that every male person imprisoned, in the county jail, under the judgment of any court having jurisdiction in criminal cases, should immediately upon his arrival at the jail have the hair of his head "cut or clipped to a uniform length of one inch from the scalp thereof," and made it the duty of the sheriff to have this provision enforced. The ordinance, which is known as the queue ordinance, was clearly directed against the Chinese only, and was regarded as hostile and discriminating legislation against a class, forbidden by the equality clause of the Constitution. The court said:

"The class character of this legislation is none the less manifest because of the general terms in which it is expressed. The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied. Besides, we cannot shut our eyes to matters of general notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly. * * *

"During various periods of English history, legislation, general in its character, has often been enacted with the avowed purpose of imposing special burdens and restrictions upon Catholics; but that legislation has

since been regarded as not less odious and obnoxious to animadversion than if the persons at whom it was aimed had been particularly designated.

"But in our country hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the Fourteenth Amendment of the Constitution. * * * And the equality of protection thus assured to every one whilst within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others, and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment."

In *In re Tiburcio Parrott*, 1 Fed. Rep. 481, decided in 1880, article XIX, section 2, of the California constitution was declared to be violative of the Fourteenth Amendment. It provided:

"No corporation now existing or hereafter formed under the laws of this state shall, after the adoption of this constitution, employ directly or indirectly, in any capacity, any Chinese or Mongolians. The legislature shall pass such laws as shall be necessary to enforce this provision."

In pursuance of this mandate, the legislature declared the employment by any officer, director, manager, stockholder, etc., of any corporation of any Chinese or Mongolian, in any capacity, a misdemeanor, punishable by imprisonment and fine.

Judge Sawyer, speaking of the statute, said:

"It forbids the employment of Chinese. If the power to pass it exists, it might equally well have forbidden the employment of Irish, Germans, or Americans, or persons of color, or it might have required the employment of any of these classes of persons to the exclusion of the rest."

The court then quoted article XIX of the Constitution, which is directed against the Chinese and of which section 2, above quoted, was a part. Section 4 of that article provided:

"The presence of foreigners ineligible to become citizens is declared to be dangerous to the well-being of this state, and the legislature shall discourage their immigration by all the means within its power."

After quoting from the Fourteenth Amendment and section 1977 of the United States Revised Statutes, the opinion continues:

"It will be seen that in the latter clause the words are 'any person,' and not 'any citizen,' and prevents any state from depriving 'any person' of life, liberty or property without due process of law, or from denying to 'any person within its jurisdiction the equal protection of the laws.' In the particulars covered by these provisions it places the right of every person within the jurisdiction of the state, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the Constitution; and, in consonance with these provisions, the statute enacts that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.' Chinese residing in California, in pursuance of the treaty stipulations, are 'persons within the jurisdiction of the state,' and 'of the United States,' and therefore within the protection of these pro-

visions. And contracts to labor, such as all others make, are contracts which they have a 'right to make and enforce,' and the laws under which others' rights are protected are the laws to which they are entitled to the 'equal benefit,' 'as is enjoyed by white citizens.'

"It would seem that no argument should be required to show that the Chinese do not enjoy the equal benefit of the laws with citizens, or 'the equal protection of the laws,' where the laws forbid their laboring, or making and enforcing contracts to labor, in a very large field of labor which is open, without limit, let or hindrance, to all citizens, and all other foreigners, without regard to nation, race, or color. Yet, in the face of these plain provisions of the National Constitution and statutes, we find, both in the Constitution and laws of a great state and member of this Union, just such prohibitory provisions and enactments discriminating against Chinese. Argument and authority, therefore, seem still to be necessary, and fortunately we are not without either."

The court then cites *Ho Ah Kow vs. Nunan*, 5 Sawy. 562, and *Strauder vs. West Virginia*, 100 U. S. 303.

In *In re Ah Chong*, (1880), 2 Fed. Rep. 733, there was involved the constitutionality of a California statute, which provided: "All aliens incapable of becoming electors of this state are hereby prohibited from fishing or taking any fish, lobsters, shrimps or shell-fish of any kind, for the purpose of selling or giving to another person to sell." A violation of the act was made a misdemeanor.

Concurrently with this statute there was passed another act, which provided for the removal outside of the limits of the cities and towns of the State of California "of any Chinese now within or hereafter to come within such limits."

There was also another contemporary enactment, which forbade the granting of any license to transact any business or occupation "to any alien not eligible to become an elector of this state."

The petitioner was arrested for taking fish in San Pablo Bay, within the state, he being an alien of the Mongolian race. It was held that the statute violated the inhibition of the Fourteenth Amendment. Judge Sawyer, after discussing *McCreedy vs. Virginia*, 94 U. S. 391, on which the state relied, and recognizing the true extent of the doctrine there announced, said:

"Citizens of other states having no property right which entitles them to fish against the will of the state, *a fortiori*, the alien, from whatever country he may come, has none whatever in the waters or the fisheries of the state. Like other privileges he enjoys as an alien by permission of the state, he can only enjoy so much as the state vouchsafes to yield to him as a special privilege. To him it is not a property right, but in the strictest sense, a privilege or favor. To exclude the Chinaman from fishing in the waters of the state, therefore, while the Germans, Italians, Englishmen and Irishmen, who otherwise stand upon the same footing, are permitted to fish *ad libitum*, without price, charge, let, or hindrance, is to prevent him from enjoying the same privileges as are 'enjoyed by the citizens or subjects of the most favored nation;' and to punish him criminally for fishing in the waters of the state, while all aliens of the Caucasian race are permitted to fish freely in the same waters with impunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions 'as are enjoyed by the citizens or subjects of the most favored nation;' and such discriminations are in violation of articles 5 and 6 of the treaty with China, cited in full in Parrott's case. The same privileges which are granted to other aliens, by treaty or otherwise, are

secured to the Chinaman by the stipulations of the treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privilege it must permit all others to enjoy, upon like terms, the same privileges, whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation.

"The Fourteenth Amendment of the National Constitution provides that 'no state shall * * * deny to *any person* within its jurisdiction the equal protection of the laws.' To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected, and is to deny to them the equal protection of the laws, contrary to those provisions of the Constitution. * * *

"The act is clearly unconstitutional, and a violation of the treaty in discriminating against the Chinese and in favor of aliens of the Caucasian race in all other respects similarly situated. Acts when performed by Chinese are made an offense punishable by imprisonment, while the same acts, performed in the same manner and under the same circumstances, by other aliens are not an offense; and such other aliens are exempt from the punishments denounced by the law against them. It is impossible, therefore, to say that the Chinese 'enjoy the same privileges, immunities and exemptions' as are 'enjoyed by the citizens or subjects of the most favored nation,' as is stipulated they shall by the treaty, or that the 'state,' by this act, does not 'deny' to them 'the equal protection of the laws,' contrary to the Fourteenth Amendment to the National Constitution.

"While it is not very likely that the act in question was *in fact* intended by its framers to apply to any but Chinese, yet, owing to carelessness in the phraseology used, others than Chinese may have occasion to invoke the National Constitution for their protection. The language is: 'All *aliens incapable* of becoming *electors* of this state are hereby prohibited from fishing,' etc. By article 2 of the Constitution the right of suffrage is limited to '*male persons*;' so that all alien women are '*incapable of becoming electors*,' and, being so, are within the terms of the statute; so that German, French, Italian, English, and Irish women, before becoming citizens, are forbidden to take fish, shrimps, lobsters, oysters, etc., in the waters of California."

In *Re Opinion of The Justices* 207 Mass. 601, the legislature requested an opinion as to whether it had the constitutional power to enact a law making it a criminal offense for any woman under the age of twenty-one years to enter a hotel or restaurant conducted by Chinese, or to be served with food or drink therein, or for the proprietor of any such hotel or restaurant to admit thereto a woman under the age of twenty-one years, or to serve her with food or drink therein. The question was answered in the negative on the authority of *Yick Wo vs. Hopkins*, *supra*, and in *Re Tiburcio Parrott*, *supra*, and other cases.

In the course of its opinion the court said:

"The business of keeping a hotel or restaurant, to which the proposed legislation relates, is a necessary and proper kind of business that is entitled to the protection of the laws. It may be conducted legally or illegally by a person of any nationality. The proposed law, without reference to the way in which it is conducted, puts a restraint upon it which might be expected very seriously to interfere with the successful management of it,

whenever it is carried on by a person of any particular nationality, which is not put upon it when it is carried on by a person of any other race and nationality. By the strict terms of the proposed law it would be a criminal offense for a Chinese proprietor of a hotel or restaurant to permit his wife, if she was under the age of twenty-one years, or his grown-up daughter of less than that age, to enter his hotel or restaurant, or to be served with food or drink therein. This is a very great interference with the liberty of the subjects of a foreign ruler, lawfully residing within the jurisdiction of this state. It is a harmful discrimination against persons of the proscribed class, founded wholly upon their race and nationality, and it plainly falls within the constitutional prohibition quoted above. It subjects Chinese to an oppressive burden that deprives them of liberty which all others enjoy, and interferes with their right to carry on business, acquire property, and earn a livelihood, and denies them the protection of equal laws. * * *

"This proposed legislation does not assume to forbid anything that is necessarily evil in itself, or to deal directly with any offense against order, decency, or morality. There are good hotels and bad hotels, good restaurants and bad restaurants, kept by men of the Caucasian race, and there are others of both kinds kept by men of other races. This legislation does not refer to the character or condition of the hotel or restaurant that a young woman may not enter, but refers only to the nationality of the person who conducts it. The enactment of such legislation is not a proper exercise of the police power. It has no direct relation to the evil to be remedied. It forbids the entry of a young woman into the hotel or restaurant of a Chinese proprietor, even if it is a model of orderly and moral management, and it permits the entry of young women into a hotel or restaurant kept by an American, when it is known to be maintained in part for the promotion of immoral or criminal practices. The classification of hotels and restaurants into those that are open to young women and those that are closed to young women is not founded upon a difference that has any just or proper relation to the professed purpose of the classification. The only classification is into hotels and restaurants kept by Chinese and those kept by persons of any other nationality. * * *

"The fact that a man is white or black or yellow is not a just and constitutional ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of a different color."

Other cases involving discriminations against Chinese which were held to be unconstitutional are:

In re Ah Fong, 3 Sawy. 144 (1878); *Laundry Ordinance Case*, 13 Fed. Rep. 229 (1882); *Gandolfo vs. Herman*, 49 Fed. Rep. 181; *In re Ty Loy*, 26 Fed. Rep. 611 (1886); *In re Sam Kee*, 31 Fed. Rep. 681; *In re Lee Sing*, 43 Fed. Rep. 359 (1890); *Ex parte Sing Lee*, 96 Cal. 354, 24 L. R. A. 196 (1892); *Ex parte Case*, 20 Idaho 128, 116 Pac. Rep. 1037; *Poon vs. Miller*, 234 S. W. Rep. 573.

In *Ex parte Case*, *supra*, a statute of Idaho provided that it would be thereafter unlawful for any county government, or municipal or private corporation organized under the laws of or doing business in the state "to give employment in any way to any alien who has failed, neglected or refused prior to the time such employment is given to become naturalized or to declare his intention to become a citizen of the United States." The act was held to be violative of the Fourteenth Amendment, on the authority of the cases above discussed, the court saying:

"A state legislature by legislative enactment or otherwise has no authority to deprive a person of the right to labor at any legitimate business or

to deny any person within the jurisdiction of the United States the equal protection of the laws, or to prohibit a corporation that has a right to do business in the state to employ any person, whether alien or native, in the prosecution of any legitimate business."

It is to be observed that the statute there interpreted unqualifiedly prohibited the employment of an alien coming within the description of the act. This differentiates the case from *Heim vs. McCall*, 239 U. S. 175, and *People vs. Crane*, 239 U. S. 195, affirming 214 N. Y. 154, where the statute was intended to give preferential consideration, in respect to the employment of laborers on public works, to citizens; a distinction also pointed out in the opinion of Mr. Justice Hughes in *Truax vs. Raich*, 239 U. S. 40.

In *Poon vs. Miller*, *supra*, decided by the Court of Civil Appeals of Texas, an act was held to be in violation of the equality clause which denied to an alien a license to engage in business as a wholesale dealer in fish and made it a crime to be such a dealer without having procured a license. The plaintiff was a Chinaman. It was not questioned that the state had the power to regulate the sale of fish, nor that it could, under the decision in *McCready vs. Virginia*, *supra*, limit the right to catch fish within the state to its own citizens. It was, however, held that the absolute property in captured fish passed to the person who had captured them, and that an alien thereafter acquiring them could not be prohibited from selling the fish; *Yick Wo vs. Hopkins* and *State vs. Montgomery* being cited in support of the decision.

OTHER ALIEN CASES.

In *Fraser vs. McConway & Torley Co.*, 82 Fed. 257, and *Juanita Limestone Company vs. Fagley*, 187 Penn. State 193, a statute of Pennsylvania imposing a tax of three cents a day upon employers of foreign-born, unnaturalized male persons, for each day that each of such persons may be employed, and authorizing the deduction of that sum from the wages of such employees, was held to deprive the latter of the equal protection of the law.

In the first of these cases the court, in terms adopted in the second of these cases, said:

"Evidently the act is intended to hinder the employment of foreign-born, unnaturalized male persons. The act is hostile to and discriminates against such persons. It interposes, to the pursuit by them of their lawful avocations, obstacles to which others under like circumstances are not subjected."

In *State vs. Montgomery*, 94 Maine 192, 47 Atl. Rep. 165, an act relating to hawkers and peddlers required those who sell certain classes of goods therein named to procure a license which could only be granted to a citizen of the United States who complied with certain conditions. This was held to involve a discrimination between citizens and aliens which was obnoxious to the Fourteenth Amendment.

In the course of its opinion the court, after discussing *Paul vs. Virginia*, 8 Wall. 868, relating to privileges and immunities guaranteed by the Fourteenth Amendment, and *Yick Wo vs. Hopkins*, *supra*, and other of the cases we have cited, said:

"While it is true, as a general proposition, that, if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection, yet it is equally true that such a classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the

attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. (*Railway vs. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. See *Pearson vs. Portland*, 69 Me. 278.)

"In the light of these interpretations of the Fourteenth Amendment, we are compelled to conclude that a statute which forbids peddling except under a license, and which provides that citizens of the United States may be licensed, and that aliens shall not be, is a denial of the 'equal protection of the laws.' It is an unconstitutional discrimination against aliens. It does more than impose unequal burdens and charges upon the alien. It absolutely denies him the privilege of an occupation open to citizens, which is more than a discrimination in burdens. It does not permit the alien within our jurisdiction to pursue a business occupation and to acquire and enjoy on equal terms with the citizen. (*Yick Wo vs. Hopkins*, *supra*.)

"Nor can this discrimination be sustained as a constitutional exercise of the police power of the state. It must be noticed that the discrimination is not against a class, as criminals, as paupers, as intemperate, as disqualified by character or habits, or as harmful to society, but against a class solely as aliens. Such a discrimination is forbidden. (*Railway vs. Ellis*, *supra*.)

"And although in this case the discrimination was not injurious to the respondent, because he was not an alien and was not thereby prohibited from obtaining a license, still, for reasons already suggested, we think the hawkers' and peddlers' act must be regarded as invalid *in toto*. We cannot separate the constitutional part from the unconstitutional. The distinction between citizens and aliens is fundamental in the scheme for licensing."

In *Templar vs. Board of Examiners*, 131 Mich. 254, 90 N. W. Rep. 1058, a statute which denied the right to a certificate as a licensed barber to any alien, was likewise held to be unconstitutional. The various cases in which the equality clause has been applied to those of African descent, are likewise important in this connection.

In *Vietti vs. George K. Mackie Fuel Co.*, 109 Kan. 179, 197 Pac. Rep. 881, it was held that a Workmen's Compensation Act which provided for a lower rate of compensation in cases where the workman does not leave any dependent citizen who resides at the time of the accident or injury in the United States or in the Dominion of Canada than in cases where he leaves dependents residing within the United States or the Dominion, violated the equality clause of the Constitution. Chief Justice Johnston said:

"Aliens lawfully residents of the state are within the protection of this clause. The plaintiffs were lawful inhabitants of Kansas and therefore had the right to invoke the protection of the amendment. The equality clauses of the amendment, it has been determined, are 'universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality.'"

CASES AFFECTING NEGROES UNDER THE EQUALITY CLAUSE

The effect of the amendments adopted immediately after the Civil War was first considered by this court in the *Slaughter House Cases*, 16 Wall. 36. Referring to that historic decision, Mr. Justice Day said in *Buchanan vs. Warley*, 245 U. S. 76:

"The reasons for the adoption of the amendments were elaborately considered by a court familiar with the times in which the necessity for the amendments arose and with the circumstances which impelled their adop-

tion. In that case Mr. Justice Miller, who spoke for the majority, pointed out that the colored race, having been freed from slavery by the Thirteenth Amendment, was raised to the dignity of citizenship and equality of civil rights by the Fourteenth Amendment, and the states were prohibited from abridging the privileges and immunities of such citizens, or depriving any person of life, liberty, or property without due process of law. While a principal purpose of the latter amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the states. This is now the settled law. In many of the cases since arising the question of color has not been involved and the cases have been decided upon alleged violations of civil or property rights irrespective of the race or color of the complainant. In the Slaughter House Cases it was recognized that the chief inducement to the passage of the amendment was the desire to extend federal protection to the recently emancipated race from unfriendly and discriminating legislation by the states."

In *Strauder vs. West Virginia*, *supra*, Mr. Justice Strong said, after referring to the equal protection clause of the Fourteenth Amendment:

"What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

Applying this interpretation, it was decided that a statute of West Virginia which read: "All white persons who are twenty-one years of age and who are citizens of this state shall be liable to serve as jurors," and which, in effect, singled out and denied to colored citizens the privilege of serving as jurors, was a denial of the equal protection of the laws.

In *Ex parte Virginia*, 100 U. S. 339, 345, the same doctrine was applied, the court, referring to the amendments, saying:

"They were intended to take away all possibility of oppression by law because of race or color. They were intended to be, what they really are, limitations of the power of the states and enlargements of the power of Congress."

Following the rule laid down in these cases are:

Neal vs. Delaware, 103 U. S. 370; *Gibson vs. Mississippi*, 162 U. S. 565; *Williams vs. Mississippi*, 170 U. S. 213; *Carter vs. Texas*, 177 U. S. 442; *Rogers vs. Alabama*, 192 U. S. 226; *Martin vs. Texas*, 200 U. S. 316.

Commenting on some of these cases, Mr. Justice Harlan, in *Kentucky vs. Powers*, 201 U. S. 32, said:

"The cases to which we have adverted had reference, it is true, to alleged discriminations against negroes because of their race. But the rules announced in them equally apply where the accused is of the white race. Section 641, as well as the Fourteenth Amendment of the Constitution, is for the benefit of all, of every race, whose cases are embraced by its provisions and not alone for the benefit of the African race."

In *McCabe vs. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, the

Oklahoma stage-coach law was held unconstitutional because it discriminated against persons of the African race, in that it permitted carriers to provide sleeping cars, dining cars and chair cars to be used exclusively by persons of the white race and required no such provision for those of the African race; distinguishing *Plessy vs. Ferguson*, 163 U. S. 537, and other similar cases, in which it was decided that it was not an infraction of the Fourteenth Amendment for a state to require separate, *but equal*, accommodations for the two races.

In *Buchanan vs. Warley*, 245 U. S. 60, a city ordinance which forbade colored persons to occupy houses in blocks where the greater part of the houses were occupied by white persons, and which, in practical effect, prevented the sale of lots in such blocks to colored persons, was declared to be unconstitutional. Mr. Justice Day, speaking for a unanimous court, after referring to the Thirteenth and Fourteenth Amendments and section 1977 of the United States Revised Statutes, said:

"In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence? * * * These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. (Civil Rights Cases, 109 U. S. 3, 22.) The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color. * * *

"As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given. But in view of the rights secured by the Fourteenth Amendment to the Federal Constitution such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us.

"It is the purpose of such enactments, and, it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited.

"The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.

"It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

"It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful use with like results."

It is true that, in the case just cited, the parties concerned were citizens, and that the court especially referred to the due process clause of the Constitution. Yet that provision is not confined, in its application, to citizens, and, as has been frequently observed, its purpose is so cognate with that of the equality clause that both are interchangeably applied.

Viewing the California Alien Land Law in the light of the decisions which have interpreted the equality clause in cases which do not relate to the discrimination of individuals or classes on account of race, color or nationality, it will be helpful to refer to the familiar cases which are constantly brought to the attention of this court, merely by way of a reminder.

OTHER DECISIONS UNDER THE EQUALITY CLAUSE.

The elaborate discussion of the subject by Mr. Justice Field in the Railroad Tax Cases, 13 Fed. Rep. 722, has become an inherent part of our constitutional law. Referring to the contention that the prohibition of the Fourteenth Amendment was limited to members of the race enfranchised immediately before its adoption, that great judge said:

"It has a much broader operation. It does not, indeed, place any limit upon the subjects in reference to which the states may legislate. It does not interfere with their police power. Upon every matter upon which previously to its adoption they could act, they may still act. They can legislate now, as they always could, to promote the health, good order, and peace of the community; to develop their resources, increase their industries, and advance their prosperity; *but it does require that in all such legislation hostile and partial discrimination against any class or person shall be avoided; that the state shall impose no greater burdens upon any one than upon others of the community under like circumstances, nor deprive any one of rights which others similarly situated are allowed to enjoy. It forbids the state to lay its hand more heavily upon one than upon another under like conditions. It stands in the Constitution as a perpetual shield against all unequal and partial legislation by the states, and the injustice which follows from it, whether directed against the most humble or the most powerful; against the despised laborer from China, or the envied master of millions.*"

In *County of Santa Clara vs. Southern Pacific R. Co.*, 18 Fed. Rep. 385, Mr. Justice Field, again dealing with the same question, and especially in the aspect of it which related to the singling out of the property of railroad companies and subjecting them to discriminating taxation through the medium of a change in the state constitution, said:

"The principle which justifies such a discrimination in assessment and taxation, where one of the owners is a railroad corporation and the other a natural person, would also sustain it where both owners are natural persons. A mere change in the state constitution would effect this if the Federal Constitution does not forbid it. Any difference between the owners, whether of age, color, race or sex, which the state might designate, would be a sufficient reason for the discrimination. It would be a singular comment upon the weakness and character of our republican institutions if the valuation and consequent taxation of property could vary according as the owner is white, or black, or yellow, or old, or young, or male, or female. A classification of values for taxation upon any such ground would

be abhorrent to all notions of equality, of right, among men. Strangely, indeed, would the law sound in case it read that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men or by old men, and not deducted if owned by black men or by young men; deducted if owned by landmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors; deducted if owned by men doing business alone, not deducted if owned by men doing business in partnerships or other associations; deducted if owned by trading corporations, not deducted if owned by churches or universities; and so on, making a discrimination whenever there was any difference in the character or pursuit or condition of the owner. To levy taxes upon a valuation of property thus made is of the very essence of tyranny, and has never been done except by bad governments in evil times, exercising arbitrary and despotic power."

In the course of the opinion the language used by Senator Edmunds in his argument in the San Mateo case before this court is quoted, in which he pointed out that the purpose of the long consideration that was given to this measure by its framers was that protection against injustice and oppression should be made forever secure—"secure, not according to the passion of Vermont, or of Rhode Island, or of California, depending upon their local tribunals for its efficient exercise, but secure as the right of a Roman was secure, in every province and in every place, and secure by the judicial power, the legislative power, and the executive power of the whole body of the states and the whole body of the people."

The concurring opinion of Judge Sawyer abounds in further quotations from the argument of Senator Edmunds which are convincing in their force and clarity.

That decision was affirmed by this court in 118 U. S. 394.

In *Gulf, Colorado & Santa Fe Ry. Co. vs. Ellis*, 165 U. S. 150, the limitations upon the power of the legislature to classify were thus stated by Mr. Justice Brewer:

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, * * * yet it is equally true that such classification cannot be made arbitrarily. *The state may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them and all black men not.* It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrary and without any such basis. * * * Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

The opinion then quotes the words of Mr. Justice Matthews in *Yick Wo vs. Hopkins*, which we have already quoted, with the remark that "no language is more worthy of frequent and thoughtful consideration than these words."

The principle laid down in the case just cited has recently been reiterated in *Atchison, Topeka & Santa Fe Ry. Co. vs. Vosberg*, 238 U. S. 56.

This phase of the argument may be most appropriately concluded by a reference to *Truax vs. Corrigan*, 257 U. S. 312, where a statute of Arizona which specially exempted ex-employees, when committing tortious and other irreparable injury to the business of their former employer, from restraint by injunction, while leaving subject to such restraint all other tort-feasors engaged in like wrongdoing, was declared to be unreasonable and a violation of the equality clause. Not because the members of the court are not fully aware of the reasoning which led to this result, but because it so effectively formulates the principle on which we rely, do we venture to quote at some length from the opinion of the chief justice:

"Our whole system of law is predicated on the general, fundamental principle of equality of the application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply the laws. But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

"The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. Mr. Justice Field, delivering the opinion of this court in *Barbier vs. Connolly*, 113 U. S. 27, 32, of the equality clause, said—"Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." In *Hayes vs. Missouri*, 120 U. S. 68, the court, speaking through the same Justice, said the Fourteenth Amendment 'does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against a larger class."

Mr. Justice Matthews, in *Yick Wo vs. Hopkins*, 118 U. S. 356, 369, speaking for the court of both the due process and the equality clause of the Fourteenth Amendment, said:

"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

"The accuracy and comprehensive felicity of this description of the effect of the equality clause are shown by the frequency with which it has been quoted in the decisions of this court. It emphasizes the additional

guaranty of a right which the clause has conferred beyond the requirement of due process."

The opinion later refers to *Missouri vs. Lewis*, 101 U. S. 22, from which the following quotation is made:

"For, as before said, it [i. e., the equality clause] has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

The subject of classification is then taken up, and the following quotation is made from the opinion in *Southern Railway Co. vs. Greene*, 216 U. S. 400, 417:

"While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis."

The opinion of the chief justice then continues:

"Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand. Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual. We said through Mr. Justice Brewer, in *Muller vs. Oregon*, 208 U. S. 412, that 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government, which otherwise would be lacking.'"

In the case at bar we have sought to show, by the interpretation given to the equality clause of the Fourteenth Amendment almost contemporaneously with its adoption, that whatever classification might be justified, it was contrary to the permeating spirit of the provision that there should be classification on the basis of color, race, or nationality; that such classification was opposed to the primary purpose of the new amendments, and especially of the equality clause, and that, hence, there was no room for any legislative experimentation such as that embodied in the California Alien Land Law, which is at war with the fundamental rights of the individual guaranteed by that precious grant, conferred not merely upon citizens, but upon all persons within the jurisdiction of the state.

A mere reference to other well-known cases bearing upon this subject will suffice: *Cotting vs. Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly vs. Union Sewer Pipe Co.*, 184 U. S. 500; *Raymond vs. Chicago Union Traction Co.*, 207 U. S. 42; *Smith vs. Texas*, 233 U. S. 630; *Gast Realty Co. vs. Schneider Granite Co.*, 240 U. S. 55; *Royster Guano Co. vs. Virginia*, 253 U. S. 412; *Kansas City So. Ry. Co. vs. Road Improvement District No. 6*, 256 U. S. 658; *State vs. Julow*, 129 Mo. 163, 29 L. R. A. 257.

In the last of these cases Mr. Justice Sherwood, referring to a statute which restricted the right to discharge laborers because of membership in labor unions, said:

"The legislature may legislate in regard to a class of persons, but they

cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each. This would be a mere arbitrary classification without any basis of reason on which to rest, and would resemble a classification of men by the color of their hair or other individual peculiarities, something not competent for the legislature to do."

The application of this idea to the case at bar is obvious. Recognizing the right of the state to classify the ownership of an interest in real property so as to differentiate between citizens and aliens, a further classification of aliens—a natural class of persons—into two or more classes, namely, those eligible to citizenship under the laws of the United States and those not so eligible, is an arbitrary classification, especially when, on analysis, it is found to be based on the color of the skin of the respective classes of aliens and is intended to discriminate against those of a particular nationality.

If the act had provided that all aliens except Frenchmen might acquire the ownership of land or of an interest in real property in California, it would be hard to believe that such a classification could be upheld. If it could not be in the case of a Frenchman, is there any defensible reason for making such an exception in the case of Japanese or Chinese? If that could not be done, then the use of a phrase which clearly marks Japanese and Chinese as excepted from the benefits and advantages secured to all other aliens, must similarly offend against the spirit of the equality clause, and deprive them, when within the jurisdiction of the State of California, of the equal protection of the laws.

In an article published in 23 *Yale Journal*, 328, immediately after the passage of the California Alien Land Law of 1913, the author, in the course of his discussion of that legislation, said:

"Does eligibility to citizenship form a sufficient basis for classification in view of these decisions? And does it strengthen the case of the state that this classification is based proximately on the treaty rights of the alien affected? The problem finally resolves itself into this question, Can persons within the jurisdiction of the state be put into a class by themselves because, for any reason whatever, they cannot become citizens, and thus subjected to special legislation imposing burdens not imposed upon other persons? In the opinion of the writer they cannot. The California law will within all probability be declared void, because to uphold it would limit the protection of the Fourteenth Amendment to citizens and to those eligible to citizenship. To hold otherwise would mean a new departure by the supreme court and the way would then be opened up for making classifications based upon the possession or lack of possession of other political privileges."

CASES RELIED ON BY APPELLEES.

(1) *Patson v. Pennsylvania*, 232 U. S. 138, is claimed to sustain this legislation.

The act there under review made it unlawful for unnaturalized foreign-born residents to kill wild game except in defense of person or property, and to that end made the possession of shotguns and rifles unlawful. The opinion, however, shows that the lawful object of this legislation was conceived to be the protection of wild life within the state. That being so, the discrimination made between citizens and aliens and the means adopted for making it effective did not offend against the Constitution. It was

pointed out that the prohibition of the possession of rifles was peculiarly appropriate to the forbidden use. The prohibition did not extend to weapons such as pistols, which might be supposed to be needed occasionally for self-defense. And the opinion concludes with the admonition that it is to be remembered that the subject under discussion was wild game, which the state might preserve for the use of its own citizens if it so pleased; *Geer vs. Connecticut*, 161 U. S. 519, being cited in support of this proposition.

In *Truax vs. Raich*, *supra*, this case and *McCready vs. Virginia*, *supra*, were relied upon as a justification for the legislation there under criticism. Mr. Justice Hughes, however, pointed out the manifest distinction between those cases and *Truax vs. Raich*, which we also believe differentiates them from the case at bar. He said:

"The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states. Thus in *McCready vs. Virginia*, 94 U. S. 391, 396, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the state, and an analogous principle was involved in *Patsone vs. Pennsylvania*, 232 U. S. 138, 145, 146, where the discrimination against aliens upheld by the court had for its object the protection of wild game within the state with respect to which it was said that the state could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein vs. Lynham*, 100 U. S. 483; *Blythe vs. Hinckley*, 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys."

The same distinction was pointed out in the opinion of Judge Cardozo in *People vs. Crane*, 214 N. Y. at pages 161, 162.

If, in *Patsone vs. Pennsylvania*, *supra*, the act, instead of making its inhibition general in its scope by declaring it unlawful for "any unnaturalized foreign-born resident to kill any wild bird or animal," and "to that end" making it unlawful "for such foreign-born person to own or be possessed of a shotgun or rifle," had been limited to an unnaturalized Italian or Englishman, it is believed that a different conclusion would have been reached.

(2) In *Quong Wing vs. Kirkendall*, 223 U. S. 59, which has also been cited, a statute of Montana imposed a license fee on hand laundries, which was not applied to steam laundries, and which exempted from its operation laundries employing not more than two women. There was no reference in the statute to the race, color or nationality of the persons who were affected by the legislation, although the possibility of such a motive did not escape the court, and which, had it existed, it is evident might have led to a different conclusion, for Mr. Justice Holmes says:

"Another difficulty suggested by the statute is that it is impossible not to ask whether it is not aimed at the Chinese; *which would be a discrimination that the Constitution does not allow.* (*Yick Wo vs. Hopkins*, 118 U. S. 356.) It is a matter of common observation that hand laundry work is a widespread occupation of Chinamen in this country while on the other hand it is so rare to see men of our race engaged in it that many of us would be unable to say that they ever had observed a case. *But this ground of objection was not urged and rather was disclaimed when it was men-*

tioned from the bench at the argument. It may or may not be that if the facts were called to our attention in a proper way the objection would prove to be real. But even if when called to our attention the facts should be taken notice of judicially, whether because they are only the premise for a general proposition of law, * * * or for any other reason, still there are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account. Laws frequently are enforced which the court recognize as possibly or probably invalid if attacked by a different interest or in a different way. Therefore, without prejudice to the question that we have suggested, when it shall be raised, we must conclude that so far as the present case is concerned the judgment must be affirmed."

(3) The court below rested its decision on *Terrace and Nakatsuka vs. Thompson*, 274 Fed. Rep. 841, which arose under an act of the legislature of the State of Washington (ch. 50, Laws of Washington, 1921), commonly known as the Alien Land Bill. By the terms of that act it was provided:

"Sec. 2. An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state."

Section 1 of the act defines the word "alien" as follows:

"(a) 'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens."

The constitution of the State of Washington provides (art. II, sec. 33):

"The ownership of land by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage, or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition."

The bill in that case alleged that the complainant Terrace was the owner of certain lands in the State of Washington and desired to lease them to the complainant Nakatsuka, a subject of Japan, who was negotiating for the lease, he being engaged in farming and trading in farm products at wholesale and retail, but that the lease would be prevented by the defendants by reason of the provisions of the act referred to. The major part of the opinion is devoted to a consideration of the treaty between the United States and Japan, which, in view of the argument that we are presenting in the case at bar, is of no moment.

As indicating, however, a palpable distinction between that case and the present, we call attention to the comment of Judge Cushman, who wrote

the opinion in *Terrace vs. Thompson*, at page 847, where, after quoting the definition of "alien" as contained in the act, he says:

"The prohibition by this definition is made applicable to all aliens, both those eligible and those not eligible to citizenship, provided they have not declared their intention to become citizens. To this extent, the present suit is to be distinguished from *In re Ah Chong*, 2 Fed. 733."

Judge Cushman then quotes from the opinion of Judge Sawyer in *In re Ah Chong* the passages which we have quoted *supra*, and then continues:

"The present case is not only to be distinguished from the Chong case because of the fact that the present law is made applicable to all aliens and there is no punishment by imprisonment or fine of the alien grantee of lands, but the case is to be further distinguished because of the fact that the treaty with Japan does not contain, as to land ownership, the 'most favored nation' clause or any language of such import."

The opinion then refers to *Guinn and Ecal vs. United States*, 238 U. S. 347, and *Myers vs. Anderson*, 238 U. S. 368 (which arose under the grandfathers' clause contained in the Oklahoma constitution), and says that they have no application to the present controversy, "for," the opinion continues, "if it be granted that the present law is aimed primarily at the so-called yellow or brown races of the Orient, the result is the same. There is no restriction upon the authority of Congress to discriminate in the matter of the eligibility of an alien to become a citizen because of color. The Fifteenth Amendment provides that the right of a citizen of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude. The Fourteenth Amendment made the negroes citizens. It is obvious that the objection on the part of Congress is not due to color, as color, but only to color as an evidence of a type of civilization which it characterizes. The yellow or brown racial color is the hall-mark of Oriental despotisms, or was at the time the original naturalization law was enacted."

The difficulty with this statement is that we are not dealing with Congressional legislation. We have already stated that there is no limitation upon the power of Congress with respect to the conditions on which naturalization may be conferred. We are now dealing, however, with state legislation, which the Fourteenth Amendment subjects to important limitations.

The opinion continues:

"It is this disqualification put upon them by the Federal Government to which the state objects, and not their color, although the Federal Government may have made their race color the irrefutable evidence of disqualification for citizenship."

Here, again, we repeat that Congress could discriminate as it desired, arbitrarily or otherwise, in regard to the grant of citizenship. The state, however, cannot discriminate arbitrarily between the aliens within its jurisdiction, who have been guaranteed the equal protection of the law, by saying that aliens who are white or of African descent may acquire real property or an interest therein, while those who are yellow or brown may not.

The opinion proceeds (p. 849):

"It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries."

That is a forced conclusion. The same assertion might be made in support of a law which would debar an alien from acquiring personal prop-

erty, or forbid him from engaging in any of the usual occupations or employments.

Similarly the remark which immediately follows fails to justify such legislation:

"If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens."

Applying this language to the California Alien Land Law, aliens who never intend to become citizens and aliens who are non-residents, might lease or own every foot of land within the state merely because they are eligible to citizenship. If the argument, applied directly to the Washington Alien Land Bill, has any merit, then it points out a material difference between that act and the California law, and serves to demonstrate that whatever may be said of the former, the latter is an example of arbitrary selection, and not of permissible classification.

Furthermore, the Washington act applies to any alien, even though he be eligible to citizenship, who has not in good faith declared his intention to become a citizen of the United States, and who, as indicated by section 6 of the act, is to be presumed to have declared his intention in bad faith if, after having declared his intention to become a citizen, he is not admitted to citizenship within seven years after the making of his declaration.

(4) In the opinion of Judge Dooling in the case at bar, after referring to *Terrace vs. Thompson*, it is said:

"It is true that Congress has the power arbitrarily to say who may be naturalized and that exercising such power it has limited the right of naturalization to 'aliens' being free white persons; and to aliens of African 'nativity and to persons of African descent.' This limitation excludes three of the five great races of the world, the yellow, the brown and the red. And while such exclusion is in a sense arbitrary, it is not without foundation in reason, and has been in effect, except for a brief period, practically during the existence of our government. In any event, once established, however arbitrarily, and so long as it continues, it furnishes a fundamental and important distinction which may well be adopted by a state in determining who may not own land within its borders."

Does not this statement involve a serious confusion of thought? It not only fails to differentiate between federal and state legislation, to recognize the absence of limitation upon congressional action, and the existence of definite restrictions upon state action, but conceding as arbitrary the exclusion from the right to acquire an interest in real property in California of aliens who are yellow and brown, while the absolute right to acquire real property is conferred on aliens who are white or black, it nevertheless upholds such arbitrary selection in the very face of the repeated denunciations by this court of classification bearing such a character.

It is also difficult to understand, in the light of what this court has so repeatedly declared to be the test of the unconstitutionality of classification, how arbitrary selection can be regarded as reasonable, to the extent of nullifying the operation of the equality clause of the Fourteenth Amendment.

According to the argument propounded, if Congress had prohibited the immigration into this country of any person over forty years of age, an alien exceeding that age might be prohibited by the legislature of California from acquiring an interest in real property, even though all aliens under forty years of age are permitted to acquire the ownership of realty.

II.

The act is likewise unconstitutional because it deprives Porterfield, who is a citizen of the United States, of the right to enter into contracts for the leasing of his realty, and because it deprives Mizuno of his liberty and property by debarring him from entering into a contract for the purpose of earning a livelihood in a lawful occupation.

The effect of this statute is to deprive the Japanese aliens in California of the right to earn their livelihood in agricultural pursuits, in any other than a menial capacity. Nobody would claim that an act forbidding a British, French or Italian alien from conducting a laundry, a tailor shop, or a restaurant, could be upheld; nor would an act which would prohibit a citizen of the United States from leasing his realty to a British, French or Italian alien seeking to carry on a laundry, a tailor shop or a restaurant, be regarded otherwise than as a deprivation of his liberty and property without due process of law. Can it be said that, because a statute makes it unlawful for a citizen to lease his realty to a Japanese alien, and prohibits the latter from entering into a contract for such a lease, whilst such a lease may be entered into with a Dane, Swede or Norwegian, a different interpretation is to be given to the Constitution?

This aspect of the case accentuates the proposition that the act under review operates as a denial of the equal protection of the law. It is only another illustration, however, of the fact that the due process and equality clauses of the Fourteenth Amendment frequently do intermingle and melt into one another when it becomes necessary to determine the constitutionality of a legislative act possessing the characteristics of the California Alien Land Law, that the decisions under those clauses apply interchangeably.

It is believed that *Yick Wo vs. Hopkins, supra; Truax vs. Raich, supra; Butchers' Union etc., Co. vs. Crescent City Co., 111 U. S. 746; Allgeyer vs. Louisiana, 165 U. S. 578, 589, 590; Smith vs. Texas, 233 U. S. 630, and Coppage vs. Kansas, 236 U. S. 1*, sustain this proposition.

III.

It is respectfully submitted that the order of the district court should be reversed and the case remanded with instructions to grant the injunction prayed for by the appellants.

LOUIS MARSHALL,
Appellants' Counsel.

APPENDIX A.

ALIEN LAND LAW (ACT NO. 156).

An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith.

Submitted by the initiative and approved by electors November 2, 1920.
In effect December 9, 1920.

The People of the State of California do enact as follows:

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same

extent as citizens of the United States, except as otherwise provided by the laws of this state.

Sec. 2. All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Sec. 3. Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in section 1 of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy and convey real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise. Hereafter all aliens other than those specified in section one hereof may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Sec. 4. Hereafter no alien mentioned in section two hereof and no company, association or corporation mentioned in section three hereof, may be appointed guardian of that portion of the estate of a minor which consists of property which such alien or such company, association or corporation is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of this act. The public administrator of the proper county, or any other competent person or corporation, may be appointed guardian of the estate of a minor citizen whose parents are ineligible to appointment under the provision of this section.

On such notice to the guardian as the court may require, the superior court may remove the guardian of such an estate whenever it appears to the satisfaction of the court:

(a) That the guardian has failed to file the report required by the provisions of section five hereof; or

(b) That the property of the ward has not been or is not being administered with due regard to the primary interest of the ward; or

(c) That facts exist which would make the guardian ineligible to appointment in the first instance; or

(d) That facts establishing any other legal ground for removal exist.

Sec. 5. (a) The term "trustee" as used in this section means any person, company, association or corporation that as guardian, trustee, attorney-in-fact or agent, or in any other capacity has the title, custody or control of property, or some interest therein, belonging to an alien mentioned in section two hereof, or to the minor child of such an alien, if the property is of such a character that such alien is inhibited from acquiring, possessing, enjoying or transferring it.

(b) Annually on or before the thirty-first day of January every such trustee must file in the office of the secretary of state of California and in the office of the county clerk of each county in which any of the property is situated, a verified written report showing:

(1) The property, real or personal, held by him for or on behalf of such an alien or minor;

(2) A statement showing the date when each item of such property came into his possession or control.

(3) An itemized account of all expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof.

(c) Any person, company, association or corporation that violates any provision in this section, is guilty of a misdemeanor and shall be punished by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

(d) The provisions of this section are cumulative and are not intended to change the jurisdiction or the rules of practice of courts of justice.

Sec. 6. Whenever it appears to the court in any probate proceeding that by reason of the provisions of this act any heir or devisee cannot take real property in this state or membership or shares of stock in a company, association or corporation which, but for said provisions, said heir or devisee would take as such, the court, instead of ordering a distribution of such property to such heir or devisee, shall order a sale of said property to be made in the manner provided by law for probate sales of property and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such property.

Sec. 7. Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to, and become and remain the property of the State of California. The attorney-general or district attorney of the proper county shall institute proceedings to have the escheat of such real property adjudged and enforced in the manner provided by section four hundred seventy-four of the Political Code and title eight, part three of the Code of Civil Procedure. Upon the entry of final judgment in such proceedings, the title to such real property shall pass to the State of California. The provisions of this section and of sections two and three of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon, or interest in such property, so long as such real property so acquired shall remain the property of the alien, company, association or corporation acquiring the same in such manner. No alien, company, association or corporation mentioned in section two or section three hereof shall hold for a longer period than two years, the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt.

Sec. 8. Any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to the State of California. The attorney-general or district attorney of the proper county shall institute proceedings to have such escheat adjudged and enforced as provided in section seven of this act. In such proceedings the court shall determine and adjudge the value of such leasehold or other interest in such real property, and enter judgment for the state for the amount thereof together with costs. Thereupon the court shall order a sale of the real prop-

erty covered by such leasehold, or other interest, in the manner provided by section twelve hundred seventy-one of the Code of Civil Procedure. Out of the proceeds arising from such sale, the amount of the judgment rendered for the state shall be paid into the state treasury and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein. Any share of stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section three of this act shall escheat to the State of California. Such escheat shall be adjudged and enforced in the same manner as provided in this section for the escheat of a leasehold or other interest in real property less than the fee.

Sec. 9. Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section two hereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

A *prima facie* presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:

(a) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof:

(b) The taking of the property in the name of a company, association or corporation, if the memberships or shares of stock therein held by aliens mentioned in section two hereof, together with the memberships or shares of stock held by others but paid for or agreed or understood to be paid for by such aliens, would amount to a majority of the membership or the issued capital stock of such company, association or corporation;

(c) The execution of a mortgage in favor of an alien mentioned in section two hereof if said mortgagee is given possession, control or management of the property.

The enumeration in this section of certain presumptions shall not be so construed as to preclude other presumptions or inferences that reasonably may be made as to the existence of intent to prevent, evade or avoid escheat as provided for herein.

Sec. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both.

Sec. 11. Nothing in this act shall be construed as a limitation upon the power of the state to enact laws with respect to the acquisition, holding or disposal by aliens of real property in this state.

Sec. 12. All acts and parts of acts inconsistent or in conflict with the provisions hereof are hereby repealed; provided, that—

(a) This act shall not affect pending actions or proceedings, but the same may be prosecuted and defended with the same effect as if this act had not been adopted;

(b) No cause of action arising under any law of this state shall be affected by reason of the adoption of this act whether an action or proceedings has been instituted thereon at the time of the taking effect of this act or not and actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as if this act had not been adopted;

(c) This act in so far as it does not add to, take from or alter an existing law shall be construed as a continuation thereof.

Sec. 13. The legislature may amend this act in furtherance of its purpose and to facilitate its operation.

Sec. 14. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The people hereby declare that they would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.

2. BRIEF FOR APPELLEES, BY U. S. WEBB.

"It is obvious that one who is not a citizen and can not become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a Tower of Babel from which the tenants in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged."

(From opinion of United States District Court, Western District of Washington, Southern Division, *Terrace et al., Complainants, vs. Thompson, as Attorney-General of the State of Washington, Defendant*, July 25, 1921, 274 Fed. at pp. 849-850.)

STATEMENT OF THE CASE.

This is an appeal from an order denying an application for an interlocutory injunction, heard and decided by the district court of the United States for the Southern District of California, specially constituted and held by Honorable William H. Hunt, circuit judge, and Honorable Benj. F. Bledsoe and Honorable M. T. Dooling, district judges, under the provisions of the act of June 18, 1910, 36 Stats. 557, U. S. Comp. Stats., sec. 1243. The opinion and order denying the application was filed on December 19, 1921. (*Porterfield et al. vs. Webb etc. et al.*, 279 Fed. 114.) The action is brought to enjoin and restrain the attorney-general of the State of California, and the district attorney of the County of Los Angeles, from enforcing the so-called California Alien Land Law, which was adopted by the initiative on November 2, 1920. (Stats. of California, 1921, p. lxxxlii.)

There are numerous assignments of error specified (Tr., pp. 13 to 16), but they all center around and are the basis for the contention of appellants that the provisions of the Alien Land Law of the State of California, prohibiting the leasing of agricultural lands to an alien ineligible to citizenship in the United States, are in violation of the Fourteenth Amendment to the Constitution of the United States, and deprive the appellant, Mizuno, a subject of the Empire of Japan, of rights, privileges and immunities secured for him under the treaty of February 21, 1911, between the United States and the Empire of Japan. Also, that the act violates sections 1977 and 2164 of the Revised Statutes of the United States. The bill of complaint in this case alleges that Porterfield is a citizen of the United States and of the State of California; that he owns real estate located in the County of Los Angeles,

State of California, particularly adapted to raising vegetables; that Mizuno is a capable farmer and a desirable person to become a tenant of said real estate; that Porterfield desires to lease said real estate to Mizuno for a period of five years, and Mizuno desires to accept such lease.

Paragraph V of the complaint sets forth that said plaintiff, Mizuno, in addition to being a capable farmer is "engaged in the business of trading, wholesale and retail, in farm products, and, instead of purchasing such farm products, he desires to produce his own farm products for the purpose of selling them in the wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing such products for such trade, he will be prevented from engaging in trade and the incidents to trade as he is authorized so to do under the treaty hereinafter mentioned." (Tr., p. 3.)

This allegation is obviously made for the purpose of claiming that the parties plaintiff are entitled to the protection of those provisions of the treaty with Japan which state that the citizens or subjects of the two contracting parties shall have liberty to carry on trade, wholesale and retail, in the territories of the other.

The bill then contains the usual allegations that the defendants, Webb, as attorney-general of the State of California, and Woolwine, as district attorney of the County of Los Angeles, in said state, have threatened to, and will, enforce the so-called Alien Land Law against the plaintiffs in the event that they enter into a lease of said real estate, for the purpose and terms aforesaid, and will by escheat proceedings forfeit or attempt to forfeit the leasehold interest to the State of California, and will prosecute the plaintiffs criminally for alleged violation of the act, and that the act is, in its terms, so drastic and the penalties attached to a violation thereof are so great that neither of these plaintiffs may make or execute such lease, even for the purpose of testing the constitutionality or validity of said act, and that unless the court shall determine the validity of said act in this proceeding, the plaintiffs will be compelled to submit to the act, whether the same be valid or invalid, and thereby be deprived of their property without due process of law, and denied the equal protection of the laws, in contravention of the Fourteenth Amendment of the Federal Constitution. Section 8 of the California act provides for the escheat of such a leasehold interest. Section 10 provides for criminal proceedings against those violating the act. The bill prays for an interlocutory injunction prohibiting and restraining the said attorney-general and the said district attorney from bringing, or permitting to be brought, any proceedings at law or in equity for the purpose of enforcing said act against the plaintiffs, or either of them, or from causing the plaintiffs, or either of them, to be arrested, etc. (Tr., p. 3, par. VI of bill of complaint, and p. 5, par. XIV.)

The district court entertained jurisdiction of this case, and after a full hearing and with a well-considered opinion written by District Judge Dooling, and following the opinion of the United States District Court of the State of Washington, by Circuit Judge Gilbert and District Judges Cushman and Neterer, involving and deciding precisely the same question as presented in the case at bar (*Terrace et al. vs. Thompson*, 274 Fed. 841), denied the application for a preliminary injunction. (Tr., pp. 9 to 11.)

This Porterfield case is the so-called "lease" case which is to be heard before the court at the same time as the "cropping contract" case of *U. S. Webb etc. et al. vs. J. J. O'Brien et al.*, October Term, 1922, No. 267 (279 Fed. 117), and the case of *Terrace vs. Thompson*, *supra*. The Porterfield case involves the question of the validity of the California Alien Land Act in its relation to the United States Constitution and the United States-

Japan treaty. The O'Brien case involves the question of whether the cropping contract entered into between the citizen landowner and the ineligible alien in that case amounts to a violation of the California Alien Land Act.

A motion has been made by appellants in the other case of *Frick vs. Webb*, No. 555, October term, 1922, to advance the argument in said case to November 27, 1922, when the Porterfield, the O'Brien and the Terrace cases are to be argued. The Frick case involves that section of the California act which prohibits ownership of shares of stock by an ineligible alien in a landowning corporation.

In this Porterfield case we have not had the usual advantage of examining the brief for appellants before preparing this brief. We are, nevertheless, forwarding our brief to the court, in order to conform to the court rule as we understand it.

ARGUMENT.

I.

THE ALIEN LAND LAW OF CALIFORNIA DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The state has the fundamental right to prohibit alien ownership, possession, dominion over or enjoyment of land. The Fourteenth Amendment was never intended to affect this right.

The Fourteenth Amendment to the United States Constitution provides in section 1 thereof that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The citizen plaintiff Porterfield is entitled to claim the protection of all of the Fourteenth Amendment above quoted, and the alien plaintiff Mizuno is entitled to claim the protection only of that part which prohibits any state depriving any person of life, liberty or property, without due process of law, or denying to any person within its jurisdiction the equal protection of the law.

The Alien Land Act of California, which, it is claimed, violates the provisions of the Fourteenth Amendment, states in section I thereof that

"All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

Section 2 provides that—

"All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

The decisive answer to any claim, either by a citizen or a noncitizen, to the protection of the Fourteenth Amendment in a case such as is now before the court, is that the amendment was never intended to deprive the states of the Union of their inherent and unquestioned power to control in matters of ownership or other interests in lands, when a question of an alien securing such interests is involved.

Paragraph XI of the bill of complaint (Tr., folio 5) charges that the

California Land Act is unreasonable, arbitrary, capricious, inequitable and unjust, and that it is made to depend upon difference of race.

We insist, however, that this act in plain terms affords to every alien who is capable of becoming a citizen full rights of ownership and interest in our land, and to every other alien such rights as his nation enables him to obtain by the provisions of any treaty between his country and this country.

There can be no discrimination, inequality, unreasonableness, capriciousness or arbitrary injustice in this method of providing for the rights of aliens in this country or in the states that compose it.

Surely also the operation of the provisions of this law is in no respect made to depend upon difference of race, for differences of race are entirely eliminated by the liberal provisions of section 2 of the act.

Fully applicable to this contention, and decisive of it, is the judicial determination long since made and continuously maintained, that where all persons of a class are treated alike by any legislative enactment, it is not obnoxious to the provisions of the Fourteenth Amendment of the United States Constitution, or indeed to any other constitutional limitations.

As was most aptly and clearly enunciated by the Supreme Court of the United States, in *Perley vs. North Carolina*, 249 U. S. 510, 514, the general principles applicable to alleged discriminatory statutes and the constitutional inhibition thereof are well defined. In that case the court said:

"We concede the aphorism upon which counsel relies that, 'The equal protection of the laws is a pledge of the protection of equal laws.' We, on March 24th last, by an almost prescience of the contention now based on it, defined its extent and declared that the Fourteenth Amendment, which is the foundation of the aphorism, does not regard the impracticable, and that distinctions may be made by the legislation between objects or persons, and that the power of the state 'may be determined by the degrees of evil already exercised where detriment is especially experienced.' Moreover we pointed out that the deference due to the judgment of the legislature in the matter had been emphasized again and again. *Hebe Co. vs. Shaw*, 248 U. S. 297, 307; *Dominion Hotel vs. Arizona*, 249 U. S. 265." See *Moody vs. Hagen*, 162 N. W. 704.

Before proceeding with a consideration of the provisions of the treaty of 1911 between the United States and Japan and the provisions of the California Alien Land Law, the constitutionality of which is challenged in this action, it seems advisable to collate the latest definition and exposition by this court of the meaning of the term "equal protection of the laws," granted by the Fourteenth Amendment, and to note the limitations of that term.

It is obvious that the due process of law required by the Fourteenth Amendment has no application to the subject matter of this case. Probably it will not be invoked on behalf of the appellants. A statute which provides, as does the California act, that leasehold interests created in contravention thereof, and, as we claim, of the treaty itself, can not be escheated or forfeited without an action in court brought for that purpose, does not infringe upon the due process of law clause of the Constitution.

The appellants point to the provisions of section 2 of the California act which deny to aliens who can not become naturalized citizens of the United States the right to acquire or hold real property or any interest therein, while the provisions of section 1 of the said act extend those rights to aliens who can be so naturalized. This is claimed to be an arbitrary, unjust and unequal restriction and a violation of the constitutional provision guaranteeing the equal protection of the laws to all persons, whether citizens or aliens.

The meaning of the expression "equal protection of the laws" has been many times considered by this court. For the purpose of this case we deem it sufficient to refer to the latest exposition of the meaning of that expression by Mr. Chief Justice Taft in the case of *Truax vs. Corrigan*, decided December 19, 1921, 42 Supreme Court Reports, 124, and also to the dissenting opinions filed in that case by Mr. Justice Brandeis, Mr. Justice Pitney and Mr. Justice Holmes. All of these justices agreed on the definition of the term "equal protection of the law," and differed only as to its application to the question then before the court, which was the validity of an Arizona statute referring to injunctions in cases involving or growing out of a dispute concerning terms or conditions of employment. All these opinions and the cases cited and quoted therein agreed with the statement of the effect of the equality clause given by Mr. Justice Matthews in *Yick Wo vs. Hopkins*, 118 U. S. 356, at 369, which was called by Mr. Chief Justice Taft a description of "accuracy and comprehensive felicity." It is as follows:

"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

These opinions also concur with the statement of the limitation of the term "equal protection of the laws" given by Mr. Justice Bradley in *Missouri vs. Lewis*, 101 U. S. 22, 31, in which he declared as follows:

"For, as before said, it (i. e., the equality clause) has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the law which is enjoyed by other persons or other classes in the same place and under like circumstances."

And again, as stated by Mr. Chief Justice Taft, at page 131:

"Classification must be reasonable. As was said in *Gulf Ry. Co. vs. Ellis*, 165 U. S. 155, * * * 'Classification * * * must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.'

"As was said in *Magoun vs. Ill. Trust Bank*, 170 U. S. 283, 293, * * * 'the rule (i. e., of the equality clause) is not a substitute for municipal law. It only prescribes that that law have the attribute of equality of operation, and equality * * * does not mean indiscriminate operation on persons merely as such, but on persons according to their relations.'

"The same principle is repeated and enforced in *Southern Ry. Co. vs. Greene*, 216 U. S. 400, 417, * * * 'While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification can not be arbitrarily made without any substantial basis.'"

Mr. Chief Justice Taft proceeds as follows:

"Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must, therefore, obtain in and determine legislation; but it must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand."

And again, as said by Mr. Justice Pitney in his dissenting opinion, page 144:

"The familiar expression in *Barbier vs. Connolly*, 133 U. S. 27, * * * 'class legislation discriminating against some, and favoring others,' refers

to a discrimination which at the same time favors others similarly situated. The same is true of what was said in *Hayes vs. Missouri*, 120 U. S. 68, 71-72, * * * to the effect that the amendment 'merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' Other decisions are to the same effect."

And again as said by Mr. Justice Brandeis in the same case, at page 134:

"Few laws are of universal application. It is of the nature of our law that it has dealt, not with man in general, but with him in relationships. That a peculiar relationship of individuals may furnish legal basis for the classification which satisfies the requirement of the Fourteenth Amendment is clear."

And in a note to his statement of this general principle, he cites in support of it numerous cases.

We are guided, then, by the light of these fundamental principles, determining the meaning and the limitations of the broad guarantee of "equal protection of the laws," given by the Fourteenth Amendment. We maintain that the provisions of the California statute which grant to aliens who may become naturalized citizens the right to acquire and hold real estate or an interest therein and which deny those rights to all other aliens except and until such rights are conferred upon them by treaty, are fair and just provisions of law, fully warranted and required by the subject matter embraced in the statute and the "peculiar relationships" of the individuals affected by it. Aliens who can not become naturalized American citizens certainly are not in the same class and category as are all other aliens who may become such citizens.

It seems clear that a state statute which relegates to the treaty-making power of the United States the determination of what rights should be allowed to aliens to acquire and hold real estate or an interest therein in such state is a very liberal and wise statute and one in the interest of the entire people of this great country, and in the further interest of the authority of the Central Government under the Federal Constitution upon which alone the treaty power has been conferred as well as the power to determine what aliens may or may not acquire citizenship.

The provisions of the Fourteenth Amendment were never intended as a guaranty that the same law would be applied to all persons, and, happily, the courts have uniformly so held. In applying that guaranty to persons such persons may be grouped or classified and different legislation applied to the different groups or classes. There must be found to exist such differences between the person so arranged in groups or classes as to warrant such grouping or classification and these differences must be such as to justify and make proper the application of different legislative treatment to the respective groups or classes.

It is not the right of each person to demand the same legislative treatment that is accorded to every other person. The rule is satisfied in its entirety if the person is given the same legislative treatment that every other person in his class is accorded.

If there exists a reason for dividing people into two classes as (1) citizens, and (2) aliens, in respect of a particular subject matter of legislation, it is also competent to apply to those classes different legislative treatment. If there exists an equally good reason for again dividing either of these divisions into classes, it is equally competent to apply to those classes different legislative treatment.

The classification adopted in the California Alien Land Act is (1) aliens

eligible to citizenship, and (2) aliens not eligible to citizenship. The first class owes allegiance to the state and to the nation. Experience of more than a century has shown that large numbers from the first class do assume the burdens, duties and responsibilities of citizenship, severing their allegiance from the old and swearing allegiance to their new government. The classification of this statute leaves that opportunity open and encourages its exercise. The second class, irrespective of their desires, can never become citizens of this government or free themselves from the obligations and allegiance to their own government. They can never become the support and dependence of this nation, but remain the support, maintenance and dependence of their own government. They are and must continue to be aliens unassimilated and unassimilable and in full harmony, sympathy and accord with their own government when the call to arms comes. They are, and must by reason of their allegiance remain, not only aliens within our borders, but enemies when the nations are in conflict. As is so well said by the court in the Terrace case (274 Fed. at pp. 849-50):

"It is obvious that one who is not a citizen and can not become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a Tower of Babel from which the tenants in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged."

The court in the Terrace case, *supra*, cited to the point that

"A state may lawfully prohibit aliens acquiring land within its boundaries if there is no treaty to the contrary."

Chirac vs. Chirac, 2 Wheat. 259, 272; *Hauenstein vs. Lynham*, 100 U. S. 483, 484; *DeVaughan vs. Hutchinson*, 165 U. S. 566, at 570; *Clarke vs. Clarke*, 178 U. S. 186; *Blythe vs. Hinckley*, 180 U. S. 333.

The court in the Terrace case, *supra*, states that:

"Tribal laws of the progenitors of the Anglo-Saxons, while still upon the continent, made an estate in lands, similar to a freehold, a prerequisite to a voice in the tribal government. The 'free-neckedman' or 'freeman' was synonymous with 'freeholder.' They were interdependent. A freeman had a vote in determining tribal policies and no one was a freeman without an estate in lands. (Green's History of the English People, Book 1, Chap. 1, subhead 'The Land.') The recognition of this principle has run throughout the history of our race and its government." (P. 850.)

Lord Coke, in 19th Ed. Butler & Hargrave, Book 1, chap. 1, sec. 2a, of Coke upon Littleton, states the rule as follows:

"If an alien Christian or infidel purchase houses, lands, tenements, or hereditaments to him and his heires, albeit he can have no heires, yet he is of capacite to take a fee simple but not to hold. For upon an office found, the king shall have it by his prerogative of whomsoever the land is holden. And so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king. If an alien purchase any estate of freehold in houses, lands, tenements or hereditaments, the king upon office found shall have them."

Blackstone, volume 1, at page 372 of his Commentaries, states the rule as follows:

"An alien born may purchase lands, or other estates; but not for his own use; for the king is thereupon entitled to them. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconsistent with that which he owes to his own natural liege lord; besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences."

See, also, 2 Kent's Comm., 14th Ed., 53-64; Kerr, Real Property, 215 *et seq.*; Tiffany, Real Property, 2350; 1 Stimson's Am. St. Law, 6013; Stephens Comm. on Law of England, vol. I, 330; Sedgwick, Trial of Title, 226; Washburn, Real Property, 131; *Fairfax vs. Hunter's Lessee*, 7 Cranch. 603.

In *Chirac vs. Chirac*, 2 Wheat. 259, the United States Supreme Court accepted, without dissent, the point made by the plaintiff in error, that in the absence of a treaty the property of the deceased went to the state "because it was acquired before he became a citizen of the United States."

See *Orr vs. Hodgson*, 4 Wheat. 453.

In *Haucenstein vs. Lynham*, 100 U. S. 483, *Fairfax vs. Hunter's Lessee*, 7 Cranch. 603, *supra*, is affirmed, and the court says at page 484:

"The law of nations recognizes the liberty of every government to give to foreigners only such rights to immovable property within its territory as it may see fit to concede. (Vattel, Book 2, chap. 8, sec. 114.) In our country this authority is primarily in the states where the property is situated."

In *United States vs. Repentigny*, 72 U. S. 211, it was held that Congress might by general act divest aliens of any rights which they might have in real estate instead of requiring judicial proceedings.

See also *Blythe vs. Hinckley*, 180 U. S. 333; *Geofrey vs. Riggs*, 133 U. S. 258; *Donaldson vs. State*, 101 N. E. 485; *Jones vs. Jones*, 234 U. S. 615.

The only exception which the common law made was in cases of leases made for the habitation of a merchant.

Lord Coke, in 19th Ed., Butler & Hargrave, Book 1, chap. 1, sec. 2b, subhead "fee simple," Coke upon Littleton, states the rule as follows:

"But as to a lease for yeares, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods and the like. For if he take a lease for yeares of lands, meadows, etc., upon office found, the king shall have it. But of a house for habitation he may take a lease for yeares as incident to commerce; for without habitation he cannot merchandise or trade. But if he depart, or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it, but the king; for he had it only for habitation as necessary to his trade or traffique and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for yeares, albeit it were for his habitation; and so it is if he be an alienemie. And all this was so resolved by the judges assembled together for that purpose in the case of Sir James Croft, Pasch. 29, of the raigne of queene Elizabeth."

The modern application of the common law rule, dating back to the time of the Year Books, that the only title which an alien could acquire to real property was a title subject to defeasance by the sovereign, could not be better expressed than it is by the court in the Terrace case. After quoting language expressive of the enormous change that has taken place in the last two generations in international relationships, the court says:

"The sympathetic and temperate view here expressed, no doubt, should

restrain us from forcing our civilization upon alien-types. Yet it lessens no jot or tittle the duty of the court to hold impregnable the barrier erected by Congress to preserve, in its purity, our own type of civilization. The more homogeneous its parts, the more perfect the union. It may be that the changes wrought in the Orient in the last fifty or seventy-five years now warrant a different policy; but there is no law or treaty that yet has said 'the twain shall meet,' or that, if citizenship be accorded these Orientals, the danger is past of our becoming a 'mechanical medley of race fragments.' (P. 849.)"

Secretary of State Bryan, in his diplomatic correspondence with the Japanese ambassador, following the enactment of the earlier California Alien Land Law of 1913, expressed the necessity for the fundamental doctrine of a nation's control of its land tenure in the following convincing language, in his communication of July 16, 1913, to the Japanese ambassador (Papers Relating to the Foreign Relations of the United States, 1913, Department of State, United States of America, at p. 641):

"I am quite prepared to admit that all differences between human beings—differences in appearance, differences in manner, differences in speech, differences in opinion, differences in nationality, and differences in race—may provoke a certain antagonism; but none of these differences is likely to produce serious results unless it becomes associated with an interest of a contentious nature, such as that of the struggle for existence. In this economic contest the division no doubt may often take place on racial lines, but it does so not because of racial antagonism but because of the circumstance that the traditions and habits of different races have developed or diminished competitive efficiency. The contest is economic; the racial difference is a mere mark or incident of the economic struggle.

"All nations recognize this fact, and it is for this reason that each nation is permitted to determine who shall and who shall not be permitted to settle in its dominions and become a part of the body politic, to the end that it may preserve internal peace and avoid the contentions which are so likely to disturb the harmony of international relations."

The position of California and the Western states generally on the practical and absolute necessity for its alien land legislation could not be better expressed than in the above quotation from Secretary of State Bryan's diplomatic correspondence. It is a wise statesmanship guiding the international relations of the two countries which recognizes the inevitable economic struggle with its attendant fatal results that must ensue in the absence of such legislation.

The fundamental question is not one of race discrimination. It is a question of recognizing the obvious fact that the American farm, with its historical associations of cultivation, environment, and including the home life of its occupants, can not exist in competition with a farm developed by Orientals with their totally different standards and ideas of cultivation of the soil, of living and social conditions.

If the Oriental farmer is the more efficient, from the standpoint of soil production, there is just that much greater certainty of an economic conflict which it is the duty of statesmen to avoid.

The conservative and intelligent statesmen of Japan have recognized this truth just as fully as have those of America. It is far better to have an occasional outburst from extremists who refuse to recognize the underlying reason for such legislation, than to permit of a condition that would lead to results far more serious from the standpoint of the friendly relations of the two nations.

Rights to landownership and to citizenship in any country must depend on the judgment of the statesmen of that country. These are problems which throughout the years of international relationships between governments have been settled by each nation for itself. Such must continue to be the rule if we are to have any permanency of amicable relationships between the peoples of the different countries. The people of the Western states of America, in full recognition of every treaty right guaranteed to the subjects of other nations, have accepted a classification created by the Federal Government itself in an attempt to secure those conditions of land dominion, possession and enjoyment which must exist if strife and serious friction are to be avoided.

For the rule that the state may prohibit alien ownership of land see:

State vs. Staeheli, 192 Pac. 991 (Supreme Court of Washington).

The United States District Court, Southern Division, Northern District of California, in the case of *Frick vs. Webb*, 281 Fed. 407, held that the California Alien Land Act does not violate either the United States Constitution or the United States-Japan treaty of 1911.

The California Supreme Court made the same ruling in the case of *Ex parte Akado*, 207 Pac. 245.

An alien may inherit land or take by law only by grace of the state within the boundaries of which the lands are situate.

In re Colbert's Estate, 119 Pac. 791 (Supreme Court of Montana).

B. *Comparison of California Alien Land Law and Washington Alien Land Law, as related to this fundamental right determined by the United States courts in the two states.*

The bill in the Terrace case alleged that the complainants Terrace, owners of certain land, desired to lease such lands to the complainant Nakatsuka, a subject of Japan, who desired to lease said lands from them, and that the subject of Japan was engaged in farming, and trading, wholesale and retail, in farm products. The Alien Land Bill of the State of Washington forbade such a lease, and it is alleged in the complaint that this law is contrary to the Fourteenth Amendment to the Constitution of the United States. The Alien Land Law of the State of Washington is chapter 50 of the Laws of Washington, 1921.

For the purposes of this case the following are the only distinctions of interest between the California and the Washington Alien Land Laws.

Section 1 of the California law provides that all aliens eligible to citizenship under the laws of the United States, whether they have or have not applied for citizenship, may "acquire, possess, enjoy, transmit and inherit real property, or any interest therein."

Section 2 provides that all aliens other than those mentioned in section 1, that is, all aliens ineligible to citizenship, may have the same interest in real property as referred to in section 1 only as prescribed by any treaty between this government and another country of which such alien is a citizen or subject.

Section 3 of the California law places companies, associations and corporations of which a majority of the members are aliens ineligible to citizenship, or in which a majority of the issued capital stock is owned by such aliens, in the same category as the persons ineligible to citizenship described in section 2.

Section 2 of the Washington act provides that no alien, whether eligible to citizenship or not so eligible, shall own land or take or hold title thereto.

Section 1, subdivision (a), however, makes an exception in the case of an alien who has in good faith declared his intention to become a citizen of the United States.

Said subdivision (a) of section 1 also creates the same classification as we have in the California act for corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens, or a majority of whose members are aliens.

Subdivision (b) of section 1 of the Washington act makes certain exceptions in favor of the alien with which we are not here concerned, referring to lands containing mineral deposits, etc., and also provides, as an exception, the "right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen."

We see, then, that for the purposes of the principles involved in the case at bar, the two statutes can not be distinguished.

The essential differences between them are:

First: In California only aliens ineligible to citizenship are barred from the right to interests in lands, while in Washington all aliens, including those eligible to citizenship, are so barred. In this respect the Washington act bars a larger general group of aliens than does the California act.

Second: In California an eligible alien may acquire interests in land, even though he has not declared his intention to become a citizen. In Washington such an eligible alien would not be entitled to such an interest in land unless he has declared his intention of becoming a citizen. In this respect the Washington act again includes a larger class as not entitled to acquire rights in realty. That is, with reference to eligible aliens, there are some that are barred. In California none is barred.

Third: In the Washington act leasehold interests limited to ten years are allowed to any alien, provided that the treaty with the country of which the alien is a citizen grants the enjoyment of such land for some purpose. In California, on the other hand, there is no attempted limitation of any kind against aliens who are accorded rights in realty by treaty regulations. Here, again, the Washington act attempts to bar a larger class of aliens than does the California act. In Washington all aliens, citizens of a country accorded by treaty agreement certain rights in realty, are limited in these rights to a term of ten years. In California the identical aliens would not be limited at all, but would be accorded every right that the treaty attempts to confer.

Reviewing these distinctions, it is easily shown that in so far as the California statute differs from the Washington act it is supported by the logical reasoning showing the fundamental consideration involved in this entire subject matter as discussed in the Terrace case, decided by the United States district court in Washington.

The first distinction above noted is to the effect that in California the only aliens barred from acquiring interest in land are those who are ineligible to citizenship. This is certainly a natural classification. The fundamental reasoning of the Terrace case is to the effect that the inherent principle that has been handed down throughout the history of international relations from the days of the year books of the common law is the security of all nations in their international relationships. The first rule of each nation must be the rule of self-preservation. This rule demands that each nation be permitted to decree who shall own and have interest in its lands. A country that would permit of its very soil, which is the life-giving

foundation of the state, being owned by persons who owe allegiance to a foreign sovereignty would be inviting ultimate annihilation. Of all aliens, therefore, who on this principle should be barred from acquiring interest in land those who can not renounce their foreign allegiance and become citizens of our country are the ones that the state should deal with. An alien who is eligible to citizenship might be encouraged to become a citizen of this country, and such encouragement can not be better made than by inviting him to acquire land here, set up his home here, and in that way become so interested in the internal affairs of the United States as to lead to a desire that he become a citizen thereof and in this way renounce his allegiance to a foreign state.

This leads us to the second distinction noted above, which is that in California an alien eligible to citizenship may acquire an interest in land even though he has not declared his intention of becoming a citizen. In Washington he must so declare before he has this right. As noted above, the California law is based on the soundest of reasoning, in that by so permitting the eligible alien to hold lands in this state, even though he has not applied for citizenship, California is encouraging him to finally become a citizen of this country.

Every intendment, in other words, of the California statute is to finally consummate the gathering together of our foreign population into our own American family, to the end that the security of the nation might be guaranteed, which is the first and primary duty of those who would properly guard and perpetuate the national life.

The third distinction above noted is of no immediate interest in this case. We should observe, however, that the California statute so much more carefully respects and recognizes all treaty rights.

The court, in the Terrace case, addressing itself to the point raised, that the prohibition to the landowner disposing of his property to the alien is a violation of the Fourteenth Amendment, used the following language, at pages 846-7:

"The citizen landowner may sell to whom he pleases; but he may not sell to one who is rightfully forbidden the right to buy.

"That the Fourteenth Amendment was not intended as an instrument to accomplish the end here sought, is shown by legislation early enacted by Congress to give effect to the Fourteenth Amendment, the primary purpose of which was the enfranchisement of the slaves. (Slaughter-House Cases, 16 Wall. [83 U. S.] 36; *Buchanan vs. Warley*, 245 U. S. 60, at 76 and 78.)

"By the amendment, members of the enfranchised race were made citizens of the nation and state of their residence, a privilege at present denied to the subjects of Japan.

"In giving legislative aid to these constitutional provisions Congress enacted in 1866, ch. 31, sec. 1, 14 Stats. 27 (Rev. Stats., sec. 1978), that:

"*All citizens* of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

"And in 1870, by chapter 114, section 16, 16 Stats. 144 (Rev. Stats., sec. 1977), that:

"*All persons* within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties,

taxes, licenses and exactions of every kind, and no other." (*Buchanan vs. Warley*, 245 U. S. 60, at 78. (Italics those of this court.)

"These statutes show that Congress then understood the Fourteenth Amendment did not forbid the state the right to deny ownership of lands within its boundaries to aliens."

(This section, 1977 Rev. Stats., is claimed to support appellees in the case at bar, which claim we shall later discuss.)

I.

ALIEN LAND LEGISLATION IN OTHER STATES AND COUNTRIES.

Six other states have adopted legislation similar to the California law. They are Louisiana, Arizona, Delaware, Washington, New Mexico and Texas. Six states have taken preliminary steps looking to such legislation. They are Colorado, Nevada, Nebraska, Oregon, Idaho and Montana.

The Philippine legislature has passed an act, with the sanction of the Federal Government of the United States, limiting ownership and leasing of land to citizens of the Philippine Islands or the United States, except that citizens of countries whose laws grant to the citizens of the Philippines the right to acquire land may acquire in the Philippines a parcel of agricultural land not in excess of one hundred hectares.

In Mexico only Mexicans by birth or naturalization and Mexican companies have the right to ownership in land. The nation may grant the same right to foreigners, provided they agree before the department of foreign affairs to be considered Mexicans in respect to such property and accordingly not to invoke the protection of their government in respect to the same.

In Australia the matter of landownership is one affecting the individual state government. In the states of New South Wales, South Australia and Tasmania restrictions are imposed upon the tenure of lands by aliens. In New South Wales an alien is not qualified to apply for original homestead selection, original conditional purchase lease, settlement lease, original homestead lease or original conditional purchase unless he has resided in New South Wales for one year and, at the time of making application, lodges a declaration of his intention to become naturalized within five years. If he fails to become naturalized within that period the land is forfeited.

In South Australia Asiatics are disqualified from holding perpetual leases of land in irrigation areas. In Tasmania aliens can not own real estate.

II.

SECTIONS 1977 AND 2164, UNITED STATES REVISED STATUTES, ARE NOT VIOLATED BY THE CALIFORNIA ALIEN LAND LAW.

Section 1977 of the Revised Statutes provides that:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 2164 of the Revised Statutes provides that:

"No tax or charge shall be imposed or enforced by any state upon any person immigrating thereto from a foreign country, which is not equally imposed upon any person entering such state from any other foreign country."

Paragraph VIII of the bill of complaint (Tr., fol. 9) alleges that the act denies to the plaintiffs equal protection of the laws.

Paragraph IX (Tr., fol. 9) invokes the sanctity of section 1977 of the United States Revised Statutes, which, as pointed out in the opinion in *Terrace vs. Thompson*, simply declares the right of all persons "to make and enforce contracts."

Obviously this section is limited in its scope to what it describes "contracts." Though a lease may have contractual features, it is really in law a conveyance of a qualified interest in land.

See *Buchanan vs. Warley*, 245 U. S. 60, 78.

While a lease is a form of contract, its effect is to convey a right to possession of real estate and to the profits thereof. It may take the form of "conveyance to a person for life, years, or at will, in consideration of a return of rent or other recompense."

18 Am. & Eng. Ency. of Law, 2d ed., 597, citing *Branch vs. Doane*, 17 Conn. 402; *Bonsall vs. McKay*, 1 Houst. (Del.) 520; *Jackson vs. Harsen*, 7 Cow. (N. Y.) 326, 17 Am. Dec. 517.

Section 2164 of the United States Revised Statutes, also invoked by the bill of complaint in paragraph X thereof (Tr., fol. 4), forbids any state imposing unequal taxes upon persons immigrating from any foreign state. What this section has to do with agriculture land leases we fail to perceive.

Sections 1977 and 2164 partially enumerate the rights and immunities intended to be guaranteed by the Fourteenth Amendment to the Constitution. The object of section 1977 was to place the colored race, in respect to civil rights, on a level with the whites. In other words, it makes effective in part the Fourteenth Amendment itself, and we need discuss the statutes no further than to refer to our discussion above contained, which is presented as an argument to show that the Fourteenth Amendment is in no way applicable to the privilege claimed on behalf of an alien ineligible to citizenship to lease lands in California for agricultural purposes.

III.

CALIFORNIA ALIEN LAND LAW DOES NOT VIOLATE UNITED STATES-JAPAN TREATY OF COMMERCE AND NAVIGATION OF FEBRUARY 21, 1911.

A. *Examination of the treaty and study of the diplomatic negotiations preceding its approval sustain this conclusion.*

This treaty is found in volume 3 of Malloy's *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers*, Supplement 1913, to Senate Document No. 357, Sixty-first Congress, second session, at page 77. It is entitled a treaty of "Commerce and Navigation." The introductory language states that the President of the United States of America and His Majesty the Emperor of Japan, "believing that the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries will contribute to the realization of this most desirable result" (that is, a relation of amity and good understanding), "have resolved to conclude a treaty of commerce and navigation for that purpose," etc.

Article I provides: That the citizens or subjects of each of the high contracting parties "shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes * * *"

Article II provides: That the dwellings, warehouses, manufactories and shops of the citizens or subjects of each of the high contracting parties in

the territories of the other, and all premises appertaining thereto "used for purposes of residence or commerce, shall be respected."

Article IV refers to the "most favored nation" provision. It is stated that:

"There shall be between the territories of the two high contracting parties reciprocal freedom of commerce and navigation. The citizens or subjects of each of the contracting parties, equally with the citizens or subjects of the most favored nation, shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the other which are or may be opened to foreign commerce, subject always to the laws of the country to which they thus come."

An examination of the different articles of this treaty will show throughout that this purpose is to provide essentially and particularly for commerce and navigation between the two contracting parties. In article XIII it is provided: That the coasting trade of the high contracting parties is excepted from the provisions of the treaty and shall be regulated according to the laws of the United States and Japan, respectively. The article continues, however, to state that: "it is, however, understood that the citizens or subjects of either contracting party shall enjoy in this respect most-favored-nation treatment in the territories of the other."

Here, again, is an express reference to the most favored nation rule applying particularly to commerce and navigation.

This most favored nation proviso is again contained in article XIV, where it is provided that "*except as otherwise expressly provided in this treaty*, the high contracting parties agree that, *in all that concerns commerce and navigation*, any privilege, favor or immunity which either contracting party has actually granted, or may hereafter grant, to the citizens or subjects of any other state shall be extended to the citizens or subjects of the other contracting party gratuitously, if the concession in favor of that other state shall have been gratuitous, and on the same or equivalent conditions, if the concession shall have been conditional."

The above italicized language indicates not only that the most favored nation provision has nothing to do with the holding by leasehold or otherwise of land in the respective countries, but also that the treaty is essentially one of commerce and navigation.

In the Terrace case the court refers to the controversy which arose concerning the validity, under the treaty, of the earlier California Alien Land Law passed in 1913. (Statutes of California, 1913, p. 206.) The court states that in the progress of the exchange of views between the department of foreign affairs for the Empire of Japan and the secretary of state of the United States, the secretary of state found that the California act did not violate the treaty. The court refers to a communication addressed by the secretary of state, dated July 16, 1913, to the Japanese ambassador. This communication is described by the court as "Annex No. 7, pages 17 and 18," Controversy—United States and Japan—California Question (Congressional Library J. V. 6888 C. 2 J. 4). This letter is also to be found in "Papers Relating to Foreign Relations of the United States"—1913, at pages 643 and 644.

The court's quotation from the letter of Secretary Bryan is as follows: (Pages 844-45: italics and capitalization are the court's.)

"This treaty was based upon a draft presented by the Imperial Government. In article I of this draft there is found the following clause:

"3. They (the citizens or subjects of the contracting parties) shall be permitted to own or hire and occupy the houses, manufactories, warehouses, shops and premises which may be necessary for them, and to lease land for

RESIDENTIAL, COMMERCIAL, INDUSTRIAL, MANUFACTURING and other lawful purposes.'

"It will be observed that in this clause, which was intended to deal with the subject of real property, there is no reference to the ownership of land. The reason of this omission is understood to be that the Imperial Government desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation.

"In the treaty as signed the rights of the citizens and subjects of the contracting parties with reference to real property were specifically dealt with (art. I) in the stipulation that they should have liberty 'to own or lease and occupy houses, manufactories, warehouses and shops' and 'to lease land for residential and commercial purposes.' IT THUS APPEARS THAT THE RECIPROCAL RIGHT TO LEASE LAND WAS CONFINED TO 'RESIDENTIAL AND COMMERCIAL PURPOSES,' AND THAT THE PHRASES 'INDUSTRIAL' AND 'OTHER LAWFUL PURPOSES,' *which would have included the leasing of AGRICULTURAL LANDS, WERE OMITTED.*

"The question of the ownership of land was, in pursuance of the desire of the Japanese Government, dealt with by an exchange of notes in which it was acknowledged and agreed that this question should be regulated in each country by the local law and that the law applicable in the United States in this regard was that of the respective states. This clearly appears from the note of Baron Uchida to Mr. Knox of February 21, 1911, in which, in reply to an inquiry of the latter on the subject, Baron Uchida said:

"In return for the rights of land ownership, which are granted Japanese by the laws of the various states of the United States (of which, I may observe, there are now about thirty) the Imperial Government will by liberal interpretation of the law be prepared to grant land ownership to *American citizens from all the states, reserving for the future, however, the right of maintaining the condition of reciprocity with respect to the separate states.*

"In quoting the foregoing passage I have italicized the last clause for the purpose of calling special attention to the fact that the contracting parties distinctly understood that, in conformity with the express declaration of the Imperial Japanese ambassador, the right was reserved to maintain as to land ownership the condition of reciprocity in the sense that citizens of the United States, coming from states in which Japanese might not be permitted to own land, were to be excluded from the reciprocal privilege in Japan.

"From what has been pointed out it appears to result first, that the California statute, in extending to aliens not eligible to citizenship of the United States the right to lease lands in that state for agricultural purposes for a term not exceeding three years, may be held to *go beyond the measure of privilege established in the treaty, which does not grant the right to lease AGRICULTURAL LANDS AT ALL;* and, secondly, that, so far as the statute may abridge the right of such aliens to own lands within the states, the right has been reserved by the Imperial Government to act upon the principle of exact reciprocity with respect to citizens of the individual states. In a word, the measure of privilege and the measure of satisfaction for its denial were perfectly understood and accepted."

In a communication from the Japanese minister for foreign affairs to the Japanese ambassador at Washington, in the matter of this diplomatic correspondence, the minister referred as follows to the remarks of Mr. Bryan above quoted: (Papers Relating to the Foreign Relations of the United States, 1913, Department of State, United States of America, at pages 652-653.)

"It is unnecessary, it seems to me, to follow Mr. Bryan in his remarks concerning the negotiations connected with the conclusion of the treaty of 1911. It is sufficient to say that the reason why no stipulation regarding land ownership was inserted in the treaty is because neither contracting party desired at that time such a stipulation, the United States equally with Japan."

Here is an admission by the Japanese minister that neither of the contracting parties desired any stipulation regarding land ownership.

With reference to any claim that the California Alien Land Law of 1913 discriminated against Japanese subjects as such "in the matter of ownership of lands and houses," the "Aide-Mémoire" attached to Secretary of State Bryan's letter No. 7 in the "Resume of the Controversy between Japan and the United States," and found at page 645 in the "Papers Relating to the Foreign Relations of the United States, 1913," states that "it may be repeated that the statute contains no discrimination against Japanese as such, but applies equally to all aliens not eligible to citizenship."

Additional references to the said "Resume of the Controversy between Japan and the United States" arising out of the California question might here be called to this court's attention. (Congressional Library J. V. 6888 C. 2 J. 4.) There is a note written in ink on the fly leaf of this document, on a memorandum paper of the "Department of State, Bureau of Rolls and Library," as follows: "This is said to be an official Japanese publication printed at Tokyo." At page 2 of the document this statement appears:

"It is true that under the law Japanese are granted the right to lease agricultural lands for a short term—a right which is not expressly secured by the treaty—etc."

Here is a concession that the treaty does not cover agricultural leases. Also at page 8 of the document there is a description of an audience had between the President of the United States and the Japanese ambassador. The Japanese ambassador read a memorandum referring to the California Land Law and the treaty, and in reply the President stated:

"That if on further study, the law should be found to be in conflict with treaty provisions, the administration would be prepared to seek a judicial remedy, and that, even in case a suit should not be instituted, means would be sought to compensate Japanese for any loss which they might have actually sustained."

This statement clearly illustrates an executive construction of the treaty, since the Government of the United States has never made any effort to seek a judicial remedy on behalf of the Japanese affected by the California Alien Land Law, nor has it attempted to compensate them.

The first letter in the correspondence set forth in this "Resume" and labeled "Number 2" is a letter from the Japanese ambassador to Secretary of State Bryan, under date of May 9, 1913. While in this letter the ambassador does protest against the California Alien Land Law upon grounds not here in question, it is to be noted that he does not raise the point that agricultural leases are included within the treaty. This letter is also to be found at page 629 of the "Papers Relating to the Foreign Relations of the United States—1913." Number 6 of the document is an "Aide Mémoire, in Explanation and Support of Viscount Chinda's Note of June 4, 1913." It is dated July 3, 1913. This Aide-Mémoire is also to be found at page 635 of the "Papers Relating to the Foreign Relations of the United States, 1913."

It appears from the letter No. 7, *supra*, of Secretary of State Bryan that the treaty, as originally drafted by the Imperial Japanese Government, provided expressly for leases for "industrial, manufacturing and other lawful

purposes," but that this clause was omitted in the treaty as finally agreed upon, leaving the language as we now have it—"to lease land for residential and commercial purposes."

The court, at page 845 of the Terrace case, then follows this quotation from Secretary Bryan's letter with the citation of the case of *Sullivan vs. Kidd*, decided January 23, 1921, 254 U. S. 433, and quotes therefrom as follows:

"While the question of the construction of treaties is judicial in its nature, and the courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the executive department of the government, charged with the supervision of our foreign relations, should be given much weight."

The court, in the Terrace case, then continues in the following convincing language to show that by merely withholding in the treaty the right to lease real estate, the states were granted the right to determine this question for themselves, while Congress, had it wanted to, might have absolutely prohibited to aliens this right to lease (page 846):

"Aliens may only come to the United States upon such conditions and terms as our Government sees fit to impose. By the treaty, the rights to lease real estate in the United States for agricultural purposes is withheld (*Hauenstein vs. Lynham*, 160 U. S. 483). It might have been, by congressional enactment, prohibited (*U. S. vs. Repentigney*, 72 U. S. 211); but, by the treaty, it was neither granted nor prohibited. It was merely withheld, which left the state free to prohibit. The United States might have excluded all of the subjects of Japan; but rather chose to admit them, withholding the right to lease agricultural lands, thereby recognizing the right of the state to prohibit it, or regulate it. That purpose is not to be defeated by allowing the citizen landowner the broad construction of his rights under the Fourteenth Amendment for which contention is made."

The treaty with Japan expressly and positively limits in article I thereof the interests that any of the citizens of either country may have in lands "to lease land for residential and commercial purposes."

By elementary rules of construction of such public documents as treaties between nations there can be no claim to any greater interest in realty under the treaty than to so "lease land for residential and commercial purposes."

It should be borne particularly in mind that the problem of California, as well as of other Western states of the Union at the time of the negotiation of this treaty, was an agricultural problem, and we may assume, therefore, that the expression "to lease land for residential and commercial purposes" was used advisedly.

The history subsequent to the treaty of alien land legislation in California sustains this view. In 1913 the legislature of the state adopted an act prohibiting agricultural leases by aliens for a term of more than three years. (Statutes 1913, p. 206. See sec. 2.)

Said section 2 provided that "All aliens other than those mentioned in section one of this act" (that is other than aliens eligible to citizenship) "may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise, and may in addition thereto lease lands in this state for agricultural purposes for a term not exceeding three years."

Secretary of State Bryan protested the passage of this law and attended the legislative session in California to urge his objections thereto. (Congressional Record, Sixty-sixth Congress, 3d ed., vol. 60, p. 4148.) Neither Secretary of State Bryan nor the representatives of Japan urged, at any time, that the treaty with Japan gave the right to Japanese to lease lands for agricultural purposes.

B. Historical analysis of the several treaties between Japan and the United States shows that leasehold interests have always been restricted to lands devoted solely to trade and commerce.

1. The Treaty of 1854. (I Malloy's Treaties, etc., p. 996.) This was a commercial treaty, which for the first time opened the ports of Japan to the ships of the United States. It was negotiated by the celebrated United States Commodore Matthew Calbraith Perry, and is his chief title to fame.

It contained no reference whatever to the extraterritorial rights of either party.

2. The Treaty of 1857. (I Malloy's Treaties, etc., p. 998.) This was a commercial and consular treaty, and does not refer to any extraterritorial rights.

3. The Treaty of 1858. (II Malloy's Treaties, etc., p. 1000.) This was also a commercial and consular treaty. It opened certain specified ports and settlements to Americans, and closed others. In article III thereof this appears:

"In all the foregoing ports and towns American citizens may permanently reside; they shall have the right to lease grounds and purchase the buildings thereon and may erect dwellings and warehouses."

It contained no provisions granting to Japanese citizens any right to reside in America or purchase or lease land there for any purpose. As will be seen below, this treaty and all others were superseded and repealed by the treaties of 1894 and 1911.

4. Treaty of 1864. (I Malloy's Treaties, p. 1010.) This was called "Convention for the reduction of import duties," and it deals with that subject only.

5. Second Treaty of 1864. (I Malloy's Treaties, p. 1011.) This settled the payment of the so-called "Shimonoseki Indemnities," and did not cover anything else.

6. Treaty of 1866. (I Malloy's Treaties, p. 1012.) This was a treaty between Japan, the United States, Great Britain, France and the Netherlands, and was designed to establish certain tariff duties between these nations. There was nothing in it concerning territorial rights.

7. Treaty of 1878. (I Malloy's Treaties, p. 1021.)

This was called a "Commercial Convention." It related to tariff and export duties. It opened two additional ports which it declared should "be open to citizens and vessels of the United States for the purpose of residence and trade."

8. Treaty of 1880. (I Malloy's Treaties, p. 1024.) This covered the reimbursement of expenses incurred by either country in consequence of the shipwreck, on the coast, of the vessels of the other country.

9. Treaty of 1886. (I Malloy's Treaties, p. 1025.) This was an extradition treaty only.

10. Treaty of 1894. (I Malloy's Treaties, p. 1028, *et seq.*) This was a broad and comprehensive treaty relating to commerce and navigation. For the first time it touched the subject of extraterritorial rights. It remained in force until the adoption of the Treaty of 1911 under consideration in the case at bar.

Article I of this treaty reads as follows:

"Article I.

"The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property.

"They shall have free access to the courts of justice in pursuit and defense of their rights; they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects.

"In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession of personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects of the most favored nation. The citizens or subjects of each of the contracting parties shall enjoy in the territories of the other entire liberty of conscience, and, subject to the laws, ordinances and regulations, shall enjoy the right of private or public exercise of their worship, and also the right of burying their respective countrymen, according to their religious customs, in such suitable and convenient places as may be established and maintained for that purpose.

"That they shall not be compelled, under any pretext whatsoever, to pay any charges or taxes other or higher than those that are, or may be paid by native citizens or subjects, or citizens or subjects of the most favored nation.

"The citizens or subjects of either of the contracting parties residing in the territories of the other shall be exempt from all compulsory military service whatsoever, whether in the army, navy, national guard, or militia; from all contributions imposed in lieu of personal service; and from all forced loans or military exactions or contributions."

Article II provided:

"Article II.

"There shall be reciprocal freedom of commerce and navigation between the territories of the two high contracting parties.

"The citizens or subjects of each of the high contracting parties may trade in any part of the territories of the other by wholesale or retail in all kinds of produce, manufactures, and merchandise of lawful commerce, either in person or by agents, singly or in partnership with foreigners or native citizens or subjects; and they may there own or hire and occupy houses, manufactories, warehouses, shops and premises which may be necessary for them, and lease land for residential and commercial purposes, conforming themselves to the laws, police and customs regulations of the country like native citizens or subjects.

"They shall have liberty freely to come with their ships and cargoes to all places, ports, and rivers in the territories of the other, which are or may be opened to foreign commerce, and shall enjoy, respectively, the same treatment in matters of commerce and navigation as native citizens or subjects, or citizens or subjects of the most favored nation, without having to pay taxes, imposts or duties, of whatever nature or under what-

ever denomination levied in the name or for the profit of the government, public functionaries, private individuals, corporations, or establishments of any kind, other or greater than those paid by native citizens or subjects, or citizens or subjects of the most favored nation.

"It is, however, understood that the stipulations contained in this and the preceding article do not in any way affect the laws, ordinances and regulations with regard to trade, immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two countries."

It will be noted that this article II of the 1894 treaty corresponds to article I of the 1911 treaty so far as certain privileges of commerce are concerned, and in particular so far as the rights to own or lease and occupy houses, manufactories, warehouses and shops, and "*to lease land for residential and commercial purposes.*"

"Article III of this treaty provided:

"Article III.

"The dwellings, manufactories, warehouses, and shops of the citizens or subjects of each of the high contracting parties in the territories of the other, and all premises appertaining thereto destined for purposes of residence or commerce, shall be respected.

"It shall not be allowable to proceed to make a search of, or a domiciliary visit to such dwellings and premises, or to examine or inspect books, papers, or accounts, except under the conditions and with the forms prescribed by the laws, ordinances and regulations for citizens or subjects of the country."

In article XIV of this treaty is set forth "the most favored nation" clause, which here for the first time appears in any treaty between Japan and the United States. It is as follows:

"The high contracting parties agree that, in all that concerns commerce and navigation, any privilege, favor or immunity which either high contracting party has actually granted, or may hereafter grant, to the government, ships, citizens or subjects of any other state, shall be extended to the government, ships, citizens, or subjects of the other high contracting party, gratuitously, if the concession in favor of that other state shall have been gratuitous, and on the same or equivalent conditions if the concession shall have been conditional; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other upon the footing of the most favored nation."

Article XVII contained the significant provision that the several "foreign settlements in Japan should be incorporated with the respective Japanese communes, and that when such incorporation takes place, existing leases in perpetuity, upon which property is now held *in such settlements*, shall be confirmed, and no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property."

11. The Treaty of 1897. (I Malloy's Treaties, p. 1037.) This was a convention as to patents, trade-marks and designs.

12. The Treaty of 1905. (I Malloy's Treaties, p. 1037.) This was a copyright convention.

13. The Treaty of 1906. (I Malloy's Treaties, p. 1039.) This was a supplementary extradition treaty.

14. The Treaty of 1908. (I Malloy's Treaties, p. 1040.) This was a treaty by which the parties agreed to submit to the arbitration of the permanent court of arbitration at The Hague "differences which may arise of

a legal nature or relating to the interpretation of treaties between the two contracting parties."

15. Second Treaty of 1908. (I Malloy's Treaties, p. 1041.) This relates to protection of trade-marks in Korea.

16. Third Treaty of 1908. (I Malloy's Treaties, p. 1043.) This relates to the protection of trade-marks in China.

Thus it will be seen from this chronological review of the various treaties between the two powers, beginning with the celebrated Commodore Perry Treaty of 1854, that when these powers negotiated the treaty of 1911 they were aware that all their previous conventions had related, almost without exception, solely to matters connected with trade and commerce; and that any extraterritorial claims or rights of the Japanese were hardly considered at all.

As to personal property their rights were limited "to the succession of personal property by will or otherwise"; and as to acquiring and holding real property their rights were so limited that at the places where they should trade and carry on commerce either alone or with foreigners or native citizens they might "*there own or hire or occupy houses, manufactories, warehouses, shops and premises which may be necessary for them, and lease land for residential and commercial purposes.*" (Treaty of 1894.)

Thus we see a clear distinction was made by this treaty as to owning, hiring or occupying erections upon the land for trade purposes; but when it came to the question of leasing land this right was strictly and definitely limited to leasing land for *residential and commercial* purposes.

Clearly then this treaty as to extraterritorial rights in land covered only those persons who were engaged in trade and commerce at wholesale and retail, and the only lands they could own or hire were lands necessary for them for those purposes and located "there" (art. II); i. e., where they carried on such strictly trade operations. They might lease land for residences and for commercial purposes connected with their trading operations; but if the language employed in any solemn agreement between parties or nations was ever designed or used to limit the rights of the parties to it in respect of leasing lands so that it would exclude agricultural lands such is the language employed in this treaty—"*Expressio unius exclusio alterius est.*"

This treaty apparently opened the whole of the Japanese Empire to our traders who had before that been confined in their business enterprises and residences to certain specified ports and settlements. It was never intended, and no one has ever claimed that it was intended, to permit the subjects of either of the high contracting powers to own or to lease any lands or premises for any other purposes.

Japan would never have conceded any greater rights to our citizens. In view of the opposition and apprehensions of our countrymen to settlements here of excessive numbers of the Mongolian or Malay race, American statesmen would never have conceded any other or further rights or privileges than trading or commercial rights and privileges to Japanese. This is the more apparent when we note that even in the "most favored nation" clause of the 1894 treaty (art. XIV), all rights awarded to either party are especially restricted to those that "concern commerce and navigation."

So also the provision concerning the confirmation to Americans in Japan of their leases in perpetuity covered only property then held in the settlements which were to be incorporated with the communes, and affected only residence, business and commercial properties, leases to Americans for

which were the only properties which Americans had or could have had under the preceding treaties, in Japanese ports and settlements.

Furthermore, it was indeed then well known to both parties that there had been and was most serious objection on the part of the people of the Pacific Coast states, if not elsewhere, to any further extension of any rights or privileges to the citizens of Japan.

Fresh indeed in their minds must have been the trying incident concerning the ordinance of the city of San Francisco, providing for separate schools for Japanese children in that city, which had created nation-wide excitement and discussion, in which the chief executive of the nation had taken part. The diplomatic representatives of both powers interested knew all of these conditions and must have been moved to draft the treaty of 1911 in such manner that it would not grant any other or more extensive extra-territorial rights as to land holding or land leasing to the subjects of either power.

This was no time for "weasel words, nor for machiavellian tergiversations." If either party desired or intended to permit the subjects of the other power to acquire or hold any land for agricultural purposes or any except the small parcels necessary for residences, shops and warehouses, such party would have caused clear and certain provisions to that effect to be incorporated in the new treaty.

Furthermore, as seen below in this brief, under Japanese laws foreigners could not then and can not now acquire leases of agricultural lands as such. They could acquire leases of land for residential and commercial purposes which may be valuable, and also what are termed "superficies" or occupancy rights of houses and surface rights, but these must always be for residence, or shops, warehouses, stores, etc.

The Civil Code of California sets forth two rules for the interpretation and construction of contracts, which admirably and clearly declare the accepted canons on that subject:

"Sec. 1647: A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

"Sec. 1648: However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

Applying the canons of construction to the circumstances and conditions which confronted the high contracting parties at the time they entered into the treaty of 1911; reviewing the history of their conventions and their own interpretation by their own acts at these conventions, is it not clearly manifest that when they negotiated and finally executed the treaty of 1911 neither of them could have intended, as neither of them desired, to grant to the subjects of the other country any absolute right to acquire leasehold interests in any lands but those devoted principally, if not exclusively, to wholesale and retail trading and merchandising?

It becomes entirely certain that they could not have intended to impose upon their subordinate states or provinces, or permit as nations, the creation of an obligation to permit leases of tracts or parcels of any kind of land of any considerable size, much less so of any agricultural lands. Both must have recognized with abiding conviction the enormous difficulties and dangers to their political autonomy which might ensue from any such arrangement.

Hence while each willingly extended the right hand of welcome to those subjects of the other who desired to engage in commercial and manufacturing pursuits, each withheld it from those who might desire and attempt

to take away from their own citizens the enjoyment of the agricultural lands of their country.

This conviction must have been the more compelling and, indeed, the history herein recorded of the various treaties shows that it was so compelling, in Japan, because that country had a comparatively small area of land fitted for and devoted to agriculture—far from enough land even with all the intense and intensive cultivation practiced there to support its teeming population.

It is a fact sufficiently well known to warrant this court in taking judicial notice of it, that but for her extended coastline and her productive fisheries, Japan would not be able to feed one-half of her large population. (See International Encyclopedia, Article on Japan, p. 573.)

On every theory or consideration from which we survey the question before the court, it becomes more certain that it was for the best interest of both these nations, that their subjects should not be granted any rights to acquire leases of agricultural lands in the other country, but it was to their interest that their subjects should be enabled to enter into commercial ventures in each country, and should have in connection therewith land for their residences, shops, stores, warehouses and factories.

All of these rights of the last mentioned character and extent Japan had granted to American subjects in certain limited areas known as ports and settlements, ever since the shotted guns of Commodore Perry's war fleet forced open the gates of the ports of Nippon to the commerce, the ships and the traders of the occidental world. Any more extensive rights to land holding, she had sedulously and continuously withheld from the subjects of every nation of that world. The treaty of 1911 but crystallized and enforced this policy, by the use of limiting words which restricted leases of lands to leases for "*residential*" and "*commercial*" purposes.

C. Foreigners have no right to own or lease lands for agricultural purposes under the law of Japan.

The "Commentary on the Commercial Code of Japan" was written by J. E. DeBecker, "Solicitor and Legal Translator and Advocat-Conseil of the Swiss Legation in Tokyo." He is also the author of the "Annotated Civil Code of Japan." This last work includes an introduction by Count Hayashi, late Japanese minister for foreign affairs and formerly ambassador extraordinary and plenipotentiary for Japan in London.

The "Commentary on the Commercial Code of Japan," in volume 1 at page vii thereof, contains a summary of the "Disabilities of Foreigners Resident in Japan."

This summary reads in part as follows:

"(A) Foreigners can not own land as individuals, but can become superfiary holders for exceedingly long periods. While a superficies is by no means equal to ownership, if care be taken in drawing and recording it is a fairly valuable class of holding; but it has weak and inconvenient points which are gradually being discovered and is still somewhat of an unknown quantity. A company formed under the Japanese law by foreigners can own land but not perpetual leases of lands in the former settlements.

"A measure has been introduced and passed by the Diet having for its object the granting of ownership of land to aliens; but, to be perfectly candid, it is a half-hearted piece of legislation, and even if it is put in force it will never satisfy the requirements of foreign legal experts, because (from a lawyer's point of view) its provisions are highly unsatisfactory—not to say delusive and perhaps dangerous. Before the law can be accepted by foreign

investors it will certainly have to be radically revised and its weak points remedied."

(NOTE—The writers of this brief understand that even this act has not yet been promulgated by the Emperor of Japan.)

"(B) Foreigners can not become owners of ships flying the Japanese national flag. * * *

"(C) Foreigners can not at present become shareholders in Japanese national banks, the 'Bank of Japan,' the 'Yokohama Specie Bank,' or the 'Agricultural and Industrial Bank.' * * *

"(D) Foreigners can not as individuals engage in mining, * * *

"(E) Foreigners can not become members, shareholders or brokers of the various exchanges; * * *

"(F) Foreigners can not engage in the emigration business either as individuals or as shareholders in emigration companies."

At page 5 of volume 1 of the Civil Code, "foreigners" are described as "persons who do not possess Japanese nationality. Such persons are foreigners by nationality even though they may belong to the Japanese race. Persons who possess no nationality are also considered as foreigners."

An explanation follows after a general statement of the adoption by the Japanese law of the principle of international equality in accordance with the modern tendency. This explanation is as follows:

"But, as in most other countries, it is considered, either rightly or wrongly, that if foreigners were permitted to absolutely enjoy the same private rights as natives the safety and peace of state or other public interests might be endangered, so it is therefore provided in effect that 'foreigners can not enjoy those private rights forbidden to them by laws and ordinances.' The more important private rights which can not be enjoyed by foreigners are the following:

"(1) Foreigners can not enjoy the ownership of land, and they do not enjoy the franchise even in purely local matters."

Here we find DeBecker, in the Civil Code of Japan, enunciating the rule which we have found to be fundamental to a correct conclusion on this entire subject matter. That is, the rule of self-preservation which all nations have at all times insisted upon and which rule leads to the inevitable right of each nation to have absolute control so far as the dominion, enjoyment and possession of its lands are concerned.

(And then follow, in the Civil Code, the other classifications, generally, as above.)

At page viii of volume I of the "Commercial Code," DeBecker says:

"It must be remembered that the Japanese courts are apt to construe laws somewhat narrowly and strictly, and that therefore it is unsafe to depend upon receiving the benefit of any liberal interpretation which would extend rather than narrow the rights of litigants. There are no 'equity courts' in Japan, and the ordinary judges adjudicate strictly and absolutely upon the transactions themselves *in rem* and not *in personam*. 'Judicial legislation' is, at present, forbidden, and the result is a distinct tendency to foster a system of authority and rigid routine, based on technical considerations, rather than a flexible one dictated by the requirements of natural justice and practical public needs."

With reference to the above statement in the "Commentary on the Commercial Code," that foreigners "can become superfiary holders for exceedingly long periods," these "superficies" are more particularly described in DeBecker's "Civil Code of Japan." In volume 1, page 238, of the "Civil Code," the author states that "Superficies is a real right in virtue of which land belonging to

another person can be used *for the purpose of owning thereon structures, trees and bamboos.*" At page 239, article 265 reads:

"A superfiary has the right of using the land of another person for the purpose of owning thereon structures or trees and bamboos."

The author continues with this explanation:

"This article defines the nature of superficies. Superficies is the right of using the land of another person for the purpose of constructing structures, buildings or artificial mounds or digging ponds and wells, or owning trees and bamboos thereon. Therefore even though such works or trees and bamboos may have no actual existence, this right can be created all the same provided that the object and intention is to use the land for such purpose."

Article 269, at page 242, states that:

"The superfiary can, when his right is extinguished, take away his structures or trees and bamboos on restoring the land to its original state, but when the owner of the land gives notice that he desires to purchase them and offers to pay their current value, the superfiary can not refuse such offer without adequate reason."

This does not include the right to possess land for agricultural purposes.

IV.

PLAINTIFF MIZUNO IS NOT "CARRYING ON TRADE, WHOLESALE AND RETAIL," OR LEASING LAND FOR "COMMERCIAL PURPOSES" WITHIN THE SCOPE OF THE TREATY OF COMMERCE AND NAVIGATION WITH JAPAN.

As noted above in the "Statement of the Case," paragraph V of the complaint in this action states that the plaintiff Mizuno, in addition to being a farmer, "is engaged in the business of trading, wholesale and retail, in farm products."

This allegation is included so as to claim the protection of the treaty provisions which give to the nationals of the two contracting parties liberty to carry on trade, wholesale and retail, in the territories of the other.

It might be well at this point to quote this statement found in paragraph V of the complaint, and to indicate that it is identical in its language with a similar allegation found in the bill of complaint in the Terrace case. The allegation of paragraph V of the bill of complaint in our case is couched in the following language, and this language, with the exception of the names of the parties, is identical with the similar allegation in the Terrace case with the exception of that portion which we shall place in parenthesis, which is found in the Terrace case and not in this case, and which, if there be any distinction at all, renders the pleading in this case weaker than that found in the Terrace case:

"That said plaintiff Mizuno, in addition to being a capable farmer, is engaged in the business of trading, wholesale and retail, in farm products, and instead of purchasing such farm products, he (had produced and) desires to produce his own farm products for the purpose of selling them in the wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing such farm products for such trade, he will be prevented from engaging in trade and the incidents to trade as he is authorized so to do under the treaty hereinafter mentioned."

In the Terrace case the district court addressed itself to the claim that the complainant Nakatsuka's business of farming was incidental to his business as a wholesale and retail trader in farm products and used the following language with reference to this argument (pp. 845-46):

"A clear intention being shown not to supersede" (in the treaty), "in the particular now in question, the state's authority to regulate the rights

of title and possession in lands within its boundaries, that intent may not be defeated by the claim now made that complainant Nakatsuka's business of farming is incidental to his business as a wholesale and retail trader in farm products, for there is no more reason for considering farming an incident of the latter than for considering the latter an incident of the former. The language of the treaty is: 'and generally to do anything incidental to or necessary for trade upon the same terms as native citizens or subjects * * *.' (37 Stats. at L. 1504.)

"In the most liberal construction of this language that may be indulged in, it can not fairly be said that truck farming is incidental to trading, either wholesale or retail, in the products of a farm, any more than conducting a sheep ranch or growing mulberry trees is incidental to the dry goods trade.

"Kidd vs. Pearson, 128 U. S. 1; *U. S. vs. E. C. Knight Co.*, 156 U. S. 1; *Joyce vs. Auten*, 179 U. S. 591, at 594; *Capital City Dairy Co. vs. Ohio*, 185 U. S. 238, 245."

None of the allegations contained in paragraph V include the allegation that Mizuno intends to use the agricultural land described in paragraph IV for any purpose except for agricultural purposes; and after all is said, it is clearly shown that the land is agricultural land and is not sought to be leased for residential or commercial purposes. The bill does not attempt to allege even by inference that Mizuno intends to erect a warehouse or a store on the land or to continue his business of selling his products on said land. Hence, the allegations of paragraph V do not in any way change or qualify the allegation of paragraph IV, from which it clearly appears that the lease in question is solely for agricultural purposes and is not for "residential" or "commercial" purposes, which is the only kind of lease mentioned in and permitted by the terms of the Japanese treaty.

In the case of *Kidd vs. Pearson*, 128 U. S. 1, the court held that a state could prohibit the manufacture of intoxicating liquors even though such liquors were intended thereafter to be transported in interstate commerce. It was urged in the case that since Congress had power to regulate commerce the state therefore could not interfere with the manufacture of articles which were used in that commerce. The court denied the contention in the following language:

"No distinction is more popular to the common mind or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term as given by this court in *County of Mobile vs. Kimball*, 102 U. S. 691, 702, is as follows: 'Commerce with foreign nations and among the states, strictly considered, consists in intercourse and traffic, including in these terms, navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not

contemplate, more or less clearly, an interstate or foreign market? *Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago?* The power being vested in Congress and denied to the states, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests--interests which in their nature are, and must be, local in all the details of their successful management."

In *United States vs. Knight*, 156 U. S. 1, the court, upon the authority of the Kidd case, *supra*, held that the Sherman Anti-Trust Act did not apply to a combination formed by a number of sugar refining companies to restrain competition, for the reason that the court said the manufacture of sugar was not a part of that commerce. The court in that case observed, at page 12:

"Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it."

This doctrine is adhered to in the subsequent cases of *Hopkins vs. United States*, 179 U. S. 394; *Capital City Co. vs. Ohio*, 183 U. S. 245.

Just as the manufacture of sugar and of intoxicating liquors to be thereafter transported in interstate commerce is not a part of such commerce within the provision of the commerce clause of the United States Constitution, so by the same reasoning the pursuit of a farmer in raising agricultural products is not the pursuit of commerce within the terms of our treaty with Japan.

Respectfully submitted.

U. S. WEBB,
Attorney-General, State of California.

FRANK ENGLISH,
Deputy Attorney-General.

THOMAS LEE WOOLWINE,
District Attorney, County of Los Angeles, State of California.

TRACY C. BECKER,
Deputy District Attorney.
Attorneys for Appellees.

3. DECISION OF THE COURT.

Mr. Justice Butler delivered the opinion of the court.

Appellants brought this suit to enjoin the above-named attorney-general and district attorney from enforcing the California Alien Land Law, submitted by the initiative and approved by the electors, November 2, 1920.

Appellants are residents of California. Porterfield is a citizen of the United States and of California. Mizuno was born in Japan of Japanese parents and is a subject of the Emperor of Japan. Porterfield is the owner of a farm in Los Angeles County containing 80 acres of land, which is particularly adapted to raising vegetables and which for some years has been devoted to that and other agricultural purposes. The complaint alleges that Mizuno is a capable farmer and a desirable person to become a tenant of the land, and that Porterfield desires to lease the land to him for a term of five years, and that he desires to accept the lease, and that the lease would be made but for the act complained of. And it is alleged that the appellees, as attorney-general and district attorney, have threatened

to enforce the act against the appellants if they enter into such lease, and will forfeit, or attempt to forfeit, the leasehold interest to the state and will prosecute the appellants criminally for violation of the act. It is further alleged that the act is so drastic and the penalties attached to a violation of it are so great that neither of the appellants may make the lease even for the purpose of testing the constitutionality of the act, and that, unless the court shall determine its validity in this suit, appellants will be compelled to submit to it, whether valid or invalid, and thereby will be deprived of their property without due process of law and denied equal protection of the laws.

Appellants made a motion for a temporary injunction to restrain appellees, during the pendency of the suit, from bringing or permitting to be brought any proceeding for the purpose of enforcing the act against the appellants. This was heard by three judges as provided in section 266 of the Judicial Code. The motion was denied.

The act provides in sections 1 and 2 as follows:

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit, and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent, and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Other sections provide penalties by escheat and imprisonment for violation of section 2.

The treaty between the United States and Japan (37 Stat. 1504-1509) does not confer upon Japanese subjects the privilege of acquiring or leasing land for agricultural purposes. (*Terrace et al. vs. Thompson*, — U. S. —.)

Appellants contend that the law denies to ineligible aliens equal protection of the laws secured by the Fourteenth Amendment, because it forbids them to lease land in the state although the right to do so is conferred upon all other aliens. They also contend that the act is unconstitutional because it deprives Porterfield of the right to enter into contracts for the leasing of his realty, and deprives Mizuno of his liberty and property by debarring him from entering into a contract for the purpose of earning a livelihood in a lawful occupation.

This case is similar to *Terrace et al. vs. Thompson*, *supra*. In that case the grounds upon which the Washington Alien Land Law was attacked included those on which the California act is assailed in this case. There the prohibited class was made up of aliens who had not in good faith declared intention to become citizens. The class necessarily includes all ineligible aliens and in addition thereto all eligible aliens who have failed so to declare. In the case now before us the prohibited class includes ineligible aliens only. In the matter of classification the states have wide discretion. Each has its own problems, depending on circumstances existing there. It is not always practical or desirable that legislation shall be the same in different states. We cannot say that the failure of the California legislature to extend the prohibited class so as to include eligible aliens who have failed to declare their intention to become citizens of the United

States was arbitrary or unreasonable. See *Miller vs. Wilson*, 236 U. S. 373, 383, 384, and cases cited.

Our decision in *Terrace et al. vs. Thompson, supra*, controls the decision of all questions raised here.

The order of the district court is affirmed.

Mr. Justice McReynolds and Mr. Justice Brandeis think there is no justiciable question involved and that the case should have been dismissed on that ground.

Mr. Justice Sutherland took no part in the consideration or decision of this case.

A true copy.

CHAPTER V.—FRICK AND SATOW CASE. (CORPORATION STOCK TEST CASE.)

RAYMOND L. FRICK and N. SATOW, Plaintiffs, vs. U. S. WEBB, as Attorney-General of the State of California, and MATHEW BRADY as District Attorney of the City and County of San Francisco, State of California, Defendants in Equity.

IN THE UNITED STATES DISTRICT COURT.
IN EQUITY No. 694.

1. BILL OF COMPLAINT.

To the Honorable Judges of the District Court of the United States, Northern District of California, sitting in equity:

Raymond L. Frick, a citizen of the United States and of the State of California, and a resident of the said Northern District of California, Southern Division, and N. Satow, a subject of the Emperor of Japan, born in the Empire of Japan of Japanese parents, and a resident of the said Northern District of California, Southern Division, bring their bill of complaint against U. S. Webb as attorney-general of the State of California, a citizen of the United States and of the State of California and a resident of the Northern District of California, Southern Division, and against Mathew Brady as district attorney of the City and County of San Francisco, State of California, and also a resident of the said Northern District of California, Southern Division, and show unto your Honors as follows:

I.

That plaintiffs bring this bill of complaint against the said U. S. Webb as the duly elected, qualified and acting attorney-general of the State of California and against Mathew Brady as the duly elected, qualified and acting district attorney of the City and County of San Francisco, State of California.

II.

That the value of the matter in dispute herein between each plaintiff and the defendants is in excess of the sum of three thousand (\$3000.00) dollars exclusive of interest and costs.

III.

That this suit is a suit of equity and arises under the Constitution and laws of the United States and under a treaty now existing between the United States and the Empire of Japan, as will hereafter more particularly appear. That among other things, this suit is brought to repress and prevent the deprivation under the color of a certain statute of the State of California of rights and immunities secured to the complainants by the Constitution of the United States, that is, a right to have and enjoy their property without being deprived thereof without due process of law and without being denied the equal protection of the law and this suit, among other things, involves the question as to whether or not the plaintiff Raymond L. Frick may sell and the plaintiff N. Satow may buy twenty-nine (29) shares of the capital stock of the Merced Farm Co., a corporation duly organized under the laws of the State of California, said corporation being in fact the owner of, and by its articles of incorporation authorized to acquire, possess, enjoy and convey agricultural land and whether or not said purchase and sale is contrary to the statute of the State of California to which specific reference is hereinafter made and whether or not said statute, if it prevents the said

purchase and sale contemplated between plaintiffs, is contrary to the Constitution of the United States and whether or not the defendants in threatening to enforce the provisions of said statute against complainants are not depriving the plaintiff Satow of rights granted to him under the terms of that certain treaty hereinafter referred to, between the United States and the Empire of Japan.

That this suit is brought to repress and prevent the defendants, under and by virtue of the statute of California hereinafter referred to, from illegally and unlawfully threatening complainants to the effect that they will bring proceedings to escheat said capital stock to the State of California if the plaintiff N. Satow should acquire the same.

IV.

That the plaintiff Raymond L. Frick is the owner of twenty-eight (28) shares of the capital stock of the Merced Farm Co., a corporation organized and existing under the laws of the State of California, evidenced by Certificate No. 45, and that the said plaintiff as heretofore alleged wishes to sell said stock and the whole thereof to the plaintiff N. Satow and the plaintiff N. Satow wishes to buy said stock for the sum of \$4250.00 and that said stock is of the reasonable market value of the said sum of \$4250.00. That the said Merced Farm Co. is a corporation organized and existing under the laws of the State of California and is authorized to acquire, possess, enjoy and convey agricultural land in the State of California and is now the owner of and in possession of a large amount of agricultural land, to-wit: about 2200 acres in the County of Merced, in said State of California, and that a majority of the issued capital stock of said corporation is owned by citizens of the United States.

That except for the threats and acts of the defendants hereinafter referred to the plaintiff Raymond L. Frick would sell the said stock hereinbefore referred to, to the said plaintiff N. Satow and the said plaintiff would buy said stock from the plaintiff Raymond L. Frick, and if the said plaintiffs are prevented from purchasing and selling the said stock as hereinbefore set forth they both and each of them will be seriously obstructed and interfered with in the management and control of his own property and property rights to the great damage of each. That both said plaintiffs are lawabiding and wish to conform in every way to all proper laws, but that in view of the threatened action of the defendants U. S. Webb, as attorney-general of the State of California, and Mathew Brady, as district attorney of the City and County of San Francisco, State of California, the plaintiffs fear to sell and purchase the said stock and unless they are protected from the threats and acts of the defendants under and in pursuance of the statute hereinafter referred to and under color of which defendants are making such threats the said plaintiffs will be prevented from purchasing and selling said stock.

V.

That there was enacted by the electors of the State of California at the general election, November 2, 1920, an act entitled:

"An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith." (Submitted by the initiative and approved by electors November 2, 1920. In effect December 9, 1920.)

A copy of which act is hereto annexed, marked "Exhibit A", referred to herein and made a part hereof.

VI.

That the said act is, in its terms, so drastic and the penalties attached to the violation of the terms thereof are so great that neither of these plaintiffs wishes to carry out said transaction of purchase and sale of said stock as hereinbefore set forth and both are deterred from carrying out said transaction even for the purpose of testing the constitutionality and validity of the said act above mentioned or the application of said act to such a transaction as is hereinbefore set forth, and unless this court shall determine the validity of said act in this proceeding and the application of said act to said proposed transaction of purchase and sale, said plaintiffs will be compelled to submit to said act, whether the same be valid or invalid, applicable or inapplicable, and will be compelled to submit to the defendants' interpretation of said act and will thereby be deprived of their property without due process of law and will be denied the equal protection of the law, in contravention of the Constitution of the United States and the said treaty between the United States and Japan, and that plaintiffs have no adequate remedy at law and are relievable only in a court of equity.

VII.

That the said act is in contravention of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiffs of property without due process of law and denies to them and each of them the equal protection of the law; and protection of said section 1 of the Fourteenth Amendment to the Constitution of the United States is hereby specifically invoked by the plaintiffs and each of them.

VIII.

That if plaintiffs are not permitted to purchase and sell said capital stock as aforesaid and upon substantially the terms above mentioned a large and irreparable loss will occur to them and each of them and that plaintiffs have no adequate remedy at law and are relievable only in a court of equity, and that the loss to each of said plaintiffs would be in excess of three thousand (\$3,000) dollars, exclusive of interest and costs.

IX.

That on the 22nd day of November, 1892, the President of the United States negotiated a Treaty of Commerce and Navigation between the United States of America and the Emperor of Japan, a copy of which treaty is annexed hereto, marked "Exhibit B", referred to herein and made a part hereof; that said treaty was signed at Washington February 21, 1911, was ratified by the Senate with amendments February 24, 1911, was ratified by the President March 2, 1911, and was ratified by Japan March 31, 1911; that ratifications were exchanged at Tokio April 4, 1911; that said treaty was proclaimed April 5, 1911; that said treaty has never been annulled, amended or set aside, and that said treaty is the law of the land and is binding on the State of California and the people thereof and must be enforced by the courts of the United States and the courts of the State of California; that said plaintiff N. Satow, under the terms of said treaty, and particularly article I thereof, is entitled to protection in his right to purchase the personal property hereinbefore referred to.

X.

That inasmuch as plaintiffs and each of them have no adequate remedy in the premises by the strict rules of law, and can obtain relief only in a court of equity, where matters and things of the kind and character hereinbefore stated are perfectly cognizable and relievable, and to the end that they and each of them may have relief, which they and each of them can only obtain in a court of equity, they and each of them pray:

1. That U. S. Webb, as attorney-general of the State of California, and Mathew Brady, as district attorney of the City and County of San Francisco, California, be enjoined and restrained, provisionally, preliminarily and perpetually by the order and injunction of this court from bringing, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said act of the legislature of the State of California above mentioned against these plaintiffs, or either of them, upon their entering into a transaction of purchase and sale of the capital stock of said corporation as hereinbefore set forth, and from taking any other action in any other manner to prevent or interfere with the plaintiffs or either of them in carrying out said transaction of purchase and sale, and that an order to show cause issue herein upon application of the plaintiffs herein directed to the above-named defendants, requiring them to show cause why a temporary injunction should not issue as prayed for herein.

2. That upon the hearing the aforesaid act of the State of California be declared to be unconstitutional, illegal and void, and that a perpetual injunction be issued restraining the enforcement thereof as hereinabove prayed for.

3. That a writ of subpoena may issue to defendants requiring them to answer this bill of complaint fully and truthfully, but not on oath, an oath being hereby waived, and that further and general relief be granted as the nature of plaintiff's case may require or to equity may seem meet.

ALBERT H. ELLIOT and

GUY C. CALDEN,

Solicitors for Complainants.

2. BRIEF OF PLAINTIFFS ON MOTION FOR TEMPORARY INJUNCTION, BY ALBERT H. ELLIOT.

STATEMENT OF THE CASE.

This action is one in equity and involves the right of the attorney-general of the State of California and the district attorney of the City and County of San Francisco to deprive plaintiffs of the right to complete a transaction of purchase and sale, in which the plaintiff Raymond L. Frick, an American citizen, wishes to sell to the plaintiff N. Satow, a Japanese alien, twenty-eight (28) shares of the capital stock of the Merced Farm Co., a corporation organized under the laws of the State of California. From the complaint it appears that the Merced Farm Co., a domestic corporation, is authorized by its articles of incorporation to acquire, possess, enjoy and convey agricultural land, and it further appears that the said corporation is in fact the owner of approximately twenty-two hundred (2200) acres of agricultural land, situate in the County of Merced in the State of California.

It further appears from the complaint that the twenty-eight (28) shares of capital stock of the said corporation which the plaintiff Raymond L. Frick wishes to sell to the plaintiff N. Satow and which the plaintiff N. Satow wishes to buy from the plaintiff Raymond L. Frick has a present market value of forty-two hundred and fifty (\$4,250.00) dollars, and that plaintiff Raymond L. Frick is willing to sell said stock for said sum to the

plaintiff N. Satow and that plaintiff N. Satow is willing to buy said stock for said sum.

It further appears from said complaint that the plaintiffs are prevented from consummating said transaction of purchase and sale for fear that the defendants will, through escheat proceedings, confiscate the said stock in the hands of plaintiff N. Satow after the completion of said purchase and sale transaction.

It is further alleged that said escheat proceedings will be brought by defendants under the terms of that certain act entitled "California Alien Land Law of 1920," a copy of which is for the convenience of the court annexed hereto and marked "Exhibit A"; and it is further alleged that the plaintiffs are deterred from consummating said transaction of purchase and sale for fear of said escheat proceedings and that plaintiffs are prevented from testing the constitutionality and validity of said act, "Exhibit A", because of the said drastic proceedings of escheat and that unless the validity of said act shall be determined by the court they will be compelled to submit to its terms regardless of whether it is valid or invalid, and that they will thereby be deprived of their property without due process of law and will be denied the equal protection of the law, in contravention of the Constitution of the United States.

It is further alleged that the plaintiff N. Satow is protected in his right to purchase the said capital stock under the terms of a treaty existing between the Empire of Japan and the United States of America, and for the convenience of the court a copy of said treaty is annexed hereto and marked "Exhibit B".

A preliminary injunction is sought by plaintiffs to prevent the defendants from carrying out the threat of escheat proceedings as in said complaint set forth and also to permit plaintiffs to complete the transaction of purchase and sale as set forth in the complaint.

I.

INJUNCTION IS THE PROPER REMEDY AND THREE JUDGES ARE NECESSARY BECAUSE IT IS SOUGHT HEREIN TO RESTRAIN THE ENFORCEMENT OF A STATE LAW.

This proceeding is brought under section 266 of the Judicial Code (2 U. S. Comp. Stats. 1916, sec. 1243) and original jurisdiction of such an action as is contemplated herein is given to the district courts of the United States under subdivision 14 of section 991, volume 2, United States Compiled Statutes (Judiciary Code, sec. 24, as amended, Act December 4, 1911, C. 5.)

Said subdivision 14 reads as follows:

"Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States or of all persons within the jurisdiction of the United States."

Injunction is the proper remedy and three judges are necessary.

Section 266, Judicial Code (U. S. Comp. Stats. 1916, sec. 1243; *Raich vs. Truax*, 239 U. S. 33).

Louisville & N. R. Co. vs. Garrett, 34 Sup. Ct. Rep. 48 (December 1, 1913):

"* * * Because of the Federal questions raised by the bill the circuit court had jurisdiction and was authorized to determine all the questions in the case, local as well as federal. (*Siler vs. Louisville & N. R. Co.*, 213 U. S. 175, 191, 53 L. Ed. 753, 757, 29 Sup. Ct. Rep. 451.) A similar rule

- must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges, and authorizes an appeal to this court. (36 Stat. at L. 557, Chap. 309.) This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its 'unconstitutionality'. The reference, undoubtedly, is to an asserted conflict with the Federal Constitution, and the question of unconstitutionality, in this sense, must be a substantial one. But, where such a question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds, and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case, and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. The local questions arising under the state constitution and statutes were therefore before the circuit court and the appeal brings them here. They may be first considered. * * *

Injunction is the proper remedy and if the allegations of the bill show that a federal question is involved the United States courts will take jurisdiction, and once jurisdiction is taken the courts will proceed to construe the local statute or ordinance involved. *Hebe Company vs. Shaw* (January 7, 1919), 39 Sup. Ct. Rep. 125:

"* * * The prosecutions are threatened mainly or wholly under certain statutes of Ohio which, the plaintiffs argue, do not bear the construction put upon them by the defendants, or, if they do, are bad under the Fourteenth Amendment to the Constitution of the United States and the commerce clause. (Article I, sec. 8.) A similar case was heard before three judges. (*Hebe Co. vs. Calvert*, [D. C.], 246 Fed. 711.)"

(Page 127):

"In the absence of a construction by the supreme court of Ohio, we must interpret the statute ourselves. * * *"

We cite also the following cases as bearing directly on the question:

J. & A. Freiberg Co. vs. Dawson et al. (District Court, W. D. Kentucky. May 31, 1920), 274 Fed. Rep. 420; *Alabama & N. O. Transp. Co. et al. vs. Doyle et al.* (District Court, E. D. Michigan. S. D. January 28, 1914), 210 Fed. Rep. 173; *Nolen vs. Reichman, Sheriff, et al.* (District Court, W. D. Tennessee, W. D. August 6, 1915), 225 Fed. Rep. 812; *In re Sawyer*, 124 U. S. 200; *Minneapolis Brewing Co. vs. McGillibray* (Circuit Court, D. South Dakota, S. D. October 8, 1900), 104 Fed. Rep. 258; *Shawnee Milling Co. vs. Temple* (Circuit Court S. D. Iowa, C. D. May 10, 1910), 179 Fed. 517; *Ex parte Young* (March 23, 1908), 209 U. S. 443; *Claybrook vs. City of Owensboro* (District Court, D. Kentucky, 1883), 16 Fed. Rep. 297; *Kiernan vs. Multnomah County* (Circuit Court, D. Oregon, July 28, 1899), 95 Fed. Rep. 849; *San Francisco etc. vs. State and County*, 189 Fed. Rep. 243; *Louisville & Nashville Railroad Co. vs. Garrett*, 231 U. S. 298; *Van Dyke vs. Cordova Copper Company*, 234 U. S. 49.

ANALYSIS OF THOSE SECTIONS OF THE ALIEN LAND ACT WHICH PREVENT OWNERSHIP AND TRANSFER OF CAPITAL STOCK OF AN AGRICULTURAL LAND OWNING CORPORATION BY AN ALIEN INELIGIBLE TO CITIZENSHIP.

The Alien Land Law of California in so far as it subjects any capital stock of any corporation, owning agricultural land, belonging to plaintiff Satow, to escheat proceedings, is in conflict with article I of the treaty between the United States and the Empire of Japan.

Section 8 of the Alien Land Law provides in part as follows:

"Any share of stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section three of this act shall escheat to the State of California. Such escheat shall be adjudged and enforced in the same manner as provided in this section for the escheat of a leasehold or other interest in real property less than the fee."

Section 3 of said act provides in part as follows:

"* * * Hereafter all aliens other than those specified in section one hereof may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a subject or citizen, and not otherwise."

Section 1 of said act provides as follows:

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

Section 6 of said act provides as follows:

"Sec. 6. Whenever it appears to the court in any probate proceedings that by reason of the provisions of this act any heir or devisee can not take real property in this state or membership or shares of stock in a company, association or corporation which, but for said provisions, said heirs or devisees would take as such, the court, instead of ordering a distribution of such property to such heir or devisee, shall order a sale of said property to be made in the manner provided by law for probate sales of property and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such property."

Subdivision 3 of section 5 of said act provides as follows:

"An itemized account of all expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof."

From the above excerpted portions of the Alien Land Law it is evident that the legislature of California intended to provide that no alien ineligible to citizenship (in which class obviously the plaintiff N. Satow as an alien Japanese is), can after the passage of the act acquire any shares of stock in any agricultural land owning corporation without being subjected to the following penalties and forfeitures:

(a) His stock could be escheated to the State of California by proceedings brought by the attorney-general or the district attorney of the proper county.

(b) Any guardian, trustee, attorney in fact, or agent of plaintiff who might in that capacity have the title, interest, or control of any such capital stock belonging to plaintiff or to any minor child of plaintiff, must file annually in the office of the secretary of state and also in the office of the county clerk in each county in which any of said property is situated a verified written report with respect to expenditures, investments, issues and profits involved in the ownership or holding of such stock.

(c) No heir or devisee of the plaintiff, if he is an alien Japanese, can take said stock by distribution as such heir or devisee in the estate of the

said plaintiff, but such stock must be sold and the proceeds distributed to said heir or devisee.

The important question to be determined is as to whether the above sections of the Alien Land Law are in conflict with the treaty between the Empire of Japan and the United States.

If we refer to section 3 of the act (Exhibit A) and subject said section to careful analysis, we discover that obviously any corporation might shift from one class to the other over night, thus making necessary new classifications daily, even hourly—a fact which shows how unworkable and therefore unreasonable such a statutory provision is.

Further difficult and intricate questions arise where a corporation has taken title in fee to land when all or a majority of its stockholders were citizens or eligible aliens, and then enters the proscribed class because of change in the nationality of its stockholders. We cannot but believe therefore that this provision of the statute is unworkable in practice and legally bad. A writer criticizing the second paragraph of this section says: "this section is new and so inartistically drawn as to defy successful interpretation of its meaning."

Let us see if this criticism is a just one. If we concede that the treaty between Japan and the United States does not specifically grant to Japanese subjects the right to take or hold agricultural land for agricultural purposes, the above paragraph of the third section authorizes ineligible aliens to own stock in a corporation authorized to "acquire, possess, enjoy or convey agricultural land," though perhaps not if the land is held for agricultural purposes, but only for the treaty purposes.

Now, if this second paragraph is intended to authorize, and if it is regarded as necessary so to authorize ineligible aliens to acquire stock in the designated corporations, etc. (and the paragraph is wholly inane if such be not its purpose), then it is to be noted that it authorizes them to take stock holdings only in corporations, etc., authorized "to acquire, possess, enjoy or convey agricultural lands," which lands the corporations, etc., specified in the first paragraph are not empowered to take except for the treaty purposes.

That is to say, it authorizes ineligible aliens to own stock in corporations, etc., which under this statute cannot legally function.

On the other hand, if the ineligible aliens may own stock only as thus specifically authorized by statute, then they may not acquire stock in the only corporations, etc., which the statute described in its first paragraph has authorized to take real property for treaty purposes.

In any event, the provisions of this second paragraph and also in the first paragraph, in fact, run counter to the stipulations of the treaty because the acquisition of shares in corporations or companies is an incident of normal trade and as to trade the treaty specifically gives to Japanese subjects the right "generally to do anything incident to or necessary for trade, upon the same terms as native citizens or subjects," which latter labor under no such restrictions as the statute seeks to impose on Japanese subjects.

Finally, there is the further objection developed by careful analysis that as the second paragraph of this section is worded, it would apply outside the jurisdiction of the State of California, which manifestly it could not do.

Referring to section 6 of the act (Exhibit "A"), we find the words "membership or shares of stock in a company, association or corporation," included in such section. Are we to understand that under the theory of the act shares of stock in a corporation as personalty, *may not be devised or inherited*? Shares of stock in a corporation owning real property is personalty and not

realty by all the laws there are in the land. The theory upon which the act is founded is that aliens cannot acquire title to real property by descent. Certainly the transmission to heirs or devisees of shares of stock as personalty seems to be unquestionably a proper incident and necessity of trade and since obviously there is no law in California which prevents a citizen of the United States from transmitting shares of stock to heirs or devisees or receiving such shares of stock as an heir, it would seem to be clear that *this provision at least* runs contrary to the treaty between the United States and Japan and is therefore invalid.

With regard to the last two sentences of section 8 of the act (Exhibit "A"), which seeks to escheat the personal property belonging to aliens ineligible to citizenship, certainly this provision is subject to the objection that it is confiscatory, contrary to the treaty and also to article 14 of the Federal Constitution. And in this connection we call particular attention to the fact that section 9 of the act (Exhibit A), as drawn, does not cover merely transfers to the prohibited persons, but will make void the *bona fide transfer by* prohibited persons, even of property which they may have *bona fide* acquired and even if such transfer were sought to be made to a person not within the prohibited class. Apparently the state intends to take all property held in prohibited interests by prohibited persons and it would be impossible for prohibited persons to salvage any prohibited property of which they may die possessed.

III.

ANALYSIS OF THOSE SECTIONS OF THE TREATY BETWEEN THE UNITED STATES AND JAPAN OF 1911, WITH WHICH THE ALIEN LAND ACT IS IN CONFLICT.

Article I of the treaty between the United States and the Empire of Japan reads as follows:

"Article I.

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects. The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

"They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions."

Analysis of Treaty.

Since the plaintiff N. Satow relies upon the above quoted article I of the said treaty a critical examination of the entire treaty and a clear understanding as to its scope and meaning would seem to be necessary. In the preamble of the treaty we are told that the purpose of the treaty is to

govern the commercial intercourse between the two countries, and generally it may be said that the treaty is one of trade and commerce. However, we must remember "that the recitals in the preamble of a treaty, as to the object of the treaty, may be referred to for the purpose of resolving an ambiguity, but not the purpose of contradicting the clear terms used in the express stipulations of the treaty; * * * (Treaties, Their Making and Enforcement—Crandall, p. 403.) We think that a careful analysis of article I of the treaty, together with the application of the ordinary rules of construction which govern in the interpretation of treaties, will show that there is no ambiguity whatever in article I of the treaty. We should not expect to find from our analysis that the treaty contemplates that American citizens shall immigrate to Japan or that Japanese nationals shall immigrate to the United States. Nations do not generally provide in treaties for a policy which might result in stripping them of their own nationals. The treaty obviously contemplates that the nationals of one country may enter, travel and reside in the territories of the other, and this seems to be a temporary and not a permanent movement. We must call attention, however, to the fact that article I of the treaty, which is basic in its character, deals not with the respective signatory nations as political units, but specifically with the liberties of the respective nationals, each in the territory of the other. These liberties, and we are using the very word of article I, may be summed up about as follows:

(a) "to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail,"

(b) "to own or lease and occupy houses, manufactories, warehouses and shops,"

(c) "to employ agents of their choice,"

(d) "to lease land for residential and commercial purposes,"

(e) "and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects submitting themselves to the laws and regulations therein established."

When we conclude that all of the above provisions relate to trade and commerce, we are only reducing these various liberties to the common denominator which is within the scope and object of the entire treaty. For the purpose of this analysis we are not particularly making the point that the buying and selling of farm lands might be considered as trade (*Finnegan vs. Noerenberg* (1893), 52 Miss. 230), but prefer to confine our analysis to those things specifically granted as liberties to the nationals of the contracting parties under the terms of the treaty.

The provisions of article VII are also pertinent to this discussion:

"Article VII. Limited-liability and other companies and associations, commercial, industrial and financial, already or hereafter to be organized in accordance with the laws of either high contracting party and domiciled in the territories of such party, are authorized, in the territories of the other, to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other party.

"The foregoing stipulation has no bearing upon the question whether a company or association organized in one of the two countries will or will not be permitted to transact its business or industry in the other, this permission remaining always subject to the laws and regulations enacted or established in the respective countries or in any part thereof."

It is conceived that an argument, probably well founded under the technical doctrine of American law, might be addressed to the point that the provisions of article I, above quoted, giving to Japanese subjects the right

to acquire land in fee simple, the argument being that in ordinary legal parlance in American law, ownership means possession of the absolute title; that ownership of houses by an absolute title means the ownership of the land, for a house may not generally be owned separately from the land; and that the ownership of the land means a title in fee simple. Or, in other words, the grant of the right to own houses carries with it as an indispensable concomitant the right to own the land on which it stands in fee simple.

But it is not believed that this argument is well founded, because such an interpretation would give to the treaty a non-reciprocal meaning, since it is understood that under the laws of Japan aliens may not own property in fee simple. Such a contention, therefore, would lack that broad, liberal and reciprocal spirit which should control the interpretation of treaties.

Leaving, therefore, that phase of the question, attention is particularly directed to that clause of article I of the treaty which stipulates that "the citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects on their submitting themselves to the conditions imposed upon the native citizens or subjects".

This paragraph of the treaty is almost a *verbatim* copy of a provision found in article III of the Treaty of Commerce and Navigation between the United States and Italy of 1871.

Two points are to be observed in this provision: First, that it guarantees as to citizens or subjects of the one country resident in the other "the most constant protection and security for their persons and property", and that such citizens or subjects of the one resident in the other "shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects on their submitting themselves to the conditions imposed upon the native citizen or subjects".

So far as known, the extent and scope of the meaning of this particular provision of the treaty has come before the Supreme Court but once, in the case of *Maiorano vs. B. & O. R. R. Co.* (1908), 213 U. S. 268. In that case "the husband of the plaintiff in error was killed while a passenger on a train by the negligence of the defendant. The death occurred within the State of Pennsylvania and this action was brought in a court of that state to recover damages for it. The plaintiff was a resident of Italy and a subject of the King of Italy." Under the Pennsylvania statute "the right to recover damages for death occasioned by unlawful violence or negligence is, in certain cases, conferred upon the husband, wife, children or parents of the person killed".

Before the Supreme Court the plaintiff invoked articles II, III and XXIII of the treaty between the United States and Italy of 1871. In the course of his opinion, Mr. Justice Moody, speaking for the court, said:

"But the special stress is laid upon article 3, which stipulates for the citizens of each, in the territory of the other, equality with the natives of rights and privileges in respect of protection and security of person and property. It cannot be contended that protection and security for the person or property of the plaintiff herself have been withheld from her in the territory of the United States, because neither she nor her property has ever been within that territory. She, herself, therefore, is entirely outside the scope of the article. The argument, however, is that if the right of action for her husband's death is denied to her, that he, the husband, has

not enjoyed the equality of protection and security for his person which this article of the treaty assures to him. It is said that if compensation for his death is withheld from his surviving relatives, a motive for caring for his safety is removed, the chance of his death by unlawful violence or negligence is increased, and thereby the protection and security of his person are materially diminished. The conclusion is drawn that a full compliance with the treaty demands that, for his protection and security, this action by his surviving relatives should lie. The argument is not without force. Doubtless one reason which has induced legislators to give to surviving relatives an action for death has been the hope that care for life would be stimulated. This thought was dwelt upon in *Mulhall vs. Fallon*, *supra*, in considering a statute which made the amount recoverable dependent upon the degree of culpability of the negligent person. Another reason for such legislation, quite as potent, was the desire to secure compensation to those who might be supposed to suffer directly and materially by the death. This thought seems to have been uppermost in Pennsylvania, according to the courts of that state. See *Chambers vs. B. & O. R. R. Co.*, 207 U. S. 142, 52 L. Ed. 143, 28 Sup. Ct. Rep. 34, and cases cited. Without dwelling further upon the purpose and effect of legislation of this kind, and assuming that both might be calculated in some degree to increase the protection and security of persons who may be exposed to dangers, we are of the opinion that the protection and security thus afforded are so indirect and remote that the contracting powers cannot fairly be thought to have had them in contemplation.

"If an Italian subject sojourning in this country is himself given all the direct protection and security afforded by the laws to our own people, including all rights of actions for himself or his personal representatives to safeguard the protection and security, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety.

"Judgment affirmed."

There is little or nothing in this decision (which has been quoted thus fully merely in order to eliminate it from the discussion, it being the only case directly interpreting in any way this treaty provision) which might be helpful in this case, beyond the holding that for the treaty to become operative there must be *within the jurisdiction* some person or property to which it could attach.

It is therefore necessary to discuss this matter without the assistance of direct precedent.

Now, it is quite evident that the effective words of the provision, for our purposes, are, "the most constant protection and security for their persons and property", and the words following which provide that Japanese subjects "shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects."

That is to say, this provision stipulates for equal protection and equal security as between citizens of either country resident in the other and the nationals in the other. Or, to put it in other words, this stipulation requires that Japanese subjects in the United States shall have equal protection and equal security for their persons and their property with the citizens of the United States, and they must "enjoy in this respect the same *rights and privileges*" as citizens of the United States. Nothing short of such absolute

and perfect equality will at all meet or satisfy the demands of this treaty provision.

1 Cal. Jur., page 925:

"* * * If there is one object more than another which belongs to our political relations, and which ought to be the subject of treaty regulations, it has been said, it is the extension of the comity involving the removal of a disability of alienage which is highly favored by the liberal spirit of the age and conducive in its tendency to the peace and amity of nations. And it may be remarked that if the treaty-making power which resides exclusively in the Federal Government were not sufficient to permit it to arrange with a foreign nation the distribution of an alien's property, then, as has been observed, it must be confessed that there is a lameness and incompleteness in our whole system of government, which renders us inferior to any other enlightened nation, in the power and ability to advance the prosperity of the people of this country."

"* * * Even in those cases where there is a conflict between the provisions of the state law and those of a treaty upon this subject, it seems that the state law is not void as an unwarranted interference with or encroachment upon the powers of the Federal Government, but that such state law, in so far as it conflicts with the treaty provisions, is merely suspended or controlled during the life of the treaty."

(a)

Capital stock is personal property, "movables", and is the proper subject-matter of trade and commerce, and necessarily incident thereto.

We have already pointed out in our discussion under the treaty that not only is the resident alien Japanese denied the right to own stock in corporations described, but he is denied the further right (a) to transmit such stock already owned by him to such of his heirs as are alien Japanese residents or (b) himself to inherit such stock either from citizens or non-citizens.

"Right to Hold and Dispose of Personal Property.—It is a proposition so self-evident as hardly to need the citation of authorities, that an alien may hold and convey personal property. He is protected in this right mainly because personal estate is of a transitory nature, and the indulgence conduces to the advancement of trade and commerce. He may even be a mortgagee and recover his debt, in countries where there is a positive prohibition to hold lands. The right to hold personal property includes the right to bequeath it to another, and to receive it as next of kin, or legatee; and if it is necessary to sell lands for the purpose of discharging legacies, the price of such lands so sold by the owner or by the executor becomes movable, and as such must be applied to the payment of those legacies, and it cannot be said that such legacies are debts secured upon land and of a heritable character." (Vol. 1, R. C. L., p. 805.)

1 Blackstone Comm., 372 (p. 1069, C. J.):

"* * * (2) 'An alien friend may purchase and hold chattels, real, and all kinds of personal property; and may freely transfer to any place beyond the jurisdiction of the state, his movables, subject, however, in general, to such export duty as the state may think proper to impose, and also subject, in cases of public expedience, or on his becoming an alien enemy, to a total prohibition of removing any of his property out of the state, so as thereby to weaken it and strengthen its antagonist. This permission of removal of personal property is, however, granted with a view to the encouragement of commerce and the aggrandisement of the state; * * *'"

(Vol. 2 (note), C. J., p. 1069):

"In General.—The disability of aliens at common law in respect to the ownership of real estate does not extend to personal property, and aliens are capable of acquiring, holding and transmitting movable property in like manner as citizens. A statute capacitating aliens to take, recover and transmit 'real estate' has been held to include both real and personal property."

(b)

The denial to Japanese aliens of the right to own stock in California corporations authorized to acquire, possess, enjoy and convey agricultural land is tantamount to a denial to them of the right to own any capital stock in any corporation organized for profit in California, because practically all of such corporations are "authorized to acquire, possess, enjoy or convey agricultural land". (Sec. 3, Alien Land Act.)

Section 1, article I, of the constitution of California, being a part of the so-called declaration of rights, reads as follows:

"Section 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."

Since aliens are men in view of the reading of the words of the treaty, and since capital stock is certainly property, we fail to understand why an alien under California's declaration of rights is not guaranteed his right to acquire, possess and enjoy property.

In defining what is meant by the word "liberty," Brannan, Fourteenth Amendment, page 110, says:

"* * * I should say that it means exemption or immunity from unlawful imprisonment or detention of the body, freedom to go and come on lawful business or pleasure, commonly called the right of locomotion; the right to acquire, hold and convey property; the right to make contracts and to labor in any lawful calling to earn a living; to marry and have family. * * *

"* * * Vain would be the pursuit of happiness if the right of contract necessary to secure the bread of life and raiment and home be taken away. Scarcely any of the great cardinal rights are more universally recognized and vindicated under our system, indeed, under all civilized governments, than this right of contract. A man must have the right to exercise his skill and talents and dispose of and use his labor and property in lawful pursuits as to him shall seem proper. The property right may be violated by prohibiting its full use to the owner as effectually as by taking it from him, his ownership being thus damaged. * * *

"* * * It has been held in numerous cases, and seems well settled, that a law denying the right to contract or acquire property is an infraction of the right of liberty. 'Liberty includes the right to acquire property, and that means to make and enforce contracts.' The Civil Rights Act was made to enforce the Fourteenth Amendment.

"* * * Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrest, right to buy and sell as others may—all our liberties, personal, civil, political—in short, all that makes life worth living; and of none of these rights can anyone be deprived except by due process of law. (2 Story, Const., sec. 1950.) * * *

We contend that all corporations authorized for profit under the laws of the State of California are authorized to acquire, possess and enjoy agricultural land.

Corporations may be formed for any purpose for which individuals may lawfully associate themselves (Civil Code of Cal., sec. 286).

Section 9 of article XII of the constitution of California seemingly qualifies every business corporation in the state to hold any real estate for at least a period of five (5) years, provided that such real estate is necessary for carrying on its business.

We are unable to find that any corporation organized for profit in the State of California is under any restrictions other than those specified with respect to its capacity under its articles of incorporation, to own, acquire, possess and enjoy real estate. In this connection we call particular attention to the fact that the act does not make the actual ownership of agricultural lands the *sine qua non*, but rather makes important the fact as to whether or not the corporation "may be authorized" to acquire, possess and enjoy or convey agricultural land; the criterion in the instant case, as is alleged in the bill in equity, is that the corporation involved actually owns agricultural land, but we are calling attention to this serious limitation of the right of the Japanese alien for the purpose of showing that under the act he is actually denied the right to acquire, or transfer, capital stock in practically all business corporations whatsoever. We repeat that we should like to have pointed out any corporation organized for profit under the laws of California which *may not*, so far as its powers are concerned, acquire, possess and enjoy agricultural land. (Due Process of Law, Taylor, p. 490.)

In the case of *State vs. Goodwill*, 33 W. Va. 179, the court said:

"The vocation of an employer, as well as that of his employee, is his property. Depriving the owner of property of one of its attributes is depriving him of property under the provision of the Constitution. (*People vs. Otis*, 90 N. Y. 48.) The right to use, buy and sell property, and contract in respect thereto, including contracts for labor—which is, as we have seen, property—is protected by the Constitution. If the legislature without any public necessity has the power to prohibit or restrict the rights of contract between private persons in respect to one lawful trade or business, then it may prevent the prosecution of all trades and regulate all contracts.

"In *Braceville Coal Company vs. People*, 147 Ill. 66, the court said: 'The right of property preserved by the constitution is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty.'

"* * * Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their property or develop their faculties, so as to give to them their highest enjoyment.

"* * * 'Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such means protection. The right to make it available is next in importance to the rights of life and liberty.'

"* * * 'The "liberty" mentioned in the Fourteenth Amendment means not only the right of the citizen to be free from the mere physical restraint

of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.' In *Lochner vs. New York*, 198 U. S. 45, the court said: 'The general right to make a contract in relation to his business is part of the liberty of the individual protection by the Fourteenth Amendment of the Federal Constitution. * * * Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.'"

IV.

SOME OF THE WELL-ESTABLISHED RULES FOR THE CONSTRUCTION AND INTERPRETATION OF TREATIES ARE HEREIN SET FORTH.

(a)

Treaties are construed like contracts.

"Treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties." (*Rocca vs. Thompson*, 223 U. S. 317, 332.)

"Undoubtedly the intention of the two governments as gathered from the words of the treaty must control; and the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained." (*Treaties, Their Making and Enforcement*, Crandall, p. 376.)

"It is generally stated that the words of a treaty are to be taken as used with their plain and natural meaning. * * * This rule is subject to the qualification that words with a customary meaning in international usage or in the public law of each of the contracting parties are to be understood as used in this customary or technical sense, unless a contrary intention clearly appears from the context. Treaties are viewed as having been prepared with care and deliberation by those versed in international law and familiar with the legal significance of words. * * * If terms used in a treaty have definite but different legal meanings in the contracting states, and there is no common and generally received meaning in the public law of nations, that meaning which obtains within the state to which the provision specifically applies at the time of the conclusion of the treaty is, it seems, to prevail." (38 Cyc., p. 970.)

"Various rules have, however, been laid down expressly with reference to the construction of treaties. * * * The treaty should also be given such a construction as tends to the common advantage of the contracting parties and tends to place them upon an equality. * * *" "Treaties should ordinarily be construed liberally, and so where the treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred."

(R. C. L., 26, p. 926):

"* * * A treaty is to be construed on principles similar to those applied to other contracts and statutes. * * *"

Moore International Law Digest, vol. 5:

"Treaties should be interpreted 'in a spirit of *uberrima fides*', and in a manner to carry out their manifest purpose."

"A treaty is not only a law, but also a contract between two nations, and.

under familiar rules, it must, if possible, be so construed as to give full force and effect to all its parts."

"There is no rule of construction better settled, either in relation to covenants between individuals or treaties between nations, than that the whole instrument containing the stipulations is to be taken together, and that all articles in *pari materia* should be considered as parts of the same stipulations."

(P. 249):

"In doubtful cases that construction is to be adopted which will work the least injustice—which will put the contract on the foundation of justice and equity rather than of inequality.

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. (*Haucenstein vs. Lynham*, 100 U. S. 483, 487.)

"In the construction of treaties the general doctrine is that any special advantage conceded by a party under any one article is in consideration of all the advantages enjoyed by the same party under that and all other articles of the treaty."

(P. 251):

"(3) Construction of treaties is a matter of law, to be governed by the same rules, *mutatis mutandis*, as prevail in the construction of contracts and statutes.

"(6) Construction is to be distinguished from 'interpretation'. 'Construction' gives the general sense of a treaty and is applied by rules of logic; 'interpretation' gives the meaning of particular terms, to be explained by local circumstances and by the idioms the framers of the treaty had in mind.

"(7) If two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by the party accepting it."

(P. 252.)

(b)

Treaties are prepared by those skilled in legal phraseology, and the words used should be given their customary meaning in national, municipal and international law.

"It is generally stated that the words of a treaty are to be taken as used with their plain and natural meaning. * * * This rule is subject to the qualification that words with a customary meaning in international usage or in the public law of each of the contracting parties are to be understood as used in this customary or technical sense unless a contrary intention clearly appears from the context. Treaties are viewed as having been prepared with care and deliberation by those versed in international law and familiar with the legal signification of words. * * * If terms used in a treaty have definite but different legal meanings in the contracting states, and there is no common and generally received meaning in the public law

of nations, that meaning which obtains within the state to which the provision specifically applies at the time of the conclusion of the treaty is, it seems, to prevail." (Crandall—Treaties, Their Making and Enforcement, pp. 396-397.)

"* * * But if the words of a treaty have a common and accepted meaning in international usage they are to be taken as used with this meaning and not in any artificial or special sense impressed by local law, unless it clearly appears that this special and restricted meaning was intended by the parties. * * *" (Crandall—Treaties, Their Making and Enforcement, p. 398.)

(P. 400):

"In general, words should be given the meaning which will tend to give efficacy to the treaty and to secure equality and reciprocity in the benefits to be received by the parties.

"In the construction of treaties the general doctrine is that any special advantage conceded by a party under any one article is in consideration of all the advantages enjoyed by the same party under that and all other articles of the treaty." (P. 251.)

"(7) If two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by the party accepting it." (P. 252.)

(c)

Treaties should be construed in good faith to carry out the intention of the parties.

"Undoubtedly the intention of the two governments as gathered from the words of the treaty must control; and the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained." (Treaties, Their Making and Enforcement, Crandall, p. 376.)

(Pp. 401-402):

"* * * So far as a treaty comes before a domestic court of one of the contracting parties as a municipal law, it should be construed with the utmost good faith and with a view to carry out the apparent intention of the parties. It is primarily a compact between the two nations. 'This court would not readily lean to favor a restricted construction of language, as applied to the provisions of a treaty, which always combines the characteristics of a contract as well as a law.' 'Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is preferred. (*Shanks vs. Dupont*, 3 Pet. 242.) Such is the settled rule in this court.' No words, clause or provision is presumably redundant; and effect is, if possible, to be given to each of them. 'Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations and cannot be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion.

"* * * The right to reside in the country with the same privileges as the subject of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these powers. Therefore, the provisions in the mining regulations of Poorman creek, which, in effect, forbid Chinamen from working in a mining claim for themselves or others, as well as the clause of the state constitution to the same effect, seem to be in direct conflict with this article of the treaty; and if so, are therefore void.' * * *

"Treaties should be interpreted 'in a spirit of *uberrima fides*', and in a manner to carry out their manifest purpose."

(d)

A liberal construction rather than one restrictive of rights should be favored.

(38 Cyc., p. 970):

"Various rules have, however, been laid down expressly with reference to the construction of treaties. * * * The treaty should also be given such a construction as tends to the common advantage of the contracting parties and tends to place them upon an equality. * * *" "Treaties should ordinarily be construed liberally, and so where the treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred."

Hauenstein vs. Lynham, 100 U. S. 483 (Oct., 1879):

"* * * Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred. (*Shanks vs. Dupont*, 3 Pet. 242.) Such is the settled rule in this court. * * *"

(e)

Each provision of a treaty should be construed pari materia with all the others.

Moore's International Law Digest, vol. 5:

"There is no rule of construction better settled, either in relation to covenants between individuals or treaties between nations than that the whole instrument containing the stipulations is to be taken together, and that all articles in *pari materia* should be considered as parts of the same stipulations.

"* * * No priority is attached to the numerical order of the provisions in the same treaty. Each provision is supposed to be drawn with due regard to all of the provisions *pari materia* in the same instrument. * * *"

(f)

A construction should be adopted which places the parties to a treaty on an equality.

Crandall—Treaties, Their Making and Enforcement, p. 400 *et seq.* (p. 400):

"In general, words should be given the meaning which will tend to give efficacy to the treaty and to secure equality and reciprocity in the benefits to be received by the parties."

Moore's International Law Digest, vol. 5:

"In doubtful cases that construction is to be adopted which will work the least injustice—which will put the contract on the foundation of justice and equity rather than of inequality.

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. (*Hauenstein vs. Lynham*, 100 U. S. 483, 487.)"

(g)

Herein we give a few examples of how treaties have been actually construed by the courts.

In *Lee et al. vs. Boise Development Company*, supreme court, Idaho, March 16, 1912, 122 Pac. 851, the court says:

"It is next contended that the plaintiffs, being Mongolian aliens, could not hold a lease interest in real estate. There is nothing in that contention, as, under the treaty of the United States with China, it is expressly provided that citizens of the Chinese Empire residing either permanently or temporarily in the United States shall be granted the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens and subjects of the most favored nation. (Devlin on the Treaty Power, sec. 216; *Gandolfo vs. Hartman* [C. C.] 49 Fed. 181, 16 A. L. R. 277; *Fraser vs. McConway* [C. C.], 82 Fed. 257; *Yick Wo vs. Hopkins*, 118 U. S. 365, 6 Sup. Ct. 1064, 30 L. Ed. 220.)"

In the treaty of April 3, 1783, between the United States and Sweden (revived in article 17 of the treaty of July 4, 1827, between the same powers) it is provided that the subjects of the contracting parties may "dispose of their effects, etc." It was held that the word "effects" appearing in the French draft as the word "biens" includes real as well as personal property. (*Adams vs. Akerland*, 168 Ill. 632.)

In the very old case of *Delassus vs. United States*, 9 Peters, 117, there appeared in a treaty between the United States and France the stipulation "that the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

"That the perfect inviolability and security of property is among these rights, all will assert and maintain.

"The right of property then, is protected and secured by the treaty; and no principle is better settled in this country, than that an inchoate title to lands is property."

In the old case of *Strother vs. Lucas*, 12 Peters, 410, reference is made to a treaty with Spain in which "There was a stipulation *inter alia*, that the inhabitants of the ceded territory shall be maintained and protected in the free enjoyment of their liberty, property and the religion they profess as to which, this is the language of this court:

"That the perfect inviolability and security of property is among these rights, all will assert and maintain."

In the case of *In re Stierud's Estate*, Washington (May 14, 1910), 109 Pac. 343:

"* * * The use of the words 'goods and effects' only, to designate the property the treaty is applicable to, might give rise to argument as to whether or not these words include real property. In the case of *Adams vs. Akerlund*, 168 Ill. 632, 48 N. E. 454, these words in this same treaty were under consideration, where it was contended that real property was not included by them. The court, however, in a very able and exhaustive opinion, held that real property was included. (I Bouvier's Law Dictionary [Rawle's Rev.] 635; *University vs. Miller*, 14 N. C. 188.)"

The following are concrete examples of liberal construction of treaties

made by courts with a view to carrying out the purposes and spirit of the respective treaties:

The Chinese cases.

Syllabus: "A mining regulation, authorized by a state, which in effect forbids Chinese from working in a mining claim for themselves or for others, seems to be in direct conflict with the provision in article VI of the treaty with China, that the citizens or subjects of China visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect of travel or residence as may there be enjoyed by citizens or subjects of the most favored nation. If in conflict therewith it is void. (*Chapman vs. Toy Long* [1876], 4 Sawy. 28.)"

"A legislative act of the State of Oregon, which prohibits the employment by contractors of Chinese on street improvements or public works, but which permits all other aliens so to be employed, is in conflict with the provisions in the treaty with China pledging to the Chinese, resident here, the same right to be employed and labor for a living as enjoyed by the subjects of any other nation, and is therefore void. (*Baker vs. City of Portland* [1879], 5 Sawy. 566.)"

"The privilege and immunities, which, under the treaty the Chinese are entitled to enjoy to the same extent as enjoyed by the subjects of the most favored nation, are all those which are fundamental, among which is the right to labor and to pursue any lawful employment in a lawful manner. A provision of the constitution of the State of California, as likewise legislation for its enforcement, providing that no corporation formed under the laws of the state shall, directly or indirectly, in any capacity, employ any Chinese or Mongolian, is in conflict with the provisions in the treaty and therefore void. (*In re Tiburcio Parrott* [1880], 6 Sawy. 349.)"

"A statute of the State of California, which prohibits all aliens incapable of becoming electors of the state from fishing in the waters of the state (construed in connection with other contemporaneous statutes expressly directed against Chinese), violates the provisions of the treaty with China granting Chinese subjects residing in the United States the same privileges in respect of residence and travel as may be enjoyed by citizens of the most favored nation, and is therefore void. (*In re Ah Chong* [1880], 6 Sawy. 451.) See also *Ex parte Ah Fook* (1874), 49 Cal. 402; reversed in *Chy Lung vs. Freeman et al.* (1875), 92 U. S. 275." (Pps. 471-472 Crandall.)

"Those subjects of the Emperor of China, who have the right temporarily or permanently to reside within the United States, are entitled to enjoy the protection guaranteed by the Constitution and afforded by laws. An administration of a municipal ordinance for the carrying on of a lawful business within the corporate limits violates the provisions of the Constitution if it makes arbitrary and unjust discriminations founded on differences of race between persons otherwise in similar circumstances. (*Yick Wo vs. Hopkins* [1886], 118 U. S. 356.) See also *Barbier vs. Connolly* (1885), 113 U. S. 27; *Soon Hing vs. Crowley* (1885), 113 U. S. 703." (P. 479 Crandall.)

"Under the treaty with China, a Chinese resident of this country is entitled to all the rights, privileges and immunities of subjects of the most favored nation with which this country has treaty relations; and, if a resident here before the passage of the act of Congress restricting immigration of Chinese he has a right to remain and follow any of the lawful ordinary trades and pursuits of life. (*In re Quong Woo* [1882], 13 Fed. 229.)"

"A city ordinance which arbitrarily requires all Chinese inhabitants to remove from the portion of the city theretofore occupied by them to another

designated part of the city, or outside the city, is in direct conflict with the Constitution, treaties, and statutes of the United States, particularly in the sense that it is discriminatory and unequal in its operation, and involves an arbitrary confiscation of property without due process of law. (*In re Lee Sing* [1890], 43 Fed. 359.)"

"A covenant in a deed not to convey or lease land to a Chinaman is contrary to the public policy of the government, in contravention of its treaty with China, and in violation of the Fourteenth Amendment to the Constitution, and is accordingly not enforceable in a court of equity. (*Gandolfo vs. Hartman* [1892], 49 Fed. 181.)" (P. 480 Crandall.)

"Under the treaty with China, citizens of the Chinese Empire residing either permanently or temporarily in the United States are granted the same rights, privileges, immunities, and exemptions as are enjoyed by citizens and subjects of the most favored nation. Accordingly they can hold a lease interest in real estate in Idaho. (*Duck Lee vs. Boise Development Co.* [1912], 21 Idaho 461.)" (P. 481 Crandall.)

"(See also treaty of November 17, 1880.) A mining regulation, authorized by a state, in effect forbidding Chinese from working in a mining claim for themselves or for others, seems to be in direct conflict with article VI of the treaty with China, under which the citizens or subjects of China visiting or residing in the United States are guaranteed the same privileges, immunities and exemptions in respect of travel or residence as may there be enjoyed by citizens or subjects of the most favored nation. If in conflict therewith it is void. (*Chapman vs. Toy Long* [1876], 4 Sawy. 28.)"

"Under the treaty with China, a Chinese resident of this country is entitled to all the rights, privileges and immunities of subjects of the most favored nation with which this country has treaty relations; and, if a resident here before the passage of the act of Congress restricting immigration of Chinese, he has a right to remain and follow any of the lawful ordinary trades and pursuits of life. (*In re Quong Woo* [1882], 13 Fed. 229.)"

"A city ordinance which arbitrarily requires all Chinese inhabitants to remove from the portion of the city theretofore occupied by them to another designated part of the city, or outside the city, is in direct conflict with the Constitution, treaties, and statutes of the United States, particularly in the sense that it is discriminatory and unequal in its operation, and involves an arbitrary confiscation of property without due process of law. (*In re Lee Sing* [1890], 43 Fed. 359.)" (P. 608 Crandall.)

Other Treaties Construed.

Syllabus: "The provision, that subjects of either party may dispose of their 'effects' by testament, donation or otherwise, and their heirs, although unnaturalized, shall receive such succession *ab intestato*, includes real as well as personal estate. In virtue of this article, an alien heir can inherit real estate located in the state. It is for the department of the government, appointed to represent and act for us with foreign powers, not the judicial, to determine whether a treaty has ceased to be binding because of changes in the organization of the other contracting party since the conclusion of the treaty. (*University vs. Miller* [1831], 14 N. C. 188)" (Pp. 550-559 Crandall.)

"This treaty is the law of the land and admits the inhabitants of the ceded territory to the enjoyment of the privileges, rights, and immunities of citizens of the United States. They do not, however, participate in political power; they do not share in the government until Florida shall become a state. In the meantime, Florida continues to be a territory of the United States, governed by virtue of that clause of the Constitution which empowers

Congress to 'make all needful rules and regulations respecting the territory or other property belonging to the United States.' (Marshall, C. J., in *American Insurance Co. vs. Canter* [1828].)" (P. 570 Crandall.)

"The provision in article VI of the treaty of 1783, continued in force by article XVII of the treaty of 1827, that the subjects of the two nations may dispose of their '*fonds et biens*' (translated 'goods and effects') by testament, donation, or otherwise, and that their 'heirs,' in whatever place they may reside, shall receive the succession 'even *ab intestato*'—covers real estate as well as personal property. Non-resident alien subjects of the Kingdom of Sweden, by virtue of this provision, take and hold real estate in Illinois by descent or otherwise, the provisions of the alien act of the state of 1887 (Laws of 1887, p. 5) to the contrary notwithstanding. (*Adams vs. Akerlund* [1897], 168 Ill. 632.)" (Pp. 580-581 Crandall.)

"This treaty enables non-resident aliens to inherit land in the state of Nebraska, notwithstanding conflicting statutory provisions. The terms 'goods and effects' as used in the treaty include real estate. (*Erickson vs. Carlson et al.* [1914], 95 Neb. 182.)" (P. 582 Crandall.)

Meier vs. Lee (1898), 106 Iowa 303; *Johnson vs. Olsen* (1914), 92 Kans. 819.

Syllabus: "The terms 'goods and effects' as used in the treaty cover real estate passing by will or descent. (*In re Peterson's Estate* [1915], 151 N. W. [Iowa] 66; *In re Anderson's Estate*, 147 N. W. 1098.)"

"In so far as the rights to succession of property of deceased persons are concerned, the citizens of each country stand on an equal footing. The words 'goods and effects' in the treaty include real, as well as personal, property. Although the word 'heirs' in its technical common law meaning is restricted to those who take by inheritance only, it applies in the civil law to all persons who are called to the succession whether by the act of the party or by operation of law; and the phrase 'their heirs shall receive the succession' as used in the treaty refers to the right of succession of those who receive by testament, as well as those who receive by operation of law. (*In re Stixrud's Estate* [1910], 58 Wash. 339.)"

"This treaty enables non-resident aliens to inherit land in the State of Nebraska, notwithstanding conflicting statutory provisions. The terms 'goods and effects' as used in the treaty include real estate. (*Erickson vs. Carlson et al.* [1914], 95 Neb. 182.)" (Pp. 602-603 Crandall.)

"* * * It is contended that the term 'territories' above mentioned must be construed as applying only to one of the territories of the United States, as distinguished from a state. The rule laid down by the Supreme Court of the United States is that:

"Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred.' (*Hauenstein vs. Lynham*, 100 U. S. 483, 25 L. Ed. 628.)

"We accordingly think that the term 'territories,' as used in the above treaty, is to be construed in its broader sense as meaning and including any area or locality under the dominion of the United States. While we have no authority direct on that point, yet it has always, so far as we have found, been given that meaning by the courts in discussing the above treaty or one similar to it." (*Bamforth vs. Ihmsen*, 204 Pac. Rep. 345, Feb. 10, 1922.)

HEREIN ARE SET FORTH SOME OF THE WELL-ESTABLISHED DEFINITIONS OF THE ENGLISH WORDS "RIGHTS AND PRIVILEGES" WHEN USED ALONE AND IN COMBINATION, AND ALSO OF THE WORDS "TRADE" AND "COMMERCE."

Words and Phrases, vol. 1, page 788:

"'Commerce' is defined as follows: 'Commerce,' undoubtedly, is traffic,

but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse. 'Commerce,' in its simplest signification, means an exchange of goods; but, in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange become commodities, and enter into commerce. The subject, the vehicle, the agent, and the various operations become the objects of commercial regulation. 'Commerce' is a term of the largest import. It comprehends intercourse for the purpose of trade in all its forms, including the transportation, purchase, sale, and exchange of commodities." (*Snead vs. Central of Georgia R. Co.*, 151 Fed. 608, 613, citing *Gibbons vs. Ogden*, 9 Wheat. [22 U. S.] 1, 229, 6 L. Ed. 2v; *Welton vs. Missouri*, 91 U. S. 280, 23 L. Ed. 347.)

"'Commerce' within the Federal Constitution comprehends all of the intercourse between the parties necessarily or ordinarily involved in a commercial transaction with reference to merchantable commodities." (*Loverin & Browne Co. vs. Travis*, 115 N. W. 829, 832, 135 Wis. 322; *F. A. Patrick & Co. vs. Deschamp*, 129 N. W. 1096, 1097, 145 Wis. 224; *Snead vs. Central of Georgia R. Co.*, 151 Fed. 608, 613; *Imperial Curtain Co. vs. Jacob*, 127 N. W. 772, 773, 163 Mich. 72; *United States vs. Scott*, 148 Fed. 431, 434, quoting and adopting definition in *Gibbons vs. Ogden*, 9 Wheat. [22 U. S. 189, 6 L. Ed. 23].)

"'Commerce,' in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities and enter into commerce. The subject, the vehicle, the agent, and the various operations become the objects of commercial regulation. *Riverside Mills vs. Atlantic Coast Line R. Co.* 168 Fed. 987, 989, 990, citing *Gibbons vs. Ogden*, 9 Wheat. [22 U. S.] 230, 6 L. Ed. 78; *Northern Securities Co. vs. United States*, 24 Sup. Ct. 436, 478, 193 U. S. 197, 48 L. Ed. 679.)

"'Commerce among the states' comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of different states."

Vol. 4, Words and Phrases, page 956:

"'Trade' is the business of exchanging commodities by buying and selling for money. Interstate trade is the business of buying, selling, and exchanging commodities between the states, and parties may be so engaged, even though they act through the agency of carriers. (*United States vs. American Tobacco Co.*, 164 Fed. 700, 708.)

"'Trade', within the Bankruptcy Act (Act, July 1, 1898, c. 541, sec. rb. 30 Stat. 547), is the buying and selling of merchandise or any class of goods, deriving a profit therefrom. (*In re Hudson River Electric Power Co.*, 173 Fed. 934, 947.)

"To 'trade' is to engage in the purchase or sale of goods, wares, and merchandise, and a firm engaging in the business of buying standing lumber in large quantities, and cutting and sawing the same, and selling the lumber is engaged in a trading business within Gen. St. 1902, sec. 2342, providing for the assessment for taxation of the property of any trading business. (*Jackson vs. Town of Union*, 73 Atl. 773, 774, 82 Conn. 266 [citing Cent. Dict.].)"

It should be observed that under article I of the treaty the nationals of each country are given the right to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, and it follows as a corollary from this clear statement that no restrictions may be imposed

upon the nationals of one country by the other with reference to trade, which are not likewise imposed upon the nationals of the said country. While we might argue that the foregoing quoted principles of trade are designed to promote trade and commerce between the two countries involved, yet we call particular attention to the fact that the next to the last paragraph of article I *ex industria* again explains the matter so that there cannot be the slightest chance of misinterpretation as to the meaning of "trade," viz., the conducting of trade and the acquisition and disposition of the subjects and objects of trade. Obviously the nationals of each country, resident in the other, are put on a basis of *strict equality* with nationals of the country in which they are resident and distinct emphasis is placed upon the equality of rights and privileges which the nationals each shall receive in the country of the other. We are at a loss to understand how language more exact could have been chosen to express the idea that in the conduct of trade and commerce no restrictions shall be placed upon the right of the nationals of one country to acquire and dispose of the subjects and objects of trade, which are not equally placed upon the nationals of the country in which the other nationals are resident.

We shall now pursue the analysis further for the purpose of showing that so far as the California Alien Land Law attempts to make a distinction in matters of trade and the protection and security of the subjects and objects of trade between a Japanese alien, resident in the United States, for the purpose of trade and his property on the one hand, and an American citizen and his like property on the other hand, such statute runs contrary to the treaty and is, therefore, invalid. Possibly it would be more accurate to say:

A Japanese alien is excepted from the Alien Land Act so far as his right to own the capital stock of corporations is concerned, by the specific terms of the treaty between Japan and the United States.

In view of the above-quoted rules of construction and with due regard to the treaty as a whole, we shall now try to determine the meaning of the words "rights" and "privileges" as used in the third paragraph of article I of the treaty.

We must assume, under the rules of construction which we have examined above, that the contracting nations meant something by the use of these two words. We cannot too strongly emphasize the fact that whatever the two words "rights" and "privileges" connote, the Japanese national and the American national must, under the wording of the treaty, have granted to them, each in the country of the other, identical rights and privileges. Too much emphasis cannot be placed upon the principles of equality guaranteed by the treaty in the matter of the rights and privileges of the nationals of the two respective countries. We shall first show that the word "rights" and the word "privileges" both have quite definite meanings and then we shall show that aside from the ordinary meaning of these two words when they are coupled up and used in group form they have in American jurisprudence a very clear legal meaning.

In the first place, we should understand that the word "rights" as used in the treaty must mean civil rights. We are well acquainted in American jurisprudence with three kinds of rights of persons: natural rights, political rights and civil rights. Obviously the treaty was not dealing with the natural right of persons and equally obviously the treaty could not deal with the so-called political rights of residents in any particular state in the Union. It does not need citation of authorities to show that a person may be a citizen of the United States and still be denied political rights as such

in any state of the Union by the constitution of that state. We are rather familiar with the peculiar anomaly in our jurisprudence of having citizens of the United States denied the right of voting in any particular state and if we consider voting as a political right it is clear that the Constitution of the United States, which guarantees equal rights to all citizens of the United States in any state or territory, is not dealing with political rights but rather with civil rights. It could not be contended for a moment that it was the intention of those who formed the treaty before us to grant to Japanese aliens any political rights in the United States or in any of the states or territories thereof.

We conclude, therefore, that the word "rights" as used in the treaty means civil rights.

"As a noun in the singular (a right is defined as) a just claim, or that to which one has a just claim, or that which may be lawfully claimed of any other person; in law that which the law directs, a liberty of doing or possessing something consistently with law; and enforceable claim or title to any subject matter whatever; just claim, legal title, ownership; a lawful title or claim to anything; property, interest, power, prerogative, immunity, privilege; a liberty of doing or possessing something consistently with the law * * *; that which a man is entitled to have, or to do, or to receive from others, within the limits prescribed by law; that which justly belongs to one; that which one has a claim to possess or own; a well-founded claim; that which one has a legal or social claim to do or exact; a legal power; authority, that which justly belongs to one; * * *; title; claim; interest; ownership; * * * " (34 Cyc., page 1762.)

"A 'right' is defined to be that interest which a person actually has in any subject of property entitling him to hold or convey it at pleasure. (*Haskins vs. Ryan*, 64 Atl. 436, 438; 71 N. J. Eq. 575.)"

"The word 'right' denotes, among other things, 'property,' 'interest' and 'privilege;' and in law is most frequently applied to property in its restricted sense. As an enforceable legal right it means that which one has a legal right to do. (*Shaw vs. Proffitt*, 109 Pac. 584, 57 Or. 192. Ann. Cas. 1913A, 63 [citing 7, Words and Phrases, p. 6220].)"

"* * * The word 'rights' as used in the statute, seems to include more than the mere right of property. It embraces such rights as spring out of its lawful management or as are incident to its ownership and the power of disposition. (*Springer vs. Berry*, 47 Me. 330, 337.)"

"The distinction between 'power' and 'right,' whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right. (*State vs. Koch*, 85 Pac. 272, 274, 33 Mont. 490, 8 Ann. Cas. 804 [citing *Kane vs. Commonwealth*, 89 Pa. 522, 33 Am. Rep. 787].)"

"The grant of a 'right' is by reasonable construction a grant of power to do all the acts reasonably necessary to its enjoyment. (*Memphis State Line R. Co. vs. Forest Hill Cemetery Co.*, 94 S. W. 69, 72, 116 Tenn. 400 [quoting and adopting the definition in *Inhabitants of Springfield vs. Connecticut River R. Co.* (Mass.), 4 Cush. 72].)" (Vol. 4, Words and Phrases, pp. 386-387.)

"'Privilege' and 'immunity' are synonymous or nearly so." (*Van Valkenburg vs. Brown*, 43 Cal. 43.)

"* * * In a deed containing the clause 'excepting and reserving to the said party of the first part and to his heirs and assigns forever, the right and privilege of taking water from the ditch or raceway,' etc., the right and privilege mentioned as reserved are used as synonymous terms.

(*Smith vs. Cornell University*, 21 Misc. [N. Y.] 220, 221, 225, 45 N. Y. Suppl. 640.)" (32 Cyc., p. 390.)

"Civil rights are such as belong to every citizen of the state or country, or, in a wider sense, to all its inhabitants, and are not connected with the organization or administration of government. These rights are such as belong to the juristic personality of the individual, or pertain to him as a member of the community. They include the right of freedom, of property, of marriage, of protection by the laws, etc." (Black's Law Dictionary, p. 1045.)

"A 'privilege,' as defined by the Standard Dictionary, is a peculiar benefit, favor, or advantage, a right * * * not enjoyed by all * * * a special right or power conferred on or possessed by one or more individuals, in derogation of the general right." (*Leatherwood vs. Hill*, 89 Pac. 521, 523, 10 Ariz. 243.) (3 Words and Phrases, p. 1206.)

We do not believe it would be seriously questioned that the expression "rights and privileges" like the expression "privileges or immunities" has acquired in American jurisprudence historical, traditional, and legal meaning. We must assume that those who framed the treaty on behalf of the United States understood clearly the meaning of the expressions "rights" and "privileges" and "privileges and immunities" as those expressions have been used in the history of our government. We venture to suggest that no expressions which could be employed in a treaty have been the subject of so many definitions by judicial decisions as these two expressions and it would be manifestly impossible within the scope of this brief to cite the many cases which have been decided in interpreting either one or all of the words "rights," "privileges" or "immunities." Nor can we find in the treaty itself any suggestion that these words as they were well understood in American jurisprudence, are to receive in interpretation any restrictions whatever, except so far as the words must be interpreted in respect of the aims and objects of the treaty itself.

In the early case of *Paul vs. Virginia* [1868], 8 Wall. 168, in defining the words "privileges or immunities" as found in the Constitution of the United States, which declared that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states * * * " Mr. Justice Field said:

"It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."

Corfield vs. Coryell, 4 Wash. C. C. 380:

"We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental: which belong of right to the citizens of all free government, and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental principles are it would perhaps be more tedious

than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restrictions as the government may justly prescribe for the general good of the whole; the right of a citizen of one state to pass through or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, real and personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the states; may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental.

"Privileges, in general sense, including both those under state and federal citizenship, are those belonging to the citizen, not merely to a person, and would include, for instance, the right to go and come through all the territory under the jurisdiction of the United States on lawful business or pleasure; * * * to make contracts, to acquire, hold and dispose of property, to sue and have admission to the courts and the benefit of habeas corpus and other legal remedies and the public records and books; to carry on lawful business. (We do not assume to enumerate all of those things included within the meaning of the word privileges but refer to Brannan, the Fourteenth Amendment, p. 65):

"They, privileges, are those pertaining to the citizen of the nation as such, derived from the Federal Constitution, statute or treaty, given or granted by the Federal Government. * * *

"In any case where under national law the citizen of the United States may do anything, or practice or enjoy any right, it is a 'privilege' under Amendment Fourteen, and the right to be exempt from interference with, and denial of, it by state law by prohibition, penalty tax or otherwise, is an 'immunity' under the same. If the state law amounts to an abridgement of such privilege, it violates the amendment. (Brannan, Fourteenth Amendment, p. 67.)

"Equal Protection—It may occur to the mind that some of the privileges instanced above may be within the last clause of the amendment, giving every 'person within its jurisdiction the equal protection of the laws'; but the first clause relates to citizen rights alone, and that later clause is leveled only against invidious discrimination by state law between persons equally entitled to the protection of law; it is only intended to insure equality before the law, not protection of privileges and immunities." (Brannan, Fourteenth Amendment, p. 70.)

Beemis vs. State [1915], 152 Pac. 456.

"Included in the right of personal liberty and the right of private property, partaking of the nature of each, is the right to make contracts for the acquisition of property." (*Adair vs. United States*, 208 U. S. 171.)

" * * * But, when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the state; and upon these matters this court cannot. in the proper performance of its duty, yield its judgment to that of the state court. * * *

"Now, it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the

same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. 'Its true character cannot be changed by its collocation. * * *'

"* * * In the foregoing, we have manifestly assumed that a privilege or immunity within the contemplation of said constitutional provision is involved in this controversy. However, as to this, there may be some ground for difference of opinion."

The word privilege, in common acceptance, means immunity or advantage. (*Moore vs. Fletcher*, 16 Mt. 63 [33 Am. Dec. 663].)

A privilege is a particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantage of other citizens. (*Guthrie Daily Leader vs. Cameron*, 3 Okl. 677, 41 Pac. 635.)

In its natural meaning, the word privilege may be defined as a right peculiar to an individual or body. (*Ripley vs. Knight*, 123 Mass. 515.)

The words privileges and immunities are synonymous or nearly so; and privilege signifies a peculiar advantage, exemption, immunity, and immunity signifies exemption, privilege. (*Van Valkenburg vs. Brown*, 43 Cal. 43 [13 Am. Rep. 136].) *Sacramento O. Etc., Home vs. Chambers* [25 Cal. App. Sept. 1914], p. 542.)

Travis vs. Yale & Towne Mfg. Co. (March 1, 1920), 40 Sup. Ct. Rep. 228.

This case decides that a state income tax of New York, which discriminated against nonresident citizens was unconstitutional under the provision of the National Constitution, guaranteeing to every citizen of the United States all privileges and immunities to citizens of the several states. (Sec. 2, art. IV.) The case is particularly interesting because it construes the meaning of the expression "privileges and immunities" and concludes that the act in question is a discrimination against nonresident citizens.

The court says:

"This is not a case of occasional or accidental inequality due to the circumstances personal to the taxpayer (see *Amoskeag Savings Bank vs. Purdy*, 231 U. S. 373, 393-394, 34 Sup. Ct. 114, 58 L. Ed. 274; *Maxwell vs. Bugbee*, 250 U. S. 525, 543, 40 Sup. Ct. 2), of all nonresidents, including those who are citizens of the neighboring states, and favoring all residents, including those who are citizens of the taxing state. * * *"

And in concluding that the expression "privileges and immunities" was broad enough to include freedom from discrimination the court says: " * * * and, if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled. * * *"

VI.

THE WORDS "PROTECTION," "EQUAL PROTECTION," "SECURITY" AND "EQUAL SECURITY" HAVE A WELL-DEFINED MEANING IN AMERICAN JURISPRUDENCE.

It is the contention of the writer of this brief that the expressions "protection," "equal protection," "security," "equal security," "constant protection," "same rights and privileges" are all well known to American jurisprudence and that they were selected "in our diplomatic and legislative proceedings by ourselves," and that they have "each a definite and well-understood meaning."

In order that we may be able to maintain this thesis beyond all doubt and to the point of absolute conviction, we shall even at the risk of unduly extending the length of this brief make a survey of the law on this subject and shall begin with the case of *Worcester vs. Georgia* (1832), 6 Peters 515, 559, wherein Mr. Chief Justice Marshall, speaking of the words "treaty" and "nation," used this language: "the words 'treaty' and 'nation' are words

of our own language, selected in our diplomatic and legislative language, by ourselves, having each a definite and well-understood meaning."

The same must be said of "protection," "equal protection," and "security" and "equal security." These also are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning, and they must be understood in the sense in which in other cases, more than analagous and little short of absolutely identical, they have been by us employed.

The first of these words "protection" and the phrase "equal protection" is, fortunately for this discussion, incorporated in the fundamental document of the American Government and as such has received repeated definition, interpretation and determination by our courts.

The Fourteenth Amendment to the Constitution of the United States in a provision which will receive fuller consideration in the latter part of this discussion, declares that no state (of the Union) shall "deny to any person within its jurisdiction the equal protection of the laws."

It is a matter of history that this amendment, framed at the end of the Civil War, was adopted and inserted into our Constitution in order to crystallize in our fundamental law the results which had been secured by force of arms. It is a curious circumstance that even the Supreme Court itself seemed, at first, not fully to grasp the significance of the amendment, for in the Slaughter House Cases (1872), 15 Wall. 36, Mr. Justice Miller, speaking for the court, said, after an elaborate examination of the history and purpose of the amendment and after having cited the very clause now under consideration, "we doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."

But after fuller consideration and under the influence of the arguments, explanations and expositions of those who framed the provision, the Supreme Court came to a full appreciation of its great scope and purpose, so that twelve years later (1885) Mr. Justice Matthews, delivering the opinion of the court in *Yick Wo vs. Hopkins*, 118 U. S. 356 said of the provisions of the amendment:

"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; *and the equal protection of the laws is a pledge of the protection of equal laws.*" (Italics mine.)

There are some of the cases discussing the matter from which it is worth while to give extracts which show the meaning the courts of this country have placed upon the words "equal protection of the laws."

In the Railroad Tax Cases (1882), 13 Fed. 722, Mr. Justice Field, in an action brought to recover taxes assessed against the railroad company, the railroad company insisting that the taxes had been levied in a discriminatory manner against them, said:

"The Fourteenth Amendment to the Constitution, in declaring that no state shall deny to any person, within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. Whatever the state may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to every one on similar terms—in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with the others, to the courts of the country for the security of his person

and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances."

Later, in *County of Santa Clara vs. Southern Pacific R. R. Co.* (1883), 18 Fed. 385, Mr. Justice Field, in passing upon the validity of the imposition upon the railroad by the State of California of certain taxes, discussed the question again, when he used the following language:

"With the adoption of the amendment the power of the states to oppress any one under any pretense or in any form was forever ended; and henceforth all persons within their jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to every one in his private rights—in his right to life, liberty, to property, and to the pursuit of happiness. It implies not only that means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. This protection attends everyone everywhere, whatever be his position in society or his association with others, either for profit, improvement, or pleasure. It does not leave him because of any social or official position which he may hold, nor because he may belong to a political body, or to a religious society, or to a member of a commercial, manufacturing, or transportation company. It is the shield which the arm of our blessed government holds at all times over every one, man, woman, and child, in all its broad domain, wherever they may go and in whatever relations they may be placed. No state—such is the sovereign command of the whole people of the United States—no state shall touch the life, the liberty, or the property of any person, however humble his lot or exalted his station, without due process of law; and no state, even with due process of law, shall deny to any one within its jurisdiction the equal protection of the laws."

Judge Sawyer, in delivering his concurring opinion on the same case, quoted to the same point, the language of Mr. Edmunds of Vermont in his argument in the *San Mateo* case:

"Fourteenth Amendment was a new Magna Charta, that was in fact, in form, and in effect a fundamental security to every person in the state in respect to every private right that could be invaded, and an absolute affirmation of equality of civil rights to all persons before the law. The first clause forbids the state to touch life, liberty, or property without due process of law; and the second forbids that *even with* due process of law any person shall be denied the equal protection of the laws. This is the plain letter of the amendment. It is its intrinsic and beneficent spirit, and it was its purpose.

"What, then, is equality of protection. A *civil* right under a government, is a distinct thing from a *political* right in it. Thus a state may deny to females the right to vote, but it cannot deny to them the right to sue in courts, or impose on their property all the burdens of the community. To hold otherwise would lead to the affirmation of the right of the state to make race, or color, or religion, or age, or a statute the criterion of *civil* rights, and to exert the absolute right of confiscation by classes or descriptions; for in such a case every person of that class or description would stand on an equality with his fellow victims.

"It is not denied that a state may classify the persons who are to perform certain public duties, or bear certain public burdens, based upon personal peculiarities of either sex or calling, etc., as to require military service only from males, or to exempt females from a poll tax and impose a license tax upon certain trades, or tax all franchises of corporations and

their special privileges; but it could not impose a poll tax on one-half its male or female citizens that it did not impose on the rest *in like degree*. And when we come to the case of property *as property*, to be affected by a tax, or any other imposition imposed upon it as a *thing of value*, a distinction cannot be made to depend upon character, or occupation, or quality, or any individual characteristic of the citizen. To hold otherwise would be to set up the very essence of tyranny and arbitrary power.

"Equal protection is the *same* protection under the *same* circumstances; all are to stand alike in like intrinsic conditions. Holding property *as property* is certainly a like intrinsic condition. In the administration of justice, if the criterion of a right to sue be value, all must have the same right when the same value is concerned; or, if the criterion be the nature of the controversy, all must have the same right whose cases are of the same nature. This appears to be too clear for discussion.

"So, too, in the matter of taxation, if the tax, as in this case, be laid upon the *values* of property, all persons must stand on the same footing, according to the value of their respective property, as to the proportionate burden they are to bear in respect to the value.

"The farmer must be assessed at the same rate for the value of his land as the lawyer for the value of his land, and he must have the same right of notice and hearings, etc., as his fellow-citizen of another calling; and if deductions are provided to be made from values on accounts of debts (which is only a method of reaching effective value) of one class of citizens, they must be made from those of other classes, without reference to what particular characteristics as citizens or persons they may have as sex or race, or age, or quality, or calling.

"The *basis* of the imposition being *property as such*, the fact that certain property is owned by a corporation, or a white man, or man of bad character, or a clergyman, cannot be made the ground of a levy that, both in form, in fact, and in result, is unequal and injurious. Any other doctrine necessarily implies that the state may carry such unequal exactness to the end of complete confiscation by edict of all the property of any class of man, who, during the passion of the hour, may not be in the sunshine of popularity."

In re Ah Fong (1884), 3 Sawy. 144, Federal Cases, Case No. 102, the same clause was again before Mr. Justice Field, and in passing upon the legality of the detention of a Chinese woman by the commissioner of immigration of California, who was acting under a state statute, he said:

"But there is another view of this case equally conclusive, for the discharge of the petitioner, which is founded upon the legislation of Congress since the adoption of the Fourteenth Amendment. That amendment in its first section designates who are citizens of the United States, and then declares that no state shall make or enforce any law which abridges their privileges and immunities. It also enacts that no state shall deprive 'any person' (dropping the distinctive designation of citizens) of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws. The great fundamental rights of all citizens are thus secured against any state deprivation and all persons, whether native or foreign, high or low, are whilst within the jurisdiction of the United States, entitled to the equal protection of the laws. Discriminating and partial legislation, favoring particular persons, or against particular persons, of the same class, is now prohibited. Equality of privilege is the constitutional right of all citizens, and equality of protection is the constitutional right of all persons. And equality of protection implies not only equal

accessibility to the courts for the prevention or redress of wrongs, and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind. Within these limits the power of the state exists, as it did previously to the adoption of the amendment, over all matters of internal police. And within these limits the act of Congress, of May 31, 1870, restricts the action of the state with respect to foreigners immigrating to our country. 'No tax or charge' says the act, 'shall be imposed or enforced by any state upon any person immigrating thereto from a foreign country which is not equally imposed or enforced upon every person immigrating to such state from any other foreign country, and any law of any state in conflict with this provision is hereby declared null and void.' (16 Stats. 144.)

"By the term 'charge,' as here used, is meant any onerous condition, it being the evident intention of the act to prevent any such condition from being upon any person immigrating to the country which is not equally imposed upon all other immigrants, at least upon all others of the same class. It was passed under and accords with the spirit of the Fourteenth Amendment."

In addition to expounding the meaning of the word "protection" and the phrase "equal protection" these authorities also indicate with much clearness the meaning which should be given to the word "security" and the term "equal security," particularly as it affects property. Inasmuch as the questions involved in this discussion relate entirely to property, it is unnecessary to consider security to the person.

In view of the meaning which has been given in the jurisprudence of the United States to equal protection and security, so succinctly and so admirably put by Mr. Justice Matthews when he said "*and the equal protection of the laws is a pledge of the protection of equal laws*," it becomes evident that the treaty provision under consideration entitles Japanese subjects to have their property treated in the same manner, subject to the same restraints, disabilities and impositions *and none others*, as are imposed on like property of citizens of the United States.

But we are not forced to rely solely upon the evident guarantee of "equal protection" of the laws, however that may be understood, in order to justify in this case a demand that Japanese subjects in California shall in this matter be treated as citizens of the United States. The treaty is perfectly explicit on this point. It says that Japanese subjects in the United States shall as to the "protection and security of their persons and property enjoy in this respect the same *rights and privileges* as are or may be granted to native citizens or subjects." Therefore every *right* and every *privilege* which could attach to the person of an American citizen must and does belong to the persons of a subject of Japan; and every *right* and every *privilege* which would attach to a given piece or kind of property in the hands of a subject of Japan. You have but to find the *right* or the *privilege* possessed by the American citizen, as to his person or his property, in order to determine the measure of the *right* and *privilege* to be enjoyed by the subject of Japan.

It will, however, be evident from the cases already quoted, as well as from those to be quoted hereinafter, that the phrase "equal protection" covers *not only matters of adjective law, that is, matters of procedure, but that it covers also questions of substantive law, that is, matters of right.*

Moreover, the cases make it perfectly clear that the matters of substantive law have to do not only with mere police protection, but that the provision also secures exemption from, as the courts have so frequently put it, "exceptional burdens or charges." While it is true that in the cases in which this

language has been used, the question before the court was the question of taxation, yet it was also used, for example, in *In re Ah Fong* to cover discriminations in the matter of occupations. It is perfectly clear, however, that the protection called for by this treaty, and the "same rights and privileges" for which the treaty stipulates, include more than either police protection or matters of taxation. For example: in the second paragraph of article I, it is provided that "They (citizens of one resident in the territory of the other) shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects;" while article II provides for police protection and exemption from arbitrary violation of domicile. Article VI also deals with the question of the exemption of the citizens of either, resident in the other, from the imposition of transit duties, etc., and places the alien on the same basis with reference thereto as nationals.

The stipulation of article XV provides that: "The citizens or subjects of each of the high contracting parties shall enjoy in the territories of the other the same protection as native citizens or subjects in regard to patents, trade-marks, and designs, upon fulfillment of the formalities prescribed by law," showing that "protection" means more than merely police protection, and that it means indeed the granting of the same rights and privileges to aliens that are granted nationals. This follows from the fact that Japanese are permitted to take out patents, trade-marks and designs in the United States, upon the same terms as American citizens upon "the fulfillment of the formalities prescribed by law." The protection here means not only the right to resort to the courts to maintain a patent right but the granting of the patent right itself. Indeed, the tenor of the whole treaty goes to show that the statement above made is accurate, namely, that you have to find but the right or privilege possessed by the American citizen with reference either to his person or his property, and you have found the right or privilege with reference either to person or property, to which under the terms of this treaty, the Japanese subjects are entitled.

On this point it is not without interest to note the provisions of certain other articles of this treaty.

In article IV, which stipulates for favored nation treatment in matters of reciprocal freedom of commerce and navigation, it provides that the citizens or subjects of the contracting parties "equally with the citizens or subjects of the most favored nations," shall have the rights specified. Article V provides for favored nation treatment on import duties and stipulates for no "other or higher duties or charges on the exportation of any articles to the territories of the other than are or may be payable on the exportation of the like article to any other foreign country." The same article contains like stipulation with reference to prohibitions either as to importation or exportation from the one to the other, and requires that none such shall be imposed "which shall not equally extend to the like article imported from or exported to any other country."

The provisions of article VI, already referred to, also stipulate for a "perfect equality of treatment with native citizens or subjects in all that relates to warehousing, bounties, facilities and drawbacks." Article VIII, which provides for national treatment in the matter of importation of goods in the vessels of the one or the other, requires that the reciprocal charges shall be the same on the vessels of the other as if "such articles were imported in national vessels." It further says that "such reciprocal equality of treatment shall take effect without distinction, whether such articles come directly from the place of origin or from any other foreign place."

Under article IX national treatment is accorded to the vessels of either in the territory of the other in the matter of loading and unloading, and it is provided that "no privileges shall be granted by either party to national vessels which are not equally, in like cases, granted to the vessels of the other country; the intention of the contracting parties being that in these respects the respective vessels shall be treated on the footing of perfect equality." (Article XI, providing for duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar duties, also requires equality of treatment between the aliens and nationals of either. This article stipulates that no such duties shall be levied or imposed, "which shall not equally, under the same conditions, be imposed on national vessels in general, or on vessels of the most favored nation.")

Article XII provides for most favored nation treatment to vessels engaged in postal service, and the article requires that vessels of one "shall enjoy, in the ports of the territories of the other, the same facilities, privileges and immunities as are granted to like vessels of the most favored nation." Article XIII provides for most favored nation treatment in the matter of coasting trade.

It is thus evident that the purpose of the whole treaty is to secure absolute reciprocal and equal treatment either upon the basis of nationals, or upon the basis of the most favored nation.

It is not believed that any justification lies either in morals or international law for a suggestion that in the matter under consideration, the Japanese have equal privileges with citizens of the United States, because while it is true Japanese subjects may not devise their property to Japanese subjects, yet American citizens are also prohibited from devising their property to Japanese subjects, and therefore the Japanese have in this respect national treatment. Of course, if this contention were sound, it is scarcely possible to conceive of any limitation which might not properly be imposed upon Japanese subjects with reference to their acquisition, possession or transmission of property, which would be violative of the treaty provisions. It is unnecessary to point out that this, indeed, would be "to hold the promise to the ear and break it to the hope."

Such an interpretation of a treaty provision could be matched only by those early instances recorded by Grotius and Vattel, such as, for example, that which records that Plateans, having promised the Thebans to restore their prisoners, restored them after they had put them to death. Or the case of Pericles, who, having promised to spare the lives of such of the enemy as would lay down their iron or steel, ordered all those to be killed who had iron clasps on their cloaks. Or the Roman general, who, having agreed with Antiochus to restore to him half of the fleet, caused each ship to be sawed in two. Or Rhadamistus, who, having sworn to Mithridates that he would not employ either poison or steel against him, caused him to be smothered under a heap of clothes. Of a like character was the act of Cleomenes, who, having concluded a truce of some days with the people of Argos, and finding them asleep on the third night, in reliance of the faith of the treaty, he killed a part of them and made the rest prisoners, alleging that the nights were not comprehended in the truce. And likewise was the action of the Athenians, who, having promised to retire from the territory of the Boetians, claimed a right to remain in the country under the pretext that the lands actually occupied by their army did not belong to the Boetians. Vattel also records that "Mahomet," emperor of the Turks, at the taking of Negropont, having promised a man to spare his head, caused him to be cut in two through the middle of the body. Tamarlane, after having engaged the city of

Sebastia to capitulate under his promise of shedding no blood, caused all the soldiers of the garrison to be buried alive. While the results of such a suggested interpretation would fortunately not be of the character chronicled in the historic instances above cited, it is submitted that the principle involved is the same, and there would be no justification or excuse for the placing upon a treaty an interpretation which would render its terms wholly nugatory.

Therefore, any failure by the State of California to meet the requirements of this treaty, any laying of any burdens or restraints upon Japanese subjects or their property beyond what is imposed on citizens of the United States equally and in the same way and manner, and derogation from the rights or privileges possessed by American citizens as to their persons or their property, constitutes an invasion of the rights secured to the Japanese subjects by this treaty, and is therefore a violation of the treaty. That the protection of title to property from hostile state legislation, falls within the purview of treaty stipulation covering property rights of aliens, is shown by a long line of cases, of which the following are among the more important: *Fairfax vs. Hunter's Leases*, 1 Wheat. 304; *Craig vs. Bradford*, 3 Wheat. 594; *Orr vs. Hodgson*, 4 Wheat. 435; *U. S. vs. Lariviere*, 3 Otto 188.

As already pointed out, the law under discussion does violate rights conferred upon Japanese subjects by the treaty guarantee of equal protection. First, because the law seemingly does not permit Japanese to inherit property which would be descendable to heirs if owned by American citizens; second, because it does not permit Japanese subjects to devise property which if owned by American citizens would be devisable; third, because it escheats to the State of California real and personal property which, if owned by American citizens, would not be escheatable.

In none of these cases do Japanese enjoy that equality of protection and security of property to which under the treaty they are entitled; in none of these respects do they enjoy the same *rights* and *privileges* as are enjoyed by American citizens and to which they are under the treaty entitled.

"Equal Protection—It may occur to the mind that some of the privileges instanced above may be within the last clause of the amendment, giving every 'person within its jurisdiction the equal protection of the laws'; but the first clause relates to citizen rights alone, and that later clause is leveled only against invidious discrimination by state law between persons equally entitled to the protection of law; it is only intended to insure equality before the law, not protection of privileges and immunities." (Brannan, Fourteenth Amendment, p. 70.)

Bemis vs. State (1915), 152 Pac. 456.

"Included in the right of personal liberty and the right of private property, partaking of the nature of each, is the right to make contracts for the acquisition of property." (*Adair vs. United States*, 208 U. S. 171.)

" * * * But, when a party appears to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the state; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court. * * *"

"Now, it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. 'Its true character cannot be changed by its collocation. * * *'"

State vs. Montgomery, 80 Am. St. Rep. p. 391.

" * * * While an alien is not entitled to the 'privileges and immunities' of a citizen, strictly as such, under the first clause of the Fourteenth Amendment which we have quoted, he is, while within our jurisdiction, entitled to the 'equal protection of the laws.'"

" * * * While it is held that the Fourteenth Amendment does not interfere with the police power of a state, it is also held that the police regulations must be impartial. The court said in *Barbier vs. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 'though in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose is limited in its application if, within the sphere of its operation, it affects alike all persons similarly situate, is not within the amendment.'" (*Minneapolis etc. Ry. Co. vs. Beckwith*, 129 U. S. 26, 9 Sup. Ct. Rep. 207; *State vs. Deering*, 84 Wis. 585, 36 Am. St. Rep. 948, 54 N. W. 1104.)

And the phrase "equal protection of the law" has been splendidly defined in the case of *Strawder vs. West Virginia*, 100 U. S. 303, as follows:

"The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

What is the meaning of "equal protection of the laws" as that phrase is used in the Fourteenth Amendment?

Freund, Police Power (p. 727):

" * * * For otherwise a state might close all profitable avocations to deprive resident aliens of any privileges accorded to foreigners by the comity of nations or to discriminate against them where equal treatment is guaranteed by treaty."

" * * * It would be unwarranted to infer from the peculiar power of the states over land tenures that the legal capacity of aliens is in other respects completely under their control, so that the duty of legal protection would apply only to such rights as the state chooses to allow aliens to acquire. * * *

Page 728:

" * * * ; but with regard to other occupations, even those requiring special skill, or moral qualifications, discrimination against resident aliens ought not to lie in the discretion of the states. The analogy of the disability to hold land, a survival of feudal conceptions, should not be extended. It has, accordingly, been held in Michigan that citizenship may not be made a requirement for engaging in the avocation of a barber."

" * * * For otherwise a state might close all profitable avocations to them, and, by preventing them from earning a livelihood, drive them away. Such a result would bring about international complications and can therefore be only a matter of national action. The federal adjudications in the matter of discrimination against Chinese in the laundry business, while involving also treaty rights, seem to support this position."

Page 729:

" * * * Aliens who are at the same time non-resident may, it seems, be discriminated against, in the absence of treaty stipulation, in the matter

of membership in corporations, and probably in other matters not affecting the fundamental rights or commerce." (*Italics ours.*)

Yick Wo vs. Hopkins (May 10, 1886), U. S. Sup. Ct. Rep., vol. 6, p. 1064.

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion, or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men.'"

"* * * ; for the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States."

Freund, *Police Power*, p. 549:

"* * * This view is in accordance with the doctrine of the common law that the right to alien is so essential to property that a condition annexed to grant of absolute property against its alienation is void as repugnant to the nature of the right granted. * * *"

Page 631:

"In the thirty years that have passed since the decision on the Slaughter House Cases the equality provision of the Fourteenth Amendment has, however, assumed an entirely different aspect. The principle of equality is relied upon more and more to check the exercise of governmental powers, and the controlling jurisdiction of the Federal Supreme Court is invoked with increasing frequency to give it effect."

"* * * The equal protection of the laws does certainly not mean equal participation in government, and its primary meaning is simply equal security in person and property."

Page 633:

"* * * In the Texas case it was said that the equal protection of the laws is denied where property is wrested from an individual without compensation for the benefit of another or of the public, and in the Nebraska case equal protection and due process are treated almost as meaning the same thing.

"The state courts likewise identify equality and due process of law. So it is said in *Millett vs. People*, that due process of law or the law of the land is the general public law binding upon all the members of the community, and not partial or private laws affecting the rights of private individuals or classes of individuals. * * *

"Equality is for the purpose of controlling the validity of legislation a more definite conception than liberty, for it has the advantage of being measurable. Government cannot be conceived without an infringement of liberty, while the claim of equality is consistent, in idea at least, with almost any form of governmental power. The power of criminal and civil legislation, the judicial power, the taxing power, and the police power, may all be exercised with a due regard for the principle of equality."

Connolly vs. Union Sewer Pipe Co., 22 Sup. Ct. Rep. 439 (March 10, 1902).

Page 439:

" * * * But upon this general question we have said that the guaranty of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' (*Missouri vs. Lewis*, 101 U. S. 22, 31, sub nom. *Bowman vs. Lewis*, 25 L. Ed. 989, 992.) We have also said: 'The Fourteenth Amendment, in declaring that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such is prescribed for all for like offenses.' (*Barbier vs. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357, 359.) This language was cited with approval in *Yick Wo vs. Hopkins*, 118 U. S. 356, 369, 30 L. Ed. 220, 226, 6 Sup. Ct. Rep. 1064, 1070, in which it was also said that the 'equal protection of the laws is a pledge of the protection of equal laws.' In *Hayes vs. Missouri*, 120 U. S. 68, 71, 30 L. Ed. 578, 580, 7 Sup. Ct. Rep. 350, 352, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, 'shall be treated alike, under like circumstances and conditions both in the privileges conferred, and in the liabilities imposed.' 'Due process of law and the equal protection of the laws,' this court has said, 'are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' (*Duncan vs. Missouri*, 152 U. S. 377, 382, 38 L. Ed. 485, 487, 14 Sup. Ct. Rep. 570, 572.) Many other cases in this court are to the like effect."

Page 439, second column:

"The equal protection demanded by the Fourteenth Amendment forbids

this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection.”

Page 440:

“But different considerations control when the state, by legislation, seeks to regulate the enjoyment of rights and the pursuits of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates.”

Claybrook vs. City of Owensboro, 16 Fed. Rep. 297:

“ * * * This section gives a citizen of the United States or of a state, and even persons who are not citizens, an additional guaranty of the enjoyment of their fundamental rights. This guaranty is not against individual action on encroachment, but against the state, and its laws and its officers. * * * This guaranty has rounded out and perfected our government, and will be a priceless heritage to posterity long after the race in whose behalf it was adopted has ceased to need its protection.

“Waiving all considerations of the question as to the rights of complainants as citizens of the United States, we proceed to inquire whether the act of 1871 and its amendments deny to complainants ‘the equal protection of the laws’ within the meaning of this section. * * * 2.”

“ * * * The equal protection of the laws guaranteed by this amendment must and can only mean that the laws of the states must be equal in their benefit as well as equal in their burdens, and that less would not be ‘the equal protection of the laws.’”

It is with pleasure that we cite from the most recent case which speaks upon this question so far as we have been able to find, *Truax et al. vs. Corrigan* (December 19, 1921), 42 Sup. Ct. Rep. 124, wherein Mr. Chief Justice Taft says:

“ * * * It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one’s right of life, liberty, and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. ‘All men are equal before the law.’ ‘This is a government of laws and not of men,’ ‘No man is above the law,’ are all maxims showing the spirit in which legislatures, executives and

courts are expected to make, execute and apply laws. But the framers and adopters of this amendment are not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

"(12) The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process.

"(13) Mr. Justice Field, delivering the opinion of this court in *Barbier vs. Connolly*, 113 U. S. 27, 32, 5 Sup. Ct. 357, 360 (28 L. Ed. 923), of the equality clause, said:

"Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment.'"

In *Heyes vs. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 573, the court, speaking through the same justice, said, the Fourteenth Amendment—

"Does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in privileges conferred and in liabilities imposed.

"Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class however limited, having the effect to deprive another class however limited of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against it, a larger class.

"Mr. Justice Matthews, in *Yick Wo vs. Hopkins*, 118 U. S. 356, 369, 6 Sup. Ct. 1064, 1070 (30 L. Ed. 220), speaking for the court of both the due process and equality clause of the Fourteenth Amendment, said:

"These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race, of color or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.'

"The accuracy and comprehensive felicity of this description of the effect of the equality clause are shown by the frequency with which it has been quoted in the decisions of this court. It emphasizes the additional guaranty of a right which the clause has conferred beyond the requirements of due process. * * *

Southern Pacific R. R. Co. vs. Greene (Feb., 1910), 30 Sup. Ct. Rep. 287:

"* * * The equal protection of the law means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation.

"That a corporation is a person, within the meaning of the Fourteenth Amendment, is no longer open to discussion. * * *

"* * * But none of the cases relied upon presents the questions under the conditions obtaining in the case at bar. We have here a foreign corporation within a state in compliance with the laws of the state, which has

lawfully acquired a large amount of permanent and valuable property therein and which is taxed by a discriminating tax."

We call particular attention to the fact that Mr. Justice Taft in the case (cited *supra*) reviews most of the cases which we have cited in this brief and which we contend are in point, and in that behalf the learned Justice says:

"Our conclusion, that the plaintiffs are denied the equal protection of the laws, is sustained by the decision in this court in *Truax vs. Raich*." (Here are cited the leading cases reviewed in this brief.)

It is to be noted also that the learned justice refers to the section of the Fourteenth Amendment as "the equity clause" as follows:

"In the first place the equity clause of the Fourteenth Amendment does not apply to the congressional, but only to state action."

In view of the recent case of *Terrace vs. Thompson*, 274 Fed. 841, wherein much reliance is placed upon the act of Congress, R. S. 2169, as justifying the classification made in the Alien Land Act, we think the above suggestion of the learned justice is exceedingly significant.

In re Grice (Feb., 1897, Circuit Court, Texas), 79 Fed. 627:

"* * * The Fourteenth Amendment to the Constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the law, imposes a limitation upon the exercise of all the powers of the state, which can touch the individual or his property. Whatever the state may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws, and by 'equal protection of the laws' is meant equal security under them to every one, under similar terms, in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens and charges than such as are equally imposed upon all others under like circumstances. This subject of equality before the law is a fundamental principle of English and American liberty, which not only has been held sacred in all latter-day constitutions, state and federal, but the principle has been guarded by the courts with jealous watchfulness, to see that the citizen may have guaranteed to him this inestimable privilege and condition. (*Barbier vs. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357; *Yick Wo vs. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064; *Dent vs. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231; *Ex parte Virginia*, 100 U. S. 339; *Duncan vs. Missouri*, 142 U. S. 382, 14 Sup. Ct. 570.) The Supreme Court of the United States, in an unanimous opinion on the equality of the citizens, in *Dent vs. West Virginia*, above, says:

"The great purpose of the requirement is to exclude everything arbitrary or capricious in legislation affecting the rights of the citizen."

The same court, speaking through Justice Matthews, in *Yick Wo vs. Hopkins*, *supra*, says: (here follows quotation from the case.)

"* * * We do not mean to say by this that the State of Texas does not have the power to prescribe regulations to promote the health, peace, morals, education and good order of its people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity. * * *"

"* * * The right to hold or sell property, and to make agreements and contracts concerning it, which may be believed by the owner to be for his betterment, is the most essential right of property. * * *"

"* * * Although the reasons alleged in support of the act by the state

are inapplicable and invalid, and do not properly state the purpose for which the act was really passed, of course there was a purpose behind so important a piece of legislation—one that formulated the thing and procured its passage. Such a purpose is patent upon its face, and is apparent from the history of the act. It is a purpose thoroughly appreciated by the court and recognized by the public, but it is such a purpose that the Constitution of the United States will not support, nor the courts thereof favor. The court can find no better language in this connection—almost prophetic in some respects—than that used by Judge Catron, of Tennessee, in two early cases, viz., *Wally vs. Kennedy*, 2 Yerg. 555, and *Vanzant vs. Waddel*, id. 270:

“The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law; the most of the community, and those who made the law, by another; whereas a like and general law, affecting the whole community equally, could not have been passed. The idea of people, through their representatives, making laws whereby are swept away the life, liberty and property of one or a few willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of the Magna Charta in England, which is, and for centuries has been, the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as a part of our Constitution. * * *”

Vol. 11, U. S. Comp. Stats., p. 14826:

“The term ‘police power’ denotes the power to impose restraints on private rights which are necessary for the general welfare of all. (*Union Ice & Coal Co. vs. Town of Ruston* [1914], 66 South. 262, 135 La. 898, L. R. A. 1915B, 859, Ann. Cas. 1916C, 1274.) * * *”

Freund, Police Power, page 635:

“* * * This principle lies at the foundation of the law of taxation, and applies equally to the police power. With reference to the latter it may be expressed by saying that to justify the imposition of a burden there must be some connection of causation or responsibility between the persons selected or the right impaired and the danger to the public welfare or the public burden which is sought to be avoided or relieved. * * *”

Alabama & N. O. Transp. Co. vs. Doyle (January 28, 1914), 210 Fed. 181:

“* * * However, there are some features of the statute which are not even within the shadow of the police power. * * *”

“* * * Such a provision is an arbitrary and oppressive interference with the right of contract; it bears no ‘reasonable relation’ to the public health or the public morals, or even to the ‘public welfare’, in the broadest conceivable sense of that phrase. * * *”

(a)

Some examples where the Alien Land Act of California denies to Japanese aliens the equality of treatment to which they are entitled under the terms of the treaty between the United States and Japan.

If we pick the Alien Land Act up from its four corners and read it critically, we may spell out from it the following particulars in which Japanese aliens are denied equality of treatment:

First: The law does not permit Japanese to inherit property, real or personal (stock), which would be descendable to heirs if owned by American citizens.

Second: The act does not permit Japanese aliens to devise property which, if owned by American citizens, would be deviseable.

Third: The act escheats to the State of California real and personal property which if owned by American citizens would not be escheatable.

Fourth: The act prohibits Japanese aliens from acquiring stock in agricultural land-owning corporations while American citizens may freely do so.

Fifth: The act prohibits Japanese alien parents from being guardians of the property of their own children, while that right is granted to American citizens.

Sixth: The act compels trustees or guardians of property of Japanese children to file reports while American citizens are subject to no such restrictions.

We should like to have it clearly explained, in view of the above specifications, how Japanese aliens are given under the Alien Land Act the "same rights and privileges" as those granted to the citizens of the state. (See Treaty, article I, third paragraph.)

VII.

THE TREATY OF 1911 BETWEEN THE UNITED STATES AND JAPAN IS THE SUPREME LAW OF THE LAND AND IS DETERMINATIVE OF THE RIGHTS OF JAPANESE ALIENS, RESIDENT OF CALIFORNIA, SO FAR AS SUCH RIGHTS MAY BE SPELLED OUT OF THE TREATY.

(a)

A narrow construction of the treaty between the United States and Japan can find no justification either in American constitutional law or international law or good morals.

(b)

The underlying basis of international law involves a liberal construction of treaties with a view to the founding of the rights of the nationals belonging to the parties to the treaty upon an equality basis.

We cannot enter upon a very elaborate discussion of the principles of international law which are controlling and applicable to the instant case. Much as we should like to review the question from the standpoint of international law, we are forced to remember that so far as the instant case is concerned the issue must be presented within the limits of issues properly defined by either national or municipal law. The only purpose which we have in introducing international law into this branch of our argument is to emphasize both the necessity and the good policy of a broad and liberal interpretation of those provisions of the treaty between the United States and Japan which speak on the question of equality of rights. From our study of international law we have gathered the following principles:

1. A nation has the right to exclude aliens from coming within its borders. (Vattel, book 2, chap. 7, sec. 94; Oppenheim's International Law, vol. 1, sec. 314.)

2. A nation has a right to admit aliens upon such terms as it deems satisfactory and proper. (Vattel, book 2, chap. 8, sec. 100; Oppenheim's International Law, vol. 1, 315.)

3. Aliens resident in a foreign country have no rights save those expressly given by the country to which they go. (Vattel, book 1, chap. 19, sec. 213.)

4. Aliens may be excluded from a foreign country by the local sovereign without reasons being given therefor. (Oppenheim; Westlake, vol. I, p. 217;

Halleck, vol. I, p. 493; Hall, 6th Ed., p. 211; Holland's Studies in International Law, pp. 178-179; Ralston's International Arbitral Law and Procedure, sec. 418 *et seq.*)

5. Aliens entering a foreign country must submit themselves to the laws of that country. (Oppenheim, subd. 7, chap. 3, part 2, vol. I.)

6. A country in which aliens are must see to it that the local laws are enforced with absolute impartiality and equality as between aliens and citizens. "The sovereign ought not to grant an entrance into his state for the purpose of drawing foreigners into a snare. As soon as he admits them he engages to protect them as his own subjects and to afford them perfect security as far as depends on him." (Vattel, book 2, chap. 8, sec. 104.)

"* * * A foreigner * * * cannot be outlawed in foreign countries, but must be afforded such protection of his person and property as is enjoyed by a citizen. The home state of the foreigner has by its right of protection a claim upon such state as allows him to enter its territory that such protection should be afforded. In consequence thereof every state is by the law of nations compelled to grant to foreigners equal protection before the law with its citizens as far as safety of person and property is concerned. * * *" (Oppenheim, vol. 1, pp. 375, 376.)

It is not contended that a country admitting aliens within its borders (we are not speaking now of treaty rights or rights under the Fourteenth Amendment) is bound to give to such aliens the same rights given to its citizens, nor is there any principle in international law which requires that a country should treat aliens on the same basis.

But a nation does have a right to expect, and under appropriate conditions to demand, that when its citizens have been permitted to enter a country, and have been allowed to acquire property of whatever kind or nature (not illegal), then the property of such citizens must, like their persons, receive the full protection of the laws, and the host nation may not arbitrarily misuse either person or property without laying foundations for representations and in appropriate cases recovery for the injuries it inflicts.

It is, however, equally well settled that when any country makes a distinction between the foreigners of different nationality who are found within its borders, when they practically classify them by nationality, that then and in that event the nationality discriminated against, while seemingly having no *legal right* to complain, does have just cause for objection as a matter of comity, and the authorities are clear in the opinion that such a course of conduct by one government against another justifies acts of retorsion by the one against the other. Hall says (6th Ed., p. 360):

"Retorsion is the appropriate answer to acts which it is within the strict rights of a state to do, as being general acts of state organization, but which are evidence of unfriendliness, or which place the subjects of a foreign state under special disabilities as compared with other strangers, and result in injuries to them. It consists in treating the subjects of the state giving provocation in an identical or closely analogous manner with that in which the subjects of the state using retorsion. Thus, if the productions of a particular state are discouraged or kept out of a country by differential import duties, or if its subjects are put at a disadvantage as compared with other foreigners, the state affected may retaliate upon its neighbors by like laws and tariffs."

Oppenheim (vol. 1, sec. 314), in a passage already quoted above, says:

"Every state is and must remain master in its own house, and such mastership is of especial importance with regard to the admittance of foreigners. Of course, if a state excluded all subjects of one state only, this

would constitute an unfriendly act, against which retorsion would be admissible; but it cannot be denied that a state is competent to do this, although in practice such wholesale seclusion will never happen."

The United States has in the past taken the position that a discrimination against citizens of the United States by another country in preventing them from purchasing real property, while permitting persons of other nationalities to do so, was an act such as justified it in making representations. In writing to Mr. Foster, Secretary of State Evarts stated, March 26, 1879:

"The Mexican law forbidding United States citizens from holding real estate in that country while the privilege is extended to other aliens may also be regarded as incompatible, if not with the letter, certainly with the spirit, of the treaty, the obvious purpose of which was to provide for equalities generally between our citizens and other foreigners in that republic." (Wharton, vol. 2, p. 436.)

While the treaty of 1831 between the United States and Mexico is herein referred to, its provisions on the point discussed were sufficiently vague to entitle the use of this expression by the secretary of state as indicating the position of the United States on the general question.

On another occasion (not strictly in point, but upon an analogous situation) Mr. Marcy, secretary of state, writing to Mr. Jackson, the American charge at Vienna, April 6, 1865, used an expression which may be repeated:

"All we can ask of Austria, and this we can demand as a right, is that in her proceedings against American citizens prosecuted for offenses committed within her jurisdiction she should give them the full and fair benefit of her system, such as it is, and deal with them as she does with her own subjects or those of other foreign powers." (Moore's Digest, vol. 6, p. 275.)

In view of this discussion it is submitted that while the California Alien Land Law violates no positive and absolute rights held by Japanese subjects under the principles of international law (and not regarding the positive provisions of treaty), in so far as the future acquisition of property is concerned, nevertheless the discrimination resulting from the law between Japanese subjects and foreigners of other nationalities, in the matter of the acquisition of property, is such as to amount to a violation of that comity which should exist between nations; and that such violation is an act of sufficient unfriendliness under the recognized principles of international law to justify the Japanese Government in acts of retorsion should it determine that such a course was the appropriate one for it to pursue. (For the nature of retorsion reference may also be made to Oppenheim, vol. 2, p. 31; Phillimore, vol. 3, sec. 8, and Vattel, book 2, sec. 341.)

With reference to the effect of the statute on the property *already acquired* by individual Japanese subjects, the matter may stand differently. If, as to any of such property, this act amounts to confiscation or other illegal deprivation of property, quite obviously, as indicated above, this would raise a question essentially different from that discussed above. It is, however, sufficiently clear (to note one case that will arise) that for California to regulate the line of descent or to regulate the matters of devise of property already acquired would not amount to such an act of confiscation, though for that state to apply retroactively to an estate of devise or inheritance already vested any such rule as that set forth in this statute in the matter of escheat would amount to such confiscatory action.

The following brief discussion is sufficient on this point:

The Constitution of the United States, article VI, provides that

"This Constitution and the laws of the United States which shall be made

in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

The courts have repeatedly construed this provision as avoiding any state statute contrary to the terms of a valid treaty. The earliest case in which the question was presented in which the Supreme Court passed upon and declared void a Virginia statute confiscating to the State of Virginia debts due from an American to a British subject, contrary to the provisions of treaty, was *Ware vs. Hylton* (1796), 3 Dall. 199. In that case Mr. Justice Chase said:

"It seems to me that treaties made by Congress, according to the confederation, were superior to the laws of the states; because the confederation made them obligatory on all the states. They were so declared by Congress on the 13th of April, 1787; were so admitted by the legislatures and executives of most of the states; and were so decided by the judiciary of the General Government and by the judiciaries of some of the state governments.

"If doubts could exist before the establishment of the present national government, they must be entirely removed by the 6th article of the Constitution, which provides 'That all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution, or laws, of any state to the contrary notwithstanding.' There can be no limitation on the power of the people of the United States. By their authority the state constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the state constitutions, or to make them yield to the General Government, and to treaties made by their authority. A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a state legislature can stand in its way. If the construction of a state law (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty, and fall before it; can it be questioned, whether the less power, and act of the state legislature, must not be prostrate. It is the declared will of the people of the United States that every treaty made by the authority of the United States, shall be superior to the constitution and laws of any individual state, and their will alone is to decide. If the law of a state, contrary to a treaty, is not void, but voidable only by a repeal or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole. The people of America have been pleased to declare that all treaties made before the establishment of the National Constitution, or laws of any state, contrary to a treaty, shall be disregarded."

This constitutes and is recognized as the classic exposition of the principles laid down.

In *Baker et al. vs. Portland* (1879), 5 Sawy. 566, 2 Fed. Cases, No. 777, a suit was brought before Deady, district judge, to enjoin the city of Portland from enforcing an act of the legislature of that state which was entitled "An act to prohibit the employment of Chinese laborers on the improvements of streets and public works in this state." In considering the questions presented before them, Judge Deady, after reciting articles V and VI of the treaty between the United States and China of 1858 and 1868, and article VI of the additional article of 1858, providing that "Chinese subjects visiting or residing in the United States shall enjoy the same privileges,

immunities and exemptions in respect to travel or residence as may be then enjoyed by the citizens or subjects of the most favored nation," said:

"This treaty, until it is abrogated or modified by the political department of the government, is the supreme law of the land, and the courts are bound to enforce it fully and fairly. An honorable man keeps his word under all circumstances, and an honorable nation abides by its treaty obligations, even to its own disadvantage.

"The state cannot legislate so as to interfere with the operation of this treaty or limit or deny the privileges or immunities guaranteed by it to the Chinese residents in this country. As was said by Mr. Justice Field in the 'queue ordinance case,' lately decided in the circuit court for the district of California (*Ho Ah Kow vs. Nunan*, Case No. 6, 546), to the National Government 'belongs exclusively the treaty making power and the power to regulate commerce with foreign nations, which includes intercourse as well as traffic. * * * That Government alone can determine what aliens shall be permitted to land within the United States and upon what conditions they shall be permitted to remain.'

"It will be observed that the treaty recognizes the right of the Chinese to change their home and allegiance and to visit this country and become permanent residents thereof, and as such residents it guarantees to them all the privileges and immunities that may be enjoyed here by the citizens or subjects of any nation. Therefore, if the state can restrain and limit the Chinese in their labor and pursuits within its limits, it may do the same by the subjects of Great Britain, France or Germany.

"True this act does not undertake to exclude the Chinese from all kinds and fields of employment. But if the state, notwithstanding the treaty, may prevent the Chinese or the subjects of Great Britain from working upon the street improvements and public works, it is not apparent why it may not prevent them from engaging in any kind of employment or working at any kind of labor.

"Nor can it be said with any show of reason or fairness that the treaty does not contemplate that the Chinese shall have the right to labor while in the United States. It impliedly recognizes their right to make this country their home, and expressly permits them to become permanent residents here; and this necessarily implies the right to live and labor for a living. It is difficult to conceive a grosser case of keeping the word of promise to the ear and breaking it to the hope than to invite Chinese to become permanent residents of this country upon a direct pledge that they shall enjoy all the privileges here of the most favored nation, and then to deliberately prevent them from earning a living and thus make the proffered right of residence a mere mockery and deceit. In *Chapman vs. Toy Long* (Case No. 2, 610), this court, in considering these provisions of this treaty, said: 'The right to reside in the country, with the same privileges as the subjects of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these powers.'

"Whether it is best that the Chinese or other peoples should be allowed to come to this country without limit and engage in its industrial pursuits without restraint is a serious question, but one which belongs solely to the National Government. Upon it there has always been a difference of opinion, and probably will be for years to come.

"But so far as this court and the case before it is concerned, the treaty furnishes the law, and with that treaty no state or municipal corporation thereof can interfere. Admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home and destroying the

treaty and overriding the treaty-making power altogether. But it is not necessary to consider further this feature of the case, because this demurrer must be sustained on other grounds."

The case came on for rehearing before Mr. Justice Field and Deady, district judge, where the decree sustaining the demurrer was affirmed and the bill dismissed. The following appears at the end of the case as printed in Federal Cases:

"Note (from original report)—It is said that the state has the same right as an individual to say who it will employ. This proposition assumes that the state is the employer of persons who work upon street improvements. But this is denied upon the ground that the owner of the property being compelled to pay for the improvement is the real employer, and that the state only interferes to compel the owner to make the improvement, and to secure uniformity in the character and time of doing the same.

"But admitting for the present, that the state has such a general right, and further that it is the employer of persons who work upon street improvements under contractors, yet the state, being a member of the Union, and subordinate to the Constitution, laws and treaties of the United States, in the exercise of its powers, it may be restricted in the exercise of this right in particular instances, by the operation of such Constitution, laws or treaties. For instance the state has the general power of taxation, but as a member of the Union, it is restrained in the exercise of this power by the operation of the Constitution and the laws of the United States, so that it is in effect prohibited from taxing articles of great value, the property of its citizens, because the same are also the agencies or means by which the National Government exercises its comparatively supreme powers. The bonds and notes of the United States, issued by it in pursuance of its power to borrow money, are instances in point.

"Therefore, if the state cannot exercise this general right to say who it will employ in this class of cases without coming in conflict with the operation of the treaty, then it is virtually prohibited from so doing. This treaty having guaranteed to the Chinese the right to reside here permanently with the same privileges and immunities as the subjects of Great Britain, Germany and France, which certainly includes the right to labor for a living, if it includes anything, the state cannot, in the exercise of any of its admitted general powers, limit or deny this right.

"If this act had provided that no alien should be employed on street improvements or public works it might be said that it did not discriminate against Chinese and was therefore not obnoxious to the charge of infringing the treaty. But as it is, the act in effect denies the Chinese the privileges of laboring for a living in a field where it permits all other aliens to be employed without restriction, and thus so far denies to them the privileges and immunities enjoyed by the subjects of other nations, which is directly contrary to the treaty.

"The only legal remedy for the evils, real or fancied, of Chinese or other immigration, is by an appeal to the National Government, in whom the power over the subject is exclusively vested. But the fact is, the anti-Chinese legislation of the Pacific Coast is but a poorly disguised attempt on the part of the state to evade and set aside the treaty with China, and thereby nullify an act of the National Government. Between this and 'the firing on Fort Sumter' by South Carolina, there is the difference of the direct and indirect—and nothing more."

It is unnecessary to multiply citations to this point. The doctrine of the

supremacy of treaty provisions over statute or municipal legislation is too well settled to admit of serious question.

Moreover, the courts have held that the supremacy of treaty over state statutes is applicable to cases affecting the rights of aliens with reference to real estate. In the case of *Hauenstein vs. Lynham* (1880), 100 U. S. 483, where the question was whether a treaty giving aliens inheriting property a period in which to sell it and remove the proceeds could be overridden by a state statute, the court said:

"In *Chirac vs. Chirac*, 2 Wheat. 259, it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country. The state law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal vs. Banks*, 10 Wheat. 181, and with respect to the British treaty in 1794, in *Hughes vs. Edwards*, 9 Wheat. 489. A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a state. (*Orr vs. Hodgson*, 4 Wheat. 453.) By the British treaty of 1794, 8 Stat. at L., 116, 'All impediment of alienage was absolutely leveled with the ground despite the laws of the state.' It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union. (*Fairfax vs. Hunter*, 7 Cranch. 627; see *Ware vs. Hylton*, 3 Ball. 242; *Droit vs. D'Aubaine*, 8 Ops. Attys. Gen. 417.) Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says:

"'Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, within the treaty making power and may be adjusted by it.'" (Treat. on the Const. and Gov. of the U. S., 204.)

"If the National Government has not the power to do what is done by such treaties, it cannot be done at all, for the states are expressly forbidden to 'enter into any treaty, alliance, or confederation.' (Const., art. 1, sec. 10.)

"It must always be borne in mind that the Constitution, laws and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. This is a fundamental principle in our system of complex national policy. See, also, *Shanks vs. Dupont*, 3 Pet. 242; *Foster vs. Neilson*, 2 Pet. 253; *Cherokee Tobacco*, 11 Wall. 616 (78 U. S. XX 227); Mr. Pinkney's Speech, 3 Elliott, Const. Deb. 231; *People vs. Gerke*, 5 Cal. 381."

Inasmuch, therefore, as the treaty gives to Japanese subjects the same rights as to the kinds of property they are entitled to acquire and possess, that are possessed by citizens of the United States as to such kinds of property, and inasmuch as this statute fails to give to Japanese subjects the right to devise or (probably) inherit real property-rights which citizens of the United States do possess as to real property, the statute is invalid and of no effect under the constitutional principle that makes a treaty the supreme law of the land and state laws inconsistent therewith a nullity.

(II) *Rights possessed by Japanese subjects by reason of the provision of the Constitution of the United States itself, irrespective of the question of rights possessed thereunder by virtue of treaty.*

The Fourteenth Amendment to the Constitution of the United States provides in its first section:

"Nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws."

Probably the first question that presents itself here is whether or not an alien falls within the meaning of "persons" as used in this amendment. The courts have repeatedly held he does, as will be seen from the cases hereinafter cited and quoted. It is unnecessary at this point to do more than quote one expression from the Supreme Court opinions, which we have done (*supra*).

VIII.

THE RIGHT POSSESSED BY RESIDENT ALIEN JAPANESE TO ACQUIRE, CONVEY, TRANSMIT AND INHERIT CAPITAL STOCK OF CALIFORNIA CORPORATIONS IS GUARANTEED TO THEM UNDER THE CONSTITUTION AND LAW OF THE UNITED STATES IRRESPECTIVE OF THE TREATY BETWEEN THE UNITED STATES AND JAPAN.

The Alien Land Act of California, so far as it deprives plaintiffs of the right freely to sell and purchase capital stock of corporations, conflicts with section 1, article XXIV of the Constitution of the United States.

The Fourteenth Amendment, being section 1 of article XIV of the Constitution of the United States, reads as follows:

"Section 1. All persons, born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

If there is any doubt about the provisions of the treaty between the United States and Japan being broad enough to protect plaintiff Satow in his right to purchase or sell capital stock of California corporations on an equality with the citizens of the United States, residents of California, it would seem that the decisions rendered under the Fourteenth Amendment would clearly protect him in that right.

The question is very sharply presented, so far as plaintiff Satow is concerned, as to whether the State of California may arbitrarily create a class of persons to which Satow belongs and deny to that class the rights or right to purchase and sell personal property when it is admitted that this right is freely granted to all other resident aliens and citizens.

If the denial of this right is sought to be justified under the police powers of the state then surely we should have presented to us a specification as to just what particular police power is invoked and especially whether the exercise of such police power is sought to be justified as tending to protect the public health, public safety, public morals or the public welfare. It would be interesting to know how the ownership of stock in an agricultural land-owning corporation, by resident alien Japanese, can possibly tend to affect public health, safety, morals or welfare, in view of the fact that so far as the act is concerned the State of California permits non-resident aliens, who never have stepped foot upon California soil and never intend to do so, to own stock in agricultural land-owning corporations. In other words, we should like to have it pointed out as to just what the basis of the discrimination can be if it is sought to justify discrimination under the police powers of the state.

We have already shown in our discussion under the treaty that not only is the resident alien Japanese denied the right to own stock in corporations described, but he is denied the further right (a) to transmit such stock

already owned by him to such of his heirs as are alien Japanese residents (citizens or non-citizens) or (b) to himself inherit such stock either from citizens or non-citizens.

It has been very clearly decided that "the guarantees of protection contained in the Fourteenth Amendment extend to all persons within the territorial jurisdiction of the United States, without regard to difference of race, color or nationality." (*Yick Wo vs. Hopkins*, 118 U. S. 356.)

We have already shown that the Alien Land Act does not strike down any rights which a Japanese alien has, so far as his person is concerned or his occupation, but it does affect directly his property rights and we mean by that, that it affects his right to possess, acquire and dispose of property.

While we may cite many cases where states have attempted to discriminate in their laws against resident aliens in the matter of

- (a) Taxation,
- (b) Occupation,
- (c) Ownership of real property,

we are unable to find a single case where any state has even MADE THE ATTEMPT BY LEGISLATION to prevent a resident-alien from purchasing and owning personal property. So far as our study has gone we affirm that the Alien Land Act of California is unique in this regard and goes further than any statute which has been called to our attention. Abortive attempts have been made to discriminate against aliens. (*In re Tiburcio Parrott*, 1 Fed. 481; *In re Ah Chong*, 2 Fed. 733; *Yick Wo vs. Hopkins*, 118 U. S. 356; *Barbier vs. Connolly*, *infra*; *Hing vs. Crowley*, *infra*.)

An attempt was made in California to discriminate in the matter of a poll tax levied exclusively on resident-alien (*In the Matter of Heikich Terui on Habeas Corpus*, 62 Cal. Dec. 311; *In the Matter of Guillermo D. Kotta on Habeas Corpus*, 62 Cal. Dec. 315), but the supreme court of California held such legislation to be contrary to the Fourteenth Amendment to the Constitution of the United States.

Let us concede *for the purpose of argument only* that a state has the right to control the devolution of the title to real property within its territorial jurisdiction and that involved therein is the right even to discriminate against resident aliens in the matter of the ownership and control of real property.

Chirac vs. Chirac, 2 Wheat. 259, 272; *Haucenstein vs. Lynham*, 100 U. S. 483, 484; *De Vaughan vs. Hutchinson*, 165 U. S. 566, 570; *Clarke vs. Clarke*, 178 U. S. 186; *Blythe vs. Hinckley*, 180 U. S. 333.

We may go further and sum up generally as the learned justice did in the opinion in *Raich vs. Truax*, 219 Fed. 273, the generally known but improperly called exceptions to the non-discrimination principle of the Fourteenth Amendment. These so-called exceptions are not exceptions at all, but each one may be explained by arguments which show that the state in passing the so-called discriminatory legislation against resident aliens is depriving them of a political, rather than a civil right, or that the state was acting in the capacity of a proprietor with respect to "conducting its business" (*Heim vs. McCall*, 36 Sup. Ct. 82). These so-called exceptions are as follows: (a) That the state was legislating concerning the devolution of real property; (b) the right to take the common property of the state such as fish and game; (c) the right to employ citizens alone on public works; and (d) the right to exercise the elective franchise.

In the case of *Raich vs. Truax*, 239 U. S. 33 (Nov. 1, 1915), Mr. Justice Hughes, in holding an act passed under the initiative provision of the constitution of Arizona unconstitutional, which act compelled an employer

working over five men to have not less than eighty per cent "qualified electors or native-born citizens of the United States", said on the subject of discrimination and in answer to the argument that the act could be justified as a reasonable discrimination under the police powers of the state:

"The discrimination defined by the act does not pertain to the regulation or distribution of the public domain or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against (40) both aliens and the citizens of other states. Thus, in *McCready vs. Virginia*, 94 U. S. 391, 396 (24 U. S. [L. Ed.] 248), the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the state, and an analogous principle was involved in *Patson vs. Pennsylvania*, 232 U. S. 138, 145, 146 (34 S. Ct. 28), 58 U. S. (L. Ed.) 539, where the discrimination against aliens upheld by the court had for its object the protection of wild game within the states, with respect to which it was said that the state could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions or within those relating to the devolution of real property (*Hauenstein vs. Lynham*, 100 U. S. 483 (25 U. S. [L. Ed.] 628); *Blythe vs. Hinckley*, 180 U. S. 333, 341, 342 (21 S. Ct. 390, 45 U. S. [L. Ed.] 557); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprises. * * *

It is obvious that the statute under consideration runs against all aliens ineligible to citizenship in the United States, no matter what their occupations may be, no matter what their condition in life, how rich or how poor, and without regard to their respective places of residence. In other words, the statute affects the alien persons subjected thereto to its full limitations and leaves untouched other aliens and also citizens of the United States, even though such aliens or citizens are situated in respect of conditions or location identical with persons excepted from the operation of the statute. Discrimination, therefore, is not even based upon occupation, and appears to be entirely a matter of the color of a man's skin or his race. The justification for such discrimination, so far as any justification has been attempted in any briefs which we have read or discussions which we have heard, is found in a sort of lone reliance upon the federal laws governing the matter of eligibility to citizenship, and especially section 2169 R. S., which says in substance that:

"Those aliens being free white persons or being aliens of African nativity or of African descent are the only ones who can be naturalized."

We have never been able to understand how this federal statute on naturalization can justify discrimination involved in the instant case, and it further clearly appears that while Congress may discriminate, the state, under the Fourteenth Amendment, cannot do so.

It is significant that in the second sentence of section 1 of article XIV of the Constitution of the United States and in the two latter portions thereof the word "citizens" is dropped and the word "person" appears. We are bound to assume that of the two words "person" is wider in scope and connotes more than the word "citizen". In other words, all citizens are persons but only a limited number of persons are citizens of the United States. It will also be observed that the words "privileges and immunities" are dropped and the much broader words "life, liberty and property" and the "equal protection of the law" are substituted. It should also be said

that the larger words used in connection with the words "persons" include privileges and immunities, but on the other hand the expression "privileges and immunities" would not necessarily include all that is comprehended within the scope of the other words used. This analysis is splendidly summed up in the dissenting opinion of Mr. Justice Swayne in the Slaughter House Cases, 16 Wall., at page 127, as follows:

"In the next category, obviously *ex industria*, to prevent, as far as may be, the possibility of misinterpretation, either as to persons or things, the phrases 'citizens of the United States' and 'privileges and immunities' are dropped, and more simple and comprehensive terms are substituted. The substitutes are 'any person', and 'life', 'liberty' and 'property', and 'the equal protection of the laws'. Life, liberty and property are forbidden to be taken 'without due process of law', and 'equal protection of the laws' is guaranteed to all. Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property and of all solid individual and national prosperity. 'Due process of law' is the application of the law as it exists in the fair and regular course of administrative procedure. 'The equal protection of the law' places all upon a footing of legal equality and gives the same protection to all for the preservation of life, liberty and property and the pursuit of happiness."

The case of *State vs. Montgomery*, 94 Me. 192, contains a very full discussion on the rights of an alien under the Fourteenth Amendment, and we quote from the opinion in that case as follows:

"* * * it allows no impediments to the acquisition of property and the pursuit of happiness to which all are not subjected; it suffers no other or greater burden or charges to be laid upon one than such as are equally borne by all others. * * * It secures to all persons their civil rights upon the same terms."

"* * * when they are subjected to no restrictions in the acquisition of property, the enjoyment of personal liberty and the pursuit of happiness, which do not greatly affect others; when they are liable to no other or greater burdens and charges than such as are laid upon others; and when no different or greater punishment is enforced against them for a violation of the laws."

"In Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. Rep. 18, it was declared that 'many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not in any just sense incidents or elements of slavery. Such, for example, would be * * * denying to any person or class of persons the right to pursue any peaceful vocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment. * * * The Fourteenth Amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.'" (P. 392 Am. St. Rep., vol. 80.)

"But, on the other hand, an alien is not a citizen. He is, however, a 'person' whom the state cannot deprive of life, liberty or property without due process of law, and to whom the state cannot deny, while he is within

its jurisdiction, 'the equal protection of the laws'. This was settled in *Yick Wo vs. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064." (P. 390, Am. St. Rep., vol. 80.)

"See, also, *Fraser vs. McConway & Torley Co.*, 82 Fed. 257. While an alien is not entitled to the 'privileges and immunities' of a citizen, strictly as such, under the first clause of the Fourteenth Amendment, which we have quoted, he is, while within our jurisdiction, entitled to the equal protection of the laws." (P. 391, Am. St. Rep., vol. 80.)

"The inhibition of the Fourteenth Amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. (*Jembina Min. Co. vs. Penn.*, 125 U. S. 181, 8 Sup. Ct. Rep. 737; *Janesville vs. Carpenter*, 77 Wis. 288, 20 Am. St. Rep. 123, 46 N. W. 128; *Nashville etc. Ry. Co. vs. Taylor*, 86 Fed. 168.)"

"While it is true, as a general proposition, that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection, yet it is equally true that such a classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis. (*Gulf etc. Ry. Co. vs. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255. See *Pearson vs. Portland*, 69 Me. 278, 31 Am. Rep. 276.)"

"Nor can this discrimination be sustained as a constitutional exercise of the police power of the state. It must be noticed that the discrimination is not against a class, as criminals, as paupers, as intemperate, as disqualified by character or habits, or as harmful to society; but against a class solely as aliens. Such a discrimination is forbidden. (*Gulf etc. Ry. Co. vs. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255.)"

Judicial discussions of the meaning of the Fourteenth Amendment.

With the fact in mind that the amendment does apply to aliens, it is desirable to secure a general view of the meaning which has been attached to this clause by the federal courts, especially the Supreme Court of the United States.

One preliminary remark may at this point be properly made, and that is that this amendment, though providing for "the protection of equal laws", does not prohibit the state from proper classification of persons within it into groups or classes; on the contrary, the states have full and complete power to make any and every proper classification which they may desire of persons within their jurisdiction. The legality of the present law *vis a vis* the constitutional amendment will therefore turn upon whether or not the classification is a proper one. The following extracts from some of the more important cases bearing upon the subject, and decided by the Supreme Court, should be considered with this principle always in mind.

The cases for this discussion will be arranged chronologically, a plan which will best give the development of the principle and its present status.

The examination may begin by a reference to the words of Mr. Justice Miller in the *Slaughter House Cases* (1872), 15 Wall. 36, where, speaking of the provisions of the amendment, he said:

"We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."

Seemingly it was not until seven years later that the possibilities of the principle incorporated in the amendment began to be appreciated. Such cases as *Munn vs. Illinois* (1876), 94 U. S. 113, dealing with the regulation of grain elevator charges, and *Kirtland vs. Hotchkiss* (1879), 100 U. S. 491, dealing with discriminatory taxation, were discussed apparently without any consideration being given to the equal protection clause, though both cases involved matters as to which, under the later decisions, that clause might have been invoked.

However, in *Bowman vs. Lewis* (1879), 101 U. S. 22, the meaning of this provision was raised by counsel for the parties and the court discussed the matter at some length. The case involved a discrimination in the matter of taking appeals to the supreme court of Missouri, such an appeal being freely allowed from certain localities in Missouri and conditionally allowed in other sections.

Five years later, 1884, the Supreme Court had the question raised in *Barbier vs. Connolly* (1884), 113 U. S. 27, a case now considered as the leading case upon the question. (See Watson on the Constitution, vol. II, pp. 1634-5.)

In the meanwhile, however, Mr. Justice Field had on circuit decided the Railroad Tax Cases (1882), 13 Fed. 722, the *County of Santa Clara vs. Southern Pacific Ry.* (1883), 18 Fed. 285, and *In re Ah Fong* (1884), 3 Sawy. 144, s. c. Fed. Cas. Bo. 102.

Mr. Justice Field also gave the opinion in *Barbier vs. Connolly*, which involved the legality of a municipal regulation of San Francisco prescribing that laundries and wash houses within certain limits must be closed for certain specified hours of each day.

At the same term of court Mr. Justice Field considered the same question in *Soon Hing vs. Crowley* (1884), 113 U. S. 703, which also involved the construction of a San Francisco municipal regulation of the same general purport as that under consideration in *Ah Fong*, *supra*.

In 1885 Mr. Justice Matthews gave the matter careful consideration in the Kentucky Railroad Tax Cases (115 U. S. 321), the question involved being the legality of certain discrimination in the matter of taxing railroads, the discrimination consisting, *inter alia*, in calling railroad property "real estate" and then assessing it on a basis different from that employed in assessing farm lands, town lots, etc.

Mr. Justice Field was again called upon to discuss the matter in *Missouri Pacific Ry. vs. Hume* (1885), 115 U. S. 512, where the question was raised over the provisions of a Missouri statute requiring railroads to fence their roadbeds, provide cattle guards, etc.

Probably the classic case, at least next after *Barbier vs. Connolly*, is that which was submitted to the Supreme Court in April, 1886, and decided the following month, the case of *Yick Wo vs. Hopkins* (1885), 118 U. S. 356. This was another of the laundry cases arising out of regulations of the municipality of San Francisco, and in this case the question concerned a regulation providing it should be unlawful for any person to engage in the laundry business without having first obtained the consent of the designated city officer.

In the case of *Hayes vs. Missouri* (1886), 120 U. S. 68, Mr. Justice Field again directed his attention to this matter. In this case the question arose over a provision of a Missouri statute which enacted that in criminal cases

arising outside of cities of over 100,000 inhabitants, the state should be allowed eight peremptory challenges to jurors, and that in such cities fifteen peremptory challenges should be allowed.

In *Missouri Pacific Railway Co. vs. Mackey* (1887), 127 U. S. 205, Mr. Justice Field once more addressed himself to this subject. In this case (argued and decided in April, 1888) it appeared that a Kansas statute had modified the fellow-servant rule as to negligence in all claims against a railway.

In December of 1888—the same year in which the last case was argued and decided—the Minneapolis and St. Louis Railway Company brought before the Supreme Court (*Minneapolis & St. Louis Ry. Co. vs. Beckwith* [1888], 129 U. S. 26) a statute of Iowa which provided that a railway corporation which neglected to pay for stock injured or killed for want of a fence on the side of its road, should be liable for double the value of the stock killed, and contended that it violated the provisions of the Fourteenth Amendment.

The next decision to be noted is that delivered in the great case of *Gulf C. & S. F. Ry. Co. vs. Ellis* (1896), 165 U. S. 150, in which Mr. Justice Brewer discussed and pronounced unconstitutional a Texas statute imposing an attorney's fee of not to exceed \$10.00 in addition to costs, upon railway corporations omitting to pay certain claims within a certain time after presentation, such statutory provision applying to no other persons or corporations.

In *Williams vs. State of Mississippi* (1897), 170 U. S. 213, Mr. Justice McKenna had under consideration the constitution and laws of Mississippi regarding electors, the laws being framed in such way as to admit of discrimination against negroes, though fair on their face. The question came on the ground that as only electors could be jurors, and as it was possible to keep negroes from being electors, therefore the plaintiff had been denied the equal protection of the laws since negroes could be prevented from sitting in juries. No actual discrimination was shown.

The case of *Magoun vs. Illinois Trust & Savings Bank* (1897), 170 U. S. 283, decided on the same day by the Supreme Court, and in which Mr. Justice McKenna also gave the opinion, will be considered later.

The next important decision to be noted is the *Atchison, Topeka & Santa Fe R. Co. vs. Matthews* (1898), 174 U. S. 96, where Mr. Justice Brewer again considered the question. This case is very like the case of *Gulf, etc., vs. Ellis, supra*, save that it provided for the recovery of damages caused by fire from the railway, eliminating the doctrine of negligence, and also provided, like the Texas statute, for the recovery of attorney's fees.

In *Field vs. Barber Asphalt Co.* (1903), 194 U. S. 618, there was involved the legality of certain tax discriminations made between resident and non-resident property owners in Kansas City, by permitting protests to be filed by residents only against projected improvements.

In 1906 the question arose (*Batchel vs. Wilson* [1906], 204 U. S. 36) as to the legality under the Fourteenth Amendment of an Ohio statute providing particular punishment upon bank officers in connection with certain crimes designated, which crimes originated from a maladministration of the bank funds. The unconstitutionality of the act was predicated "not on its provisions standing by themselves, but on its relation to other statutes".

The lower federal courts have expressed like opinions and delivered like judgments in cases involving discriminations against particular classes or aliens. In *re Tiburcio Parrott* (1880), 1 Fed. 481, the question arose as to the legality under the treaty between the United States and China which

granted to Chinamen in the United States most favored nation treatment, and to the constitutionality under the Fourteenth Amendment to the Federal Constitution, of a provision of the California constitution and legislation enacted to put the same into effect, which provided that no corporation formed under the laws of the State of California should, directly or indirectly, in any capacity employ any Chinese or Mongolians. The question was tried before Hoffman, J., who, after careful consideration of the matter, pronounced the provisions of the California constitution and laws contrary to the provisions of the treaty, and so null and void. He then considered the question from the standpoint of the provisions of the Fourteenth Amendment as we shall see hereafter when we quote fully from this case.

The same general question arose in the case of *In re Ah Chong* (1880), 2 Fed. 733, in which Sawyer, C. J., had under discussion a statute of California prohibiting all aliens incapable of becoming electors of the state from fishing in the waters of the state, from which case we shall quote fully later in this brief.

(a)

Japanese aliens are persons under the Fourteenth Amendment.

It has been very clearly decided that "the guarantees of protection contained in the Fourteenth Amendment extend to all persons within the territorial jurisdiction of the United States, without regard to difference of race, color or nationality." (*Yick Wo vs. Hopkins*, 118 U. S. 356, *supra*.)

(Brannan, Fourteenth Amendment, p. 58.)

"* * * Whereas as to life, liberty or property, it protects 'any person', and as to equal protection of the law, it protects 'any person within its jurisdiction' no matter whether a citizen of the United States or state or no citizen of either."

Syllabus: "(U. S. D. C., Mass.) The Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution are not limited in their application to citizens, but apply to all persons within the United States, including aliens, so that aliens cannot be deprived of their liberty without due process of law and are exempt from unwarranted searches and seizures." (*Colyer vs. Skeffington*, 265 Fed. 17.)

(b)

The classification attempted in the Alien Land Act is not a proper one under the Fourteenth Amendment.

(c)

We think we are able to state quite clearly the principles underlying the classification permitted under the Fourteenth Amendment.

Classification.

Truax vs. Corrigan, 42 Sup. Ct. Rep. 131 (December, 1921).

"Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand. Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the in-

dividual. We said, through Mr. Justice Brewer, in *Muller vs. Oregon*, 208 U. S. 412, Sup. Ct. 324, 52 L. Ed., 551, 13 Ann. Cas. 957, that

"It is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking." * * *

Connolly vs. Union Sewer Pipe Company, 22 Sup. Ct. Rep. 431 (March 10, 1902).

We call special attention to the fact that the cases of *Magoon vs. Illinois Trust and Savings Bank*, 18 Sup. Ct. Rep. 594, and *American Sugar Refining Company vs. Louisiana*, 21 Sup. Ct. Rep. 43, are reviewed in the above case and it is shown that the classifications attempted in the two cases are different in character from the attempted classification in *Connolly vs. Union Sewer Pipe Company*, *supra*.

Particular attention is called to the fact that in the two cases cited it was held that "the power to tax persons and property is an incident to sovereignty and the extent to which it may be exerted has been indicated in numerous cases". In this connection the two California cases, *In re Heikich Terui*, on *Habeas Corpus*, 62 Cal. Dec. 311, and *In the Matter of Guillermo D. Kotta*, on *Habeas Corpus*, 62 Cal. Dec. 315, have demonstrated that even the taxing power of a state must be limited by the provisions of the Fourteenth Amendment.

(P. 439, 22 Sup. Ct. Rep.):

"* * * The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a *classification* of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis' * * *. But arbitrary selection can never be justified by calling it classification." * * *

(P. 440):

"* * * A state may in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the state, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade." * * *

Jew Ho vs. Williamson, 103 Fed. Rep. 24 (June 15, 1900):

"* * * This is precisely the point noticed by the Supreme Court of the United States, namely, the administration of a law 'with an evil eye and an unequal hand'. Wherever the courts of the United States have found such an administration of the law, although it may be, upon the face of the act or of the ordinance, such a lack of discrimination as to otherwise justify the ordinance or the law, still, if the court finds that, in its practical operation,—in its enforcement by the state or the municipality,—there is that opportunity and that it is the purpose to enforce it 'with an evil eye and an unequal hand', then it is the duty of the court to interpose, and to declare the ordinance discriminating in its character, and void under the Constitution of the United States. Therefore the court must hold that this ordinance is invalid and cannot be maintained, that it is contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, and that the board of health has no authority or right to enforce any ordinance

in this city that shall discriminate against any class of persons in favor of another. * * *

"* * * It follows from the remarks that I have made that this quarantine cannot be continued, by reason of the fact that it is unreasonable, unjust, and oppressive, and therefore contrary to the laws limiting the police powers of the state and municipality in such matters; and second, that it is discriminating in its character, and is contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States. * * *

Augus Busch & Co. vs. Webb, 122 Fed. Rep. 655 (March 28, 1903):

"* * * I recognize the right of the legislature to classify physicians, provided the classification is based upon sound public policy, and is a reasonable classification. * * *

"* * * But I apprehend that, wherever such classification is made, it must be made upon the ground of public policy, and for a reason that would attach to the party thus excluded either moral turpitude or incompetency. * * *

"* * * and therefore the legislature has the power, upon grounds of public policy, to guard strenuously the individuals that are allowed to practice medicine, and they have the right to classify and discriminate for good cause, but that does not carry with it the power of arbitrarily discriminating against any member of the medical profession, unless, as so often stated, it is for incompetency or moral turpitude, which public policy requires should be enforced. * * *

"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the law is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business, and under the same conditions, burdens are cast which are not cast upon the other.' * * *" (*Cotting vs. Stock Yards Co.*, 22 Sup. Ct. Rep., p. 30.)

Principles underlying the classification permitted under the Fourteenth Amendment.

It should at the outset be observed that the cases make it perfectly clear that the Fourteenth Amendment does not trench upon a reasonable exercise of the police power of the states.

The cases all run to this effect. But this does not mean that under the guise of police power, a state may do anything it wishes in the matter of classification and discrimination.

As Mr. Chief Justice (then Mr. Justice) White said in *Jones vs. Brim* (165 U. S. 180):

"We premise that the clause of the Fourteenth Amendment of the Constitution referred to was undoubtedly intended to prohibit an arbitrary deprivation of life or liberty or arbitrary spoliation of property."

This principle of restraint was stated with greater fullness in *Welch vs. Swasey* (1908), 214 U. S. 91, 105, when Mr. Justice Peckham declared the law to be as follows:

"The statutes have been passed under the exercise of so-called police power, and they must have some fair tendency to accomplish, or aid in the accomplishment of, some purpose for which the legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently decided

as not to require the citation of many authorities. If the means employed pursuant to the statutes have no real, substantial relation to a public object which government can accomplish, if the statutes are arbitrary and unreasonable, and beyond the necessities of the case, the courts will declare their invalidity. The following are a few of the many cases upon this subject: *Mugler vs. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota vs. Barber*, 136 U. S. 313, 320, 34 L. Ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Jacobson vs. Massachusetts*, 197 U. S. 11, 28, 49 L. Ed. 643, 650, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; *Lochner vs. New York*, 198 U. S. 45, 57, 49 L. Ed. 937, 941, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *Chicago, B. & Q. R. Co. vs. Illinois*, 200 U. S. 561, 593, 50 L. Ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175."

Therefore, wherever in any given case the classification involves an exercise of the police power of the state, much wider latitude will be allowed than where, as in this case, no such power is touched.

The language of the cases laying down the fundamental rule or principle that must control classification is usually stated shortly and simply. The following are statements of the principle:

Mr. Justice Bradley in *Bowman vs. Lewis* (1879), 101 U. S. 22:

"It (the clause in question) contemplates persons and classes of persons. * * * If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other classes in the same place and under like circumstances."

The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies.

Mr. Justice Field in *County of Santa Clara vs. Southern Pacific R. Co.* (1883), 18 Fed. 385:

"And by equal protection is meant equal security to every one in his private rights—in his right to life, to liberty, to property and to the pursuit of happiness. It implies not only that means which the laws afford for such security shall be equally accessible to him, but that no one shall be subjected to any greater burdens or charges than such as are imposed upon all others under like circumstances."

Judge Sawyer in the same case quoted with approval the following statement of principle made by Mr. Edmunds of Vermont in an argument touching the limitation placed by the amendment on the taxing power of the state:

"The basis of the imposition being *property as such*, the fact that certain property is owned by a corporation, or a white man, or man of bad character, or a clergyman, cannot be the ground of a levy that, both in form, in fact, and in result is unequal and injurious. Any other doctrine necessarily implies that the state may carry such unequal exactions to end of complete confiscation by edict of all the property of any class of man, who, during the passion of the hour, may not be in the sunshine of popularity."

Summary of principles gathered from decisions under Fourteenth Amendment.

1. "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment." (Field, J., in *Barbier vs. Connolly*.)

2. "Equal protection of the laws is a pledge of the protection of equal laws." (Matthews, J., in *Yick Wo vs. Hopkins*.)

3. "No person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." (Bradley, J., in *Bowman vs. Lewis*; Day, J., in *Field vs. Barber Asphalt Co.*)

4. "Equal protection of the laws means equal security under them to every one on similar terms,—in his life, his liberty, his property, and in the pursuit of happiness." (Field, J., in *Railroad Tax Cases*, and in *Barbier vs. Connolly*.)

5. This equality requires:

(a) Equal rights to resort to the courts to secure and vindicate personal and property rights. (Field, J., in *Railroad Tax Cases*, in *County of Santa Clara vs. Southern Pacific R. Co.*, in *Barbier vs. Connolly*, and in *Minneapolis, etc., Ry. Co. vs. Beckwith*.)

(b) Exemption from greater burdens or charges than are imposed on all others under like circumstances. (Field, J., in *Railroad Tax Cases*, in *County of Santa Clara vs. Southern Pacific Ry. Co.*, in *Minneapolis, etc., Ry. Co. vs. Beckwith*.)

First: As to "the same pursuits" followed by others. (Field, J., in *Barbier vs. Connolly*.)

Second: As to "others in the same calling and condition." (Field, J., in *Barbier vs. Connolly*.)

(c) Enjoyment of personal and civil rights. (Field, J., in *Barbier vs. Connolly*.)

(d) Right equally "to pursue their happiness and acquire and enjoy property". (Field, J., in *Barbier vs. Connolly*.)

(e) That "same punishment in like offenses in the administration of criminal justice." (Field, J., in *Barbier vs. Connolly*.)

(f) That "same means and methods to be applied impartially to all constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." (Bradley, J., in *Kentucky Tax Cases*; Matthews, J., in *Yick Wo vs. Hopkins*.)

(g) That classification be not an arbitrary exercise of power. (Fueller, C. J., in *Duncan vs. Missouri*; Gray, J., in *Lowe vs. Kansas*; Brewer, J., in *Gulf etc. R. R. Co. vs. Ellis*; White, C. J. (then J.), in *Jones vs. Brim*; Brewer, J., in *Batchel vs. Wilson*.)

(h) That the classification be based on "some difference which has a reasonable and just relation to the act in respect to which the classification is proposed." (Brewer, J., in *Gulf etc. R. R. Co. vs. Ellis*, and in *Atchison etc. R. R. Co. vs. Matthews*.)

(i) That the persons composing the classes must be "in different relations to the purpose of the law." (McKenna, J., in *Lang vs. New Jersey*.)

(j) That the classification must be "within reasonable limits and gen-

eral usage", and not of "an unusual character unknown to the practice of our governments." (Bradley, J., in *Bells Gap Ry. Co. vs. Pennsylvania.*)

(k) Reasonableness in classification takes into consideration "established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." (Brown, J., in *Plessey vs. Ferguson.*)

(l) Classification must not be based on "fact that certain property is owned by a corporation, or a white man, or a man of bad character, or a clergyman." (Sawyer, J., quoting Edmunds in *County of Santa Clara vs. Southern Pacific R. Co.*); nor may a classification be based on the color of persons. (Brewer, J., in *Gulf etc. Ry. Co. vs. Ellis*); nor on "hospitality to the race and nationality" of persons affected. (Matthews, J., in *Yick Wo vs. Hopkins*; and see generally on discrimination based on race, *In re Ah Fong, supra*; *In re Ah Chung, supra*; *In re Tiburcio Parrott.*)

6. Classification and discrimination is justified:

(a) If "all persons subjected to the law" shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed", either

First: "In the objects to which it is directed." (Field, J., in *Hayes vs. Missouri.*) "Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind." (Field, J., in *Missouri vs. Mackey.*)

"It may, if it choose, exempt certain classes of property from any taxation at all, as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them." (Bradley, J., in *Bell's Gap R. R. Co. vs. Pennsylvania.*)

Second: As to "the territory within which it is to operate." (Field, J., in *Hayes vs. Missouri.*) "If a Mexican state should be acquired by treaty and added to an adjoining state or part of a state, in the United States, and the two should be erected into a new state, it cannot be doubted that such new state might allow the Mexican laws and jurisdiction to continue unchanged in the one portion and the common law and its corresponding jurisdiction in the other portion." (Bradley, J., in *Bowman vs. Lewis.*)

(b) If discrimination is based on relatively dangerous conditions of different branches of the same business. (Field, J., in *Soon Hing vs. Crowley.*)

(c) If based on "different nature and uses of property." (Bradley, J., in *Kentucky Tax Cases.*)

(d) If "all companies are subject to the same duties and liabilities under similar circumstances." (Field, J., in *Missouri Pacific R. R. Co. vs. Hume*, and in *Missouri vs. Mackey.*)

(e) "Diversities which are allowable in different states are allowable in different parts of the same state." (Bradley, J., in *Bowman vs. Lewis*, speaking of territorial classification.)

Now it is in the first place to be observed that classification or discrimination may come either by granting special favors to a certain class, or by freeing a certain class from inhibition and limitations imposed upon

all others, or by imposing limitations upon a certain class. It is with the latter species of classification only that we have to deal with in this case.

In the next place it will be observed that the cases seem to show quite clearly that any discrimination or classification may include the following elements:

(1) The objects to which the classification is directed, or the purpose for which it is made,—that is, whether for water works, bridges, levees, etc. (*Hayes vs. Missouri; Missouri vs. Mackey.*)

(2) The subject-matter affected by the classification, that is, whether real property, or personal property or any kind of either or a man's occupation. (*Bel's Gap R. R. Co. vs. Pennsylvania.*)

(3) The persons affected by the classification. (The Laundry Cases.)

The opinion is ventured that if the purpose of the classification is improper, if, for example, it is for the accomplishment of something forbidden by the Constitution or laws of the United States—such, for instance, as raising supplies for a public enemy, or, to put a less extreme case, the levying of taxes by a municipality to engage in matters not authorized by its charters, then any person against whom the imposition runs may object as being denied his constitutional equality before the law—not all persons being similarly taxed. In such an event it might be that the subject-matter could be properly taxed and that the discrimination as against persons included would be such as, the first element being proper, the statute would stand, yet notwithstanding this it must fall because of the defect in the first element, and in like manner as to the subject-matter of the classification, that is the particular property or right against which it was applied. If that were illegal, it is believed that the legality of the purpose of the classification or the legality of the personal classification would not save the statute under this constitutional amendment. And again, even if the purpose of the classification and the subject-matter thereof were proper and legal, yet if the persons affected thereby were improperly chosen, if they were affected as to the result by improper discrimination, the statute must fall.

Now the provision of the amendment runs in favor of *persons*.

The discussion thus far has shown that such *persons* may be either natural persons—physical beings, or artificial persons—companies and corporations.

Again, it is evident that a natural person may be affected by hostile legislation both with reference to his personal rights, attaching to him as a physical being—and in his property rights. In his personal rights he may have his right to life and liberty involved (*Hayes vs. Missouri, supra; Williams vs. Mississippi, supra*); or his right to engage in any or a given occupation (*In re Tiburcio Parrott, supra; In re Ag Chang, supra*); or his right to protection in his chosen occupation (*Barbier vs. Connolly, supra; Soon Hing vs. Crowley, supra; Yick Wo vs. Hopkins, supra*), or his civil rights generally, including access to the courts in equal terms with all others (*Bowman vs. Lewis, supra*); and see, as to the corporations, *Missouri Pacific Ry. Co. vs. Mackey, supra; Minneapolis etc. Ry. Co. vs. Beckwith, p. 71, supra; Gulf etc. Ry. Co. vs. Ellis, supra; Atchison Ry. Co. vs. Matthews, supra*. In his property rights he may have brought under liabilities his right to acquire property by purchase, by inheritance, or otherwise (*Magoun vs. Illinois etc. Bank, p. 79, supra*); or his possessory rights, such as the use to which he might put his property or his general enjoyment thereof (*Kentucky Railroad Tax Cases, supra; Missouri Pacific Ry.*

vs. *Hume, supra*); or his dispositive rights, his right freely to alienate or to devise his property (see *Magoun vs. Illinois etc.*).

Now, an examination of the present statute shows that the present discrimination is not aimed at and does not affect Japanese subjects in their personal rights—that is, rights affecting their physical persons; it only incidentally and remotely (in legal contemplation) affects their occupations; but directly, and immediately, affects them in their property rights.

Almost no authority is to be found bearing directly upon this subject.

(d)

What is the police power of a state and how far, if at all, can it be invoked to modify the equality clause of the Fourteenth Amendment?

(e)

Herein we give a summary of the principles gathered from the decisions under the Fourteenth Amendment.

(f)

The rights of persons and the rights of property are involved in the Fourteenth Amendment.

“* * * If the act is to be sustained under the police power of the state the court must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety and welfare, and if the statute discloses no such purpose, and has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge. (*Minnesota vs. Barber*, 136 U. S. 320, 10 Sup. Ct. 862, 34 L. Ed. 455; *Mugler vs. Kansas*, 123 U. S. 661, 8 Sup. Ct. 273, 31 L. Ed. 205; *Grainger vs. Douglas Park, supra*).

Nolen vs. Reichman, 225 Fed. Rep., p. 822 (August 6, 1915):

“* * * But notwithstanding this general rule of the law it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property. * * *”

“* * * Within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment to the Federal Constitution. * * *”

Dobbins vs. Los Angeles, 25 Sup. Ct. Rep. 18 (November 14, 1904):

“* * * If, as is asserted, the granting of equitable remedies falls within the police power, and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause, which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction. The Fourteenth Amendment, as this court said in *Barbier vs. Connolly*, already cited, intended ‘not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like

circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid on others in the same calling and condition, and that in the administration of criminal practice no different or higher punishment should be imposed upon one than such as is prescribed for all for like offenses.'"

"* * * Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand. Classification like the one with which we are dealing is said to be the development of the philosophic thought of the world and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual. We said, through Mr. Justice Brewer, in *Muller vs. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957, that

"It is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.' * * *

Truax et al. vs. Corrigan et al., 42 Sup. Ct. Rep. 124 (December 19, 1921):

"* * * The sole question presented on the record is whether a state law is unconstitutional which revokes a license to a foreign corporation to do business within the state because, while doing only a domestic business in the state, it resorts to the federal court sitting in the state. * * *

"* * * exercise of the right thus secured is void because the sovereign power of a state in excluding foreign corporations, *as in the exercise of all others of its sovereign powers*, is subject to the limitations of the supreme fundamental law. (Italics ours.) (*Terrall, Secretary of State of Arkansas, vs. Burke Const. Co.*, 42 Sup. Ct. Rep. 188 [Feb. 27, 1922].)"

We call particular attention to the above case as being the latest expression of the Supreme Court with respect to a very definite limitation on the police power of a state, to-wit: the limitation placed thereon by the prohibitions of the Fourteenth Amendment. This case indicates the soundness of our reasoning when we say that even within the sphere of the admitted sovereign police powers of a state there must be no arbitrary and discriminatory legislation. In other words, we contend that even in the matter of the control of the state over its fish and game (*In re Ah Chong, supra*), while the state, in the exercise of its police powers, may make general classifications for the purpose of the legislation, in such classifications the state cannot, under the Fourteenth Amendment, indulge in arbitrary or unreasonable discriminations against persons or groups of persons on the basis of their race or color. The theory upon which the above cited case was decided is that while a state may prevent all foreign corporations from doing business within its borders, if it admits such corporations and permits them to do business the same as all domestic corporations, there can be no discrimina-

tions between such foreign and domestic corporations in the matter of legislation. It would seem at first glance that if a state can deny to foreign corporations the right to do business within its borders it should have the right to discriminate against corporations after they are admitted to do business in the state. We must remember, however, that the state is prohibited from passing discriminatory legislation as to persons "within its jurisdiction". After a corporation has come within the jurisdiction of a state, then the state is bound to treat that corporation upon an equality with domestic corporations. We suggest, therefore, that the above case is a very recent sign post pointing the way to a solution of the question as to whether or not the discriminatory Alien Land Act evidences a proper exercise of the police powers of the State of California, in view of the prohibitions of the Fourteenth Amendment.

"* * * However, there are some features of the statute which are not even within the shadow of the police power. * * *" (*Alabama & N. O. Transp. Co. vs. Doyle*, 210 Fed. Rep. 173 [January 28, 1914].)

We have cited the above case to ask the question as to whether the Alien Land Act is even "within the shadow of the police power of the state".

Granting that cases may be cited in which discriminations are justified as an exercise of the police power of a state which is practically unbounded save by reasonableness; granting that such reasonableness means that the exercise of the powers of a state must be justified on the basis that either the health, morals, safety or public welfare of the people of the state is involved; granting that it is difficult to define the latitude and longitude of the so-called police powers of the state, nevertheless, as was said in a brief covering this point very aptly:

"They involved an exercise of the police power, which is practically unbounded save by reasonableness; this case does not fall within an exercise of the police power. Those cases involved no property rights whatsoever; this case is grounded on a property right. Those cases involved no discrimination, but a mere separation, operating as much against one race as the other; this case is based on discrimination. Those cases involved no inequality, but strict equality; this case is grounded on inequality. In those cases there was a substantial and reasonable relation between the purpose, the object sought and the act, and the measures taken to accomplish it; in this case there is no proper or substantial purpose and no reasonable or respectable relation between the purpose and the means or action taken."

(g)

The so-called Civil Rights Statutes also contain a guarantee to resident Japanese aliens of their right to purchase stock in California corporations.

Under the so-called Civil Rights Statutes both plaintiffs, and especially plaintiff Satow, is guaranteed his right to make and enforce the contract for the purchase of the capital stock set forth in the bill in equity in the instant case.

The Civil Rights Statutes, so far as they affect the instant case, are as follows:

Section 3925, U. S. Comp. Stats., 1916 (R. S., sec. 1977), reads as follows:

"Sec. 3925. (R. S., sec. 1977.) Equal rights under the law. All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and

shall be subject to like punishment, pains, penalties, taxes and licenses and exactions of every kind, and to no other."

"Sec. 3931. (R. S., sec. 1978.) Rights of citizens in respect to real and personal property.

"All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property."

"It has been held in numerous cases, and seems well settled, that a law denying the right to contract or acquire property is an infraction of the right of liberty. 'Liberty includes the right to acquire property, and that means to make and enforce contracts'. The Civil Rights Act was made to enforce the Fourteenth Amendment. * * * Rights of property preserved by all constitutions is right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following lawful pursuit. * * * Right to contract is both a liberty and a property right. If any person is denied the right to contract and acquire property in the manner in which he has hitherto enjoyed it under the law, and which others are still allowed by law to enjoy, he is deprived of both the constitutional right of liberty and property. * * * Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrest, right to buy and sell as others may—all our liberties, personal, civil, political—in short, all that makes life worth living; and of none of these rights can anyone be deprived except by due process of law. * * * The common business and calling of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. * * * If we did not give it such comprehensive import it would cripple the efficacy of what was evidently designed to cover vital fundamental rights and privileges. * * *" (Brannan, The Fourteenth Amendment, pp. 113, 114 and 115.)

Volume 2, C. J., p. 1069:

"In General.—The disability of aliens at common law in respect to the ownership of real estate does not extend to personal property, and aliens are capable of acquiring, holding, and transmitting movable property in like manner as citizens. A statute capacitating aliens to take, recover, and transmit 'real estate' has been held to include both real and personal property."

"* * * (2) 'an alien friend may purchase and hold chattels, real, and all kinds of personal property; and may freely transfer to any place beyond the jurisdiction of the state, his movables, subject, however, in general to such export duty as the state may think proper to impose, and also subject, in cases of public expediency, or on his becoming an alien enemy, to a total prohibition of removing any of his property out of the state, so as thereby to weaken it and strengthen its antagonist. This permission of removal of personal property is, however, granted with a view to the encouragement of commerce and the aggrandizement of the state; * * *"

Brannan, Fourteenth Amendment, p. 58:

"* * * Whereas as to life, liberty or property, it protects 'any person,' and as to equal protection of the law, it protects 'any person within its jurisdiction' no matter whether a citizen of the United States or state or no citizen of either."

Citations contra under this title explained.

Moore's International Law Digest, vol. 4, p. 24, falls into the error of saying:

"A state has the right to bar aliens from holding stock in its corporations, or to admit them to that privilege on such terms as it may prescribe."

The case of *State vs. Travels' Ins. Co.* (Conn.), 40 Atl. Rep. 465, 66 Am. St. Rep. 138, is cited in support of this doctrine.

The facts of this case are that the State of Connecticut taxed some of its corporations in lieu of any tax upon the shareholders thereof, while for others a different rule was prescribed under the terms of which the shares of stock were taxable directly against non-resident owners. The question was raised as to whether or not the Connecticut law, so far as it provided a different rule with respect to taxing the resident and non-resident shareholders, was constitutional under the Fourteenth Amendment to the Constitution. An examination of the provisions of the Fourteenth Amendment shows that the protection of the Fourteenth Amendment extends specifically to those persons *who are within the jurisdiction of the state*. This was the particular question which was called to the attention of the court, as appears from the following language of the opinion:

"This inhibition is only for the benefit of persons who are physically present within the territorial jurisdiction of the state, the protection of whose laws they invoke. (*Yick Wo vs. Hopkins*, 118 U. S. 356, 369.) The same is true of the act of Congress (U. S. Rev. Stats., sec. 1977), passed under the authority of the Fourteenth Amendment, by which it is provided that 'all persons within the jurisdiction of the United States shall have the same right in every state * * * to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like * * * taxes, licenses, and exactions of every kind, and to no other.' The rights thus secured are those only of persons who at the time are within the jurisdiction—that is, within the territory or under the flag, of the United States.

"A state has a right to debar aliens (and as has been stated, it does not appear that any Americans are among the non-resident stockholders in the defendant company) from holding shares in her corporations, or to admit them to that privilege only on such terms as she may prescribe. The right of association under the protection of an artificial personality, and of doing business on its credit, whether it be obtained by a special charter or under a general incorporation law, is a franchise granted by the state to such, and such only, as she may deem fit to be intrusted with its exercise. Whatever may be the law as to citizens of other states, aliens can be excluded from membership in such bodies, unless they enter them on conditions which subject their investments to such burdens of taxation as the legislature may think it proper to impose. (*Mager vs. Grima*, 8 How. 490, 494.)"

We have been careful to present this case fully because it has formed the basis of statements made by digest and text-book writers, but it is apparent from an examination of the case itself that the doctrine of the case has been seriously misconstrued. For example, we find in *Fletcher's Encyc., Corporations*, vol. 2, p. 1204, sec. 582, this language: " * * * but a state has the right to debar aliens from holding stock in her corporations, or to admit them to that privilege on such terms as she may prescribe," citing the case above referred to.

It will be observed, however, that in 2 C. J., p. 1069, where this same case forms the basis of a statement as to the capacity of aliens to hold stock in corporations the significant qualification "non-resident" is studiously

added. " * * * a state may debar *non-resident* aliens from holding stock in its corporations, or admit them to that privilege only on such terms as the state may prescribe." (2 C. J., sec. 34.) (*Italics ours.*)

We find, however, the error further perpetuated in vol. I, R. C. L., p. 803, in the following language with the above case cited as the only authority to justify such language:

"Membership in Corporations.—A state has a right to debar aliens from holding shares in her corporations, or to admit them to that privilege only on such terms as she may prescribe. The right of association under the protection of an artificial personality, and of doing business on its credit, whether it be obtained by a special charter or under a general incorporation law, is a franchise granted by the state to such, and such only, as she may deem fit to be intrusted with its exercise. Aliens can be excluded from membership in such bodies, unless they enter them on conditions which subject their investments to such burdens of taxation as the legislature may think it proper to impose.

"Right to Hold and Dispose of Personal Property.—It is a proposition so self-evident as hardly to need the citation of authorities, that an alien may hold and convey personal property. He is protected in this right mainly because personal estate is of a transitory nature, and the indulgence conduces to the advancement of trade and commerce. He may even be a mortgagee and recover his debt, in countries where there is a positive prohibition to hold lands. The right to hold personal property includes the right to bequeath it to another, and to receive it as next of kin, or legatee; and if it is necessary to sell lands for the purpose of discharging legacies, the price of such lands so sold by the owner or by the executor becomes movable, and as such must be applied to the payment of those legacies, and it cannot be said that such legacies are debts secured upon land and of a heritable character."

The State of California recognizes the distinction between resident and non-resident aliens, as is clearly shown by the provisions of section 1404 of the Civil Code, which section reads as follows:

"Sec. 1404. Aliens may inherit, when, and how. *Resident* aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no *non-resident* foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession." (*Italics ours.*)

IX.

WE MAY LOOK TO THE PURPOSES BEHIND THE ALIEN LAND ACT AND WHEN WE DO WE DISCOVER THAT OBVIOUSLY THE STATE OF CALIFORNIA IS TRYING TO DO BY LEGISLATION THAT WHICH THE CONSTITUTION OF THE UNITED STATES FORBIDS.

L.

A writer in the California Law Review for March, 1922, says:

"* * * Though there is nothing on the face of the statute to indicate that the Japanese is the inhabitant discriminated against, it was an early declaration by Mr. Justice Field, that ' * * * a court cannot shut its eyes to matters of public notoriety and general cognizance, and that when we (as judges) take our seats on the bench we are not struck with blindness and forbidden to know as judges what we know as men.' Suppose, then, that the classification based on a difference resulting from an exercise of federal power—the power to regulate naturalization—is admittedly valid; would the

realization that the statute was induced not by the result of such action, but rather by the same considerations that induced that result militate against its validity? It has been recently held that a congressional revenue measure, valid on its face, was unconstitutional as an attempt to regulate child labor in the State of North Carolina. The policy behind both statutes is concededly laudable, but the proper allocation of governmental power has other criteria. * * *

In the case of *George vs. Bailey* (August 22, 1921), 274 Fed. 639, this being the case referred to in the above quotation, the learned judge writing the opinion decides that the court could go behind the words of the statute involved to discover the real purpose of the statute and although it appeared on the face of the statute that the measure was a revenue measure, the real body of the statute was "to impose a penalty in order to deter violation of the child labor provision." It was held that this could not be done as it was an attempt on the part of the government "not to collect revenue, but to control the internal affairs of a state."

The internal and external evidence shows clearly that the object and purpose of the California Alien Land Act are to discriminate against Chinese and Japanese, and under the doctrine of the case of *Ah Chong, supra*, this court may consider such evidence.

Are we justified in arguing to this court that the Alien Land Act is only one of a series of acts passed by the legislature and the people of the State of California evidencing

"Hostile and discriminating legislation by a state against persons of any class, sect, creed or nation." (*Ah Kow vs. Newman*, 5 Sawy. 562.)

The external evidence that "these acts are in *pari materia*; and, being so, indicate and illustrate the motive or purpose of the passage of any one of them," is not before this court, although it is abundant in character and could be easily presented.

The internal evidence may be presented by an examination of the act itself, wherein it is sought, contrary to the Constitution, as we contend: (a) to prevent Japanese and Chinese from owning land or any interest therein; (b) to prevent Japanese and Chinese from leasing land for any term whatever and probably to prevent them from making a crop contract on land; (c) to prevent Chinese and Japanese from being guardians of the property of their own children (a right given to all other aliens and citizens); (d) to prevent Chinese and Japanese from owning any stock in any corporation which owns agricultural land; (e) and to prevent Japanese and Chinese from inheriting real property from either a citizen or an alien and from transmitting by succession any real property to either a citizen or an alien.

We assume that other acts of the State of California which we contend are hostile and discriminatory against Japanese may be looked to by the court, and some of them are as follows:

1. The Alien Land Act, approved May 19, 1913, in effect August 10, 1913, Statutes of 1913, page 206;
2. The Alien Land Act of 1920, Statutes of 1921;
3. The Alien Poll Tax Law of 1921 (declared by the supreme court of California unconstitutional);
4. The Act approved May 9, 1921, in effect July 29, 1921, Statutes 1921, page 76, being a new section added to the Penal Code, numbered 931;
5. An Act approved May 23, 1921, in effect July 29, 1921, Statutes 1921, page 546.

It is idle to deny that most, if not all, of the above acts show a legis-

lative purpose to discriminate against Japanese and Chinese aliens. We can find no essential difference between the present situation and the anti-Chinese class legislation with which California is familiar and practically all of which was held to be unconstitutional and void.

We have refrained from attempting to refer to many other statutes and ordinances which would seem to indicate the hostile purposes of California so far as Chinese and Japanese are concerned. A sample of an expressed purpose of this character is found in a resolution of the board of education of the City and County of San Francisco, passed on the 6th day of May, 1916, which reads as follows:

"Resolved, that the board of education is determined in its efforts to effect the establishment of separate schools for Chinese and Japanese pupils, not only for the purpose of relieving the congestion at present prevailing in our schools, but also for the higher end that our children should not be placed in any position where their youthful impressions may be affected by association with pupils of the Mongolian race."

(a)

The anti-Chinese legislation of California, declared unconstitutional by the courts, may be examined with interest and we discover that "history repeats itself" so far as the controversy before this court is concerned.

An author, writing in the California Law Review for March, 1922, sums up the anti-Chinese legislation of California in one paragraph as follows:

"It has precluded the validity of such legislation as the 'San Francisco Queue Ordinance' providing that all prisoners in the county jail should have their hair clipped to within an inch of the scalp; this is the opinion of Mr. Justice Field being directed solely against the Chinese (*Ah Kow vs. Nunan* [1879], Fed. Cas. No. 6546, 18 American Law Register, N. S., 676); a California constitutional provision prohibiting all aliens incapable of becoming electors from fishing in the waters of the state, *In re Ah Chong* (1880), 2 Fed. 737; a statute requiring that a bond be given that Chinese immigrants should not become charges on the public, *In re Ah Fong* (1874), 2 Sawy. 144, Fed. Cas. No. 102; the constitution and statute of California forbidding the employment of Chinese or Mongolians by corporations, *In re Parrott* (1880), 1 Fed. 481; the 'San Francisco Bingham Ordinance' confining Chinese residences to a definite portion of the city and county, *In re Lee Sing* (1890), 43 Fed. 359; and a California statute which in itself decreed no inequality but vested a board with a broad discretion which was so exercised as to have a decided discriminatory effect as against Chinese, *Yick Wo vs. Hopkins* (1895), 118 U. S. 356, 30 L. Ed., 6 Sup. Ct. Rep., 1064."

X.

WE BELIEVE WE CAN SPECIFY WITH REASONABLE CLEARNESS THE SO-CALLED CLASSIFICATIONS BASED ON RACE OR COLOR WHICH HAVE BEEN PERMITTED UNDER THE FOURTEENTH AMENDMENT.

M.

In this connection, we quote from the California Law Review of March, 1922, as follows:

"* * * The doubt of Mr. Justice Miller in the Slaughter House Cases, as to whether any state action not a discrimination against negroes would ever be held to come within the purview of the equality provisions of the Fourteenth Amendment to the Federal Constitution, has been nowhere so thoroughly dispelled as in the western states, where a series of adjudications has definitely established it as a shield against oppressive legislation available to the Oriental.

"The highest court of the land has pointed out as unquestionable that the equal protection of the laws is a pledge of equal laws to the alien as well as to the citizen. No state may exclude aliens generally, nor may it regulate, so as to restrict, their entrance. Once they are admitted with the privilege of abiding in any state in the Union, and once having become inhabitants of any state, they are then 'persons within the jurisdiction' and entitled to the equal protection of the laws. The state supreme court then, in the matter of Kotta, holding unconstitutional California's Alien Poll Tax Statute, has assumed a position with which disagreement is difficult. In the words of Mr. Chief Justice Angellotti, 'This (taxation levied solely on the basis of alienage) in view of the language of the Fourteenth Amendment in relation to the equal protection of the laws, cannot in the nature of things constitute a proper basis for classification.' * * *

"* * * The classification based on this difference is reasonable, says the court, 'due to the obviousness of the fact that one incapable of becoming a citizen will lack an interest in the welfare of the government', and because ownership of its land in periods of exigency would be impolitic. Is it not, however, equally if not still more impolitic to tolerate the ownership of that same land by aliens who at all times have been eligible to citizenship but who remain aliens by choice? What essentially different characteristics exist here, so germane to the above purpose, as to validate such unequal treatment? On this the court is silent. The instant case relies in chief upon *Terrace vs. Thompson*, which sustains as constitutional Washington's Alien Land Law, the underlying classification of which includes not only aliens incapable of citizenship, but also those who are capable but who have not in good faith declared their intention of becoming naturalized. Obviously such an act is quite different, for, including not only those who cannot but also those who will not become citizens, it is more favorably colored than the California statute which includes only those who can not, but those who, we can not say necessarily, would not become citizens."

(a)

A study of the decided cases shows that all the so-called color or race discriminations affect aliens in their social rather than in their civil rights.

Plessy vs. Ferguson (Sup. Ct. Rep., vol. 16, p. 1138):

"The object of the amendment (Fourteenth Amendment) was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or the commingling of the two races upon terms unsatisfactory to either. * * *"

"* * * When the government therefore has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all the functions respecting social advantages for which it was endowed."

and then concludes:

"Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical difference and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other, civilly or politically. If one race be inferior to the other socially,

the Constitution of the United States cannot put them upon the same plane. * * *

Under this subhead of the brief we are constrained to quote from the decision of the learned Justice Day in the case of *Buchanan vs. Warley* (October, 1917), 38 Sup. Ct. Rep. 16:

"* * * That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges. As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given. But in view of the rights secured by the Fourteenth Amendment to the Federal Constitution such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. * * *"

XI.

HEREIN WE HAVE SURVEYED, EXPLAINED AND DISTINGUISHED MANY OF THE CASES WHICH ARE CITED AS CONTRA TO THE POSITION WHICH IS OUTLINED IN THIS BRIEF.

(a)

The devolution of title cases.

We have made herein a critical examination of the cases customarily cited to support the general proposition that a state is empowered with plenary power to pass legislation bearing on the question of the devolution of title to real property situated within the territorial limits of the state. As a corollary of this proposition we have often seen it stated by textbook writers of some authority that a state may, in the matter of the devolution of the title of real property, pass discriminatory legislation, and may arbitrarily classify the subjects and objects of such legislation. It has been freely assumed that the prohibitions of the Fourteenth Amendment are not binding upon a state when the state is legislating concerning real property, and it has been freely hinted that a state may in such legislation make purely arbitrary classifications and may thereby discriminate against aliens resident in the state in the matter of the ownership and control of real property.

In view of the many reiterated statements to this effect we have made a survey of the principal cases bearing upon this matter and are setting forth our survey herein in order to justify us in contending:

First: That the doctrine that a state controls the question of the devolution of its real property absolutely is subject to important exceptions.

Second: That no case which we have been able to find since the passage of the Fourteenth Amendment justifies the assumption that a state may, despite the prohibitions of the Fourteenth Amendment, even in the matter of the devolution of real property, enact discriminatory legislation against aliens.

Third: That practically all of the leading cases cited under this head were decided before the passage of the Fourteenth Amendment, and that the few cases cited since the Fourteenth Amendment made practically no mention thereof.

Fourth: That in such cases as *Buchanan vs. Warley* the doctrine is clearly set forth that the right of a state to control the devolution of its

real property is subject to fundamental rights guaranteed to individuals and persons under the Fourteenth Amendment.

Fifth: That when the issue is clearly presented to the Supreme Court we confidently believe that it will be held that there must not be an arbitrary discrimination against any person under the Fourteenth Amendment by a state unless such discrimination is made necessary under the sovereign police powers of the state.

While conceding that the determination of no one of the above questions is necessary to the decision of the instant case, and while apologizing to the court in advance for discussing these questions in this brief, we have done so because the time has arrived for a thorough understanding of all questions involved, since they are so closely correlated as to produce confusion unless the bearing of the particular issue in the instant case is clearly fixed.

We shall therefore review the cases often cited and shall examine them chronologically:

Chirac vs. Chirac (1817), 2 Wheat. 259:

This case involved the rights of a subject of France to inherit real property in the State of Virginia under the treaty of 1778 between the United States and France. The case is most often cited on the question of the construction of the treaty, and about all that is decided by the case is that the stipulations of the treaty do away with "the incapacity of alienage", and the theory of the decision is that states might pass laws restraining "strangers from the exercise of the rights of property with respect to real estate". This is a fundamental doctrine of the common law of England and cannot be questioned. It is unnecessary to say that this case was decided long before the passage of the Fourteenth Amendment.

Mager vs. Crima (1850), 8 How. 490:

This case sustains a law of the State of Louisiana imposing a tax upon legacies payable to aliens. In the course of the decision Mr. Justice Taney argued that since every state could refuse an alien to take either real or personal property situated within its limits it followed that the state could levy a tax upon property passing by inheritance to an alien, "and if a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it pleases to be required by its interests or policy."

It would be interesting to know what the effect would have been in this opinion if the Fourteenth Amendment had been in existence, and we call particular attention in this behalf to the very recent case of *Terrell et al. vs. Burke Const. Co.* (Feb. 27, 1922), 42 Sup. Ct. Rep. 188, heretofore cited in this brief, wherein the court holds that because a state may refuse to admit foreign corporations to do business within its territory, it does not necessarily follow that after they are admitted a state may discriminate against them and in favor of domestic corporations. It should be obvious that the Fourteenth Amendment would affect the situation in the above case very materially, and we cite the case of *Terrell et al. vs. Burke Const. Co.*, 42 Sup. Ct. Rep. 188, as furnishing by analogy the basis for this statement.

Prevost vs. Grenaux (1859), 19 How. 1:

This is another inheritance tax case arising under the treaty of 1853 between France and the United States, and also involving inheritance tax law of the State of Louisiana, and while the decision of the learned Chief Justice Taney seems to be based upon the theory that the state has the absolute right to control the succession of real or personal property, a treaty

may, nevertheless, restrict a state's action in that regard. The Fourteenth Amendment was not, of course, involved.

Frederick vs. Louisiana (1859), 23 How. 445:

This case involves the construction of a treaty between the United States and the King of Wurtemberg, and also involves the same inheritance tax law of Louisiana. The Fourteenth Amendment was, of course, not involved, and while again the power of every state to regulate the manner and terms upon which property, real and personal, passes by last will and testament is not questioned, we find this rather significant statement: "The act of the legislature under review does not make any distinction between citizens of the state and aliens in the same circumstances." The question, also, of the right of the United States to control by treaty a state in the matter of real property was first raised in this case, but the court considered the subject one of great magnitude and declined to adjudicate it because it was not necessary for the decision.

Hauenstein vs. Lynham (1879), 100 U. S. 483-484:

This seems to be cited as a leading case by those who advocate the doctrine of the supreme power of a state in matters of real property, but an examination of the case shows that in essence it involves the construction of a treaty between Switzerland and the United States with respect to the rights of an alien Swiss under said treaty. The case cites the old case of *Ware vs. Hylton*, 3 Dall. 199, on the question of the supremacy of a treaty, and declines to discuss the limitation, if any, of the treaty-making power, holding that the Constitution of the United States and its laws and treaties are a part of the law of every state, and only incidentally, we contend, decides that a state is supreme in the matter of legislation with respect to its real property. We cannot understand why this case, decided, as it was, without any reference to the Fourteenth Amendment, can be considered authoritative on the question under discussion.

De Vaughn vs. Hutchinson (1897), vol. 17, Sup. Ct. Rep. 461:

This case involves the question of the applicability of the rule in *Shelly's* case, and so far as it is an authority on the question under investigation, becomes such authority only by reason of the fact that Mr. Justice Shiras, in the opening paragraph of the opinion, says:

"It is a principle formerly established that to the law of the state in which the land is situated we must look for the rules and which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances."

We quote this particular paragraph because it seems to have been one of the foundation rocks of the doctrine which has gotten ahead by constant repetition, although we discover that the case itself only indirectly involves this proposition and was, of course, decided before the Fourteenth Amendment.

Magoun vs. Illinois Trust and Savings Bank (April 25, 1898), 18 Sup. Ct. Rep. 594:

This is an inheritance tax case, and is the first one decided since the Fourteenth Amendment upon the question under investigation. While much is said in the case about classification and the basis of classification and the right of a state to classify persons and property for the purpose of taxation, we must remember that an inheritance tax is not a tax upon real property, but merely upon the right of succession. A few quotations from this case are convincing as showing how easily the case may be distinguished from the case at bar.

"The reasoning of appellant is based on the view that the tax is one on property, instead of one on the succession, as held by the supreme court of the state. * * *"

We fail to understand how this case can be cited as an authority, and in view of the strong dissenting opinion, and also the fact that the case has been analyzed and reviewed in other subsequent cases, we are constrained to say that after very careful examination of it we are unable to see how this case can form the basis for any doctrine that a state may, in the matter of real property, pass discriminatory legislation. There can be no quarrel with the case so far as its main doctrine of classification is concerned, and if we bear in mind the basis of the decision and the fact that it was an inheritance tax case, there can be no trouble with it.

Clarke vs. Clarke (1900), 20 Sup. Ct. Rep. 873:

This case decides, as stated in the syllabus, that "The local law of a state is taken by the Supreme Court of the United States as announced by the state court of last resort" in the matter of the devolution of real property. The question of the effect of the Fourteenth Amendment was not in any way discussed and did not seem to be involved. As the decision went off on the construction of the "full faith and credit clause of the Constitution," we must remember in this connection that the prohibitions placed by the Fourteenth Amendment on said action apply only to persons or property within the jurisdiction of the state. We are not advised in this case as to whether the parties were resident or non-resident, nor do we know what effect the Fourteenth Amendment might have had if it had been considered. We fail to understand how this case can be an authority on the particular question under discussion.

Blythe vs. Hinckley (1901), 21 Sup. Ct. Rep. 390:

This case is also consistently cited as a leading case upon the question under investigation and we confidently submit that it is not an authority upon that proposition. Careful reading of the case will show that the only question decided is, as stated in the syllabus, "The right of a state, in the absence of a treaty, to declare an alien capable of inheriting or taking property and holding the same within its borders, as is declared by Cal. Civ. Code, section 671, is not precluded by U. S. Const., art. I, sec. 10, declaring that 'no state shall enter into any treaty, alliance, or confederation.'"

The real question under investigation in this case seems to be as to whether or not a state *in the absence of a treaty could qualify an alien (resident or non-resident) to take title to real property by inheritance*. The decision finds that there is no doubt upon that proposition and underlying the decision there is, of course, the assumption that a state, in the absence of a treaty, may control the devolution of its real property. We can find in this decision no hint of the Fourteenth Amendment or what the effect of the Fourteenth Amendment might be upon the question involved. In fact we cannot see how the question of the Fourteenth Amendment could be legitimately involved in the case, because there is no statute of the state cited which discriminates between *resident aliens* or between citizens and resident aliens, in fact there does not seem to be any discrimination whatsoever and we fail to understand how this case supports the doctrine suggested.

CONCLUSION OF THIS BRANCH OF THE ARGUMENT.

All that we can gather from our survey of the above cases is the well known doctrine that under the common law of England, as adopted in this country, a state controls the devolution of its real property and an

alien under that principle can have no inheritable blood. In other words, an alien, resident or non-resident, did not have, under the common law, the right of inheritance, nor could he transmit by inheritance. We call particular attention to the fact, however, that this doctrine of the common law has, as shown by the cases above cited, been very seriously modified by the doctrine set forth clearly in the cases, that a treaty made by the Government of the United States is binding on the states, even in the matter of *inheritance by aliens of real property*.

We submit now to the court this argument:

If the ancient principle of the right of a state to control the devolution of its real property, can be modified by a treaty between the United States and a foreign country, why may not the right of a state to control the devolution of real property be controlled or affected by the prohibitory principles of the Fourteenth Amendment? Surely, if the Fourteenth Amendment is to justify all of the laudatory things which the textbook writers and judges and lawyers and statesmen have said about it, then it should rise at least to the dignity of a treaty and if, by the terms of a treaty, as is conceded, the right of a state to control the devolution of real property may be modified to the extent of securing to an alien affected by the treaty the full rights which citizens have in the matter of real property, surely, the Fourteenth Amendment to the Constitution of the United States should control and affect a state in the legislation which it passes with respect to the devolution of real property, especially when the state attempts to discriminate against aliens in the matter of real property. Finally, concluding this branch of our argument, we hasten to say that we have questioned the principles of the absolute right of a state to control the devolution of its real property notwithstanding the prohibitions of the Fourteenth Amendment, lest such doctrine be carried one step further to the extent of permitting a state to control the devolution of the title to personal property—to-wit, the capital stock of its corporations. It is not only a question, as the decisions have said, of forcing the doctrine of a state's control over its real property one step further, but it seems to be a question, in its last analysis, as to whether or not a state may control the devolution of its real property in the face of the Fourteenth Amendment, by discriminatory legislation against resident aliens. This is indeed forcing the ancient principle so far as to make the Fourteenth Amendment a mere "scrap of paper". Even should we be tempted to refuse to carry out the "most constant protection" and "same rights and privileges" clauses of our treaty with Japan, we should hesitate to temporize with the sacred obligations of the Fourteenth Amendment. As humble sailors manning the ship of state we should close our ears to the siren cries of race prejudice and political expediency.

(b)

Fish and game cases.

Greer vs. Conn., 161 U. S. 519; *Miss. vs. Holland*, 40 Sup. St. Rep. 382; *Patsone vs. Penn.*, 34 Sup. Ct. Rep. 279.

(c)

Public works cases.

A state in its capacity as a proprietor and in reference to its own property may prefer its own citizens to aliens without incurring the condemnation of the national Constitution. (*Heim vs. McCall* [Nov. 29, 1915], vol. 36, Sup. Ct. Rep. 78.)

This case settled the question of the right of a state in its public work

to discriminate in favor of its own citizens and against resident aliens. The court says:

"* * * The Supreme Court put its decision upon the power of the state 'to provide what laborers shall be employed upon public works', and that 'the state has the same right in conducting its business that an individual has', and had, therefore, 'a perfect right to enact section 14 of the labor law, and does not violate any rights of an alien under existing treaties.'"

"* * * And it was hence decided that in the control of such agencies and the expenditure of such moneys it could prefer its own citizens to aliens without incurring the condemnation of the national or state constitution. 'The statute is nothing more,' said Chief Justice Bartlett, concurring in the judgment of the court, 'in effect than a resolve by an employer as to the character of his employees.'"

"* * * It was there declared, and it was the principle of decision, that 'it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.' And it was said: 'No court has authority to review its action in that respect. Regulations on this subject suggest only consideration of public policy. And with such considerations the courts have no concern.'"

"* * * Immunity of municipal corporations from legislative interference in their property and private contracts was contended for there (as here); also that employees of contractors were not employees of cities. * * *

"* * * The one is as much of the essence of the right regulated as the other, that is, the same elements are in both cases—the right of the individual employer and employee to contract as they shall see fit; the relation of the state to the matter regulated; that is the public character of the work."

"* * * Construing the provision of 1871, the court of appeals decided that it 'does not limit the power of the state, as a proprietor, to control the construction of its own works and the distribution of its own moneys.' The conclusion is inevitable, we think, from the principles we have announced. We need not follow counsel in dissertation upon the treaty-making power or the obligations of treaties when made. The present case is concerned with construction, not power, and we have precedents to guide construction. * * *"

(d)

Cases where classification held proper.

Perley et al. vs. State of North Carolina (April 21, 1919), vol. 39, Sup. Ct. Rep. 357.

In this case it was held that there was a proper exercise of the police powers of the State by North Carolina in a statute which provided that: "any person that owns land or standing timber on land within 400 feet of any watershed held or owned by any city or town for the purpose of furnishing the city or town water supply, upon cutting or removing the timber or permitting either, within 400 feet of the watershed, shall * * * remove or cause to be burned under proper supervision all tree-tops, boughs, etc. * * *"

It was contended in this case that the purpose of the statute was obviously governmental, but that "the statute under review is too distant from the purposes and is simply an arbitrary exercise of power." The court held that there was no legal discrimination in this statute and we can see no possible difficulty with the doctrine of this case and we think it is a very easy matter to distinguish it from the instant case. The legislature, in

the exercise of its police power for the public welfare, classified timber holdings in respect to their proximity to public water supplies. Although this case has been cited by the learned attorney-general as being in opposition to the views expressed in this brief, we hasten to say that we should cite this case ourselves as illustrative of a proper exercise of the police powers of a state in the interests of public health or public welfare.

Patson vs. Penn. (Jan. 19, 1914), 34 Sup. Ct. Rep. 279.

This case has been much relied upon as being contrary to the proposition contended for in the instant case. It involves the constitutionality of a statute of the State of Pennsylvania, which "makes it unlawful for any unnaturalized foreign-born resident to kill any wild bird or animal, except in defense of person or property, and 'to that end' make it unlawful for such foreign-born person to own or be possessed of a shot-gun or rifle." Primarily the thesis of this decision is that since the protection of the wild game of the state is peculiarly a state matter, because fish and game really belong to a state and its citizens (*Greer vs. Conn.*, 161 U. S. 519, therefore the discrimination is warranted and "the means adopted for making it effective also might be adopted." With this fundamental thesis the decision holds "that the state may classify with reference to the evil to be prevented, and that if the class discriminated against is, or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out."

We have cited this case and with absolute frankness wish at this point to say that this is the only case which we have been able to find which even suggests a position contrary to the position which we have assumed in the instant case. We must remember, however, that legislation affecting fish and game is one of the things to which Mr. Justice Hughes called particular attention in citing the above case in *Raich vs. Truax*, 239 U. S. 33, wherein he says:

"Where the discrimination against aliens upheld by the court had for its object protection of wild game within the states, with respect to which it was said that the state could exercise its preserving power for the benefit of its own citizens if it pleased."

We call particular attention to the interpretation of the above case made in the quotation above cited. We are also mindful of the fact that the above case involved the construction of the treaty between the United States and Italy and the particular point was made that "the act was passed for an object with which possession in the way of trade has nothing to do, and well might be interpreted as not extending to it."

And in concluding the decision, and in placing it upon its real fundamental ground, the court says:

"It is to be remembered that the subject of this whole discussion is wild game, which the state may preserve for its own citizens if it pleases, * * * we see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the states to the full extent."

When the above case is interpreted in accordance with the above quoted and clearly stated ground of the decision, we can find no possible quarrel with it, and insist that it may be readily classified as being amongst that group of cases which illustrate the proper exercise of the police powers of a state.

Hebe Co. vs. Shaw (January 7, 1919), 39 Sup. Ct. Rep. 125.

The above case has been cited *contra* to the position which we have taken, but an examination of the case shows that, if the act under review therein is considered as illustrating an improper classification the answer

would be that the classification made is obviously one made by the legislature with a view to the public health. This is peculiarly a ground for the proper exercise of the police powers of a state and we can find no precedent in this case for a statute based upon an arbitrary classification which bears no relation whatever to the public health.

Dominion Hotel vs. State of Arizona (March 24, 1919), 39 Sup. Ct. Rep. 273.

This case has been cited *contra* because it contained the following language:

"* * * The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the state 'may be determined by degrees of evil or exercised in cases where detriment is specially experienced.' * * *

The facts of the case show, however, that a statute of the State of Arizona was held to be constitutional which provided a different rule for the operation of railroad restaurants, from that in other general restaurants. In the decision the learned Justice Holmes assumes many possible grounds upon which the classification was made by the legislature and gives reasons why the eight-hour law might properly be applied to restaurants generally and possibly ought not to be applied to railroad restaurants which are supposed to serve the traveling public. Railroad corporations have always been classified under a special classification, and we certainly can find no reason for supposing that eating houses in railroad stations might not be specially classified. Public welfare and convenience might be well served by such a classification and we cannot understand why this case is cited as supporting arbitrary discrimination involved in the Alien Land Act.

Porterfield vs. Webb, U. S. District Court, Northern District of California, Southern Division.

The opinion written by Judge Dooling in this case involves directly the point at issue as contended *contra* in the instant brief, but we call particular attention to the fact that the decision is rested almost, if not entirely, upon the authority of the decision in *Terrace vs. Thompson*, 274 Fed. 841 (July 25, 1921). We therefore proceed to an analysis of the only case which we have been able to find which is *contra* to the position assumed in the instant case:

Terrace et al. vs. Thompson, 274 Fed. 841 (July 25, 1921).

It will be argued that the above case furnishes an answer to the arguments herein made, but a critical examination of the case shows that its principal thesis supports the contention of the plaintiffs herein.

Plaintiff Terrace in this case was suing to secure the right to enter into a lease with plaintiff Nakatasuka, an alien Japanese, and was seeking an injunction under the Anti-Alien Land Act of Washington. The said act is vitally different from the California Alien Land Act in that it provides a definition of an alien as follows:

"Alien does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose members are aliens."

Most of the opinion is concerned with the question as to whether or not the Japanese plaintiff had the right to enter into the lease under the terms of the treaty. The court then proceeds to distinguish the case from *In re Ah Chong*, quoting the portion of the act which has been quoted and the opinion reads:

"The prohibition by this definition is made applicable to all aliens, both those eligible and those not eligible to citizenship, provided that they have not declared their intention to become citizens. To this extent the present suit is to be distinguished from *In re Ah Chong* (C. C.), 2 Fed. 733."

The court then cites fully from the *Ah Chong* case and apparently approves of the doctrine of it and then proceeds to reiterate that the case is to be distinguished from the *Ah Chong* case

"because of the fact that the present law is made applicable to all aliens and there is no punishment by imprisonment or a fine of the alien grantee of the lands, but the case is to be further distinguished because of the fact that the treaty with Japan does not contain, as to land ownership, the 'most favored nation' clause or any language of such import."

The court forgets for the moment that the Fourteenth Amendment is itself tantamount to a most favored nation clause. The corollary from the decision in this case would be that an act like the California act, which disqualifies from leasing and owning land only those amongst aliens who are ineligible to citizenship, would, under the authority of the *Ah Chong* case, be invalid. Obviously, if the filing of a declaration of intention to become a citizen would take an alien out of the prohibited class he could not complain that he was arbitrarily discriminated against. We know of no law which would prevent an alien from declaring in good faith his intention to become a citizen of the United States even though he might not be able to ever become such a citizen because of the inhibitions of section 2169, R. S. In any event, if by his voluntary act he could comply with the terms of the Washington act, and that is certainly the assumption underlying the decision, then, obviously, he could not complain under the Fourteenth Amendment of discrimination. There is no other way in which we can reconcile the court's citation of the cases of *Ah Chong* and *Buchanan vs. Warley* with the opinion in this case, and a careful reading of these two cases will show that this case must be distinguished from the instant case in order that it can be understood. As we read this case we conclude that the learned court would have held the act unconstitutional under the *Ah Chong* case and *Buchanan vs. Warley* had the California act been before them. In view of this analysis the court's conclusion "that the citizen land owner may sell to whom he pleases; but he may not sell to one who is rightfully forbidden the right to buy," presents the logical condition of a vicious circle and begs the entire question, which is: Does the alien Japanese have the right to buy land or lease land under the Fourteenth Amendment? This question we may answer in the negative and still demonstrate that under the California act the Japanese alien is unjustly discriminated against under the Fourteenth Amendment in that other aliens are permitted by the act both to lease and buy land.

(e)

Emergency rent cases.

Black vs. Hirsh (April 18, 1921), 41 Sup. Ct. Rep. 458:

The justification for the legislation referred to in the above case is found in the syllabus in this language:

"3. Circumstances may so change in time or so differ in space as to clothe with a public interest so great as to justify regulation by law an interest which at other times or in other places would be a matter of purely private concern.

(See 6 R. C. L., 227, 228.)

—emergency—temporary regulation.

4. A limit in time to tide over a passing trouble may justify a law that could not be upheld as a permanent change."

To like effect is the case of *People of the State of New York ex rel. Durham Realty Corporation vs. Edward B. La Fetra*, 16 A. L. R. 152 (March 8, 1921), New York Court of Appeals.

In both of the above cases strong dissenting opinions were written.

We call particular attention to the fact that while rent emergency acts were passed under the original police powers of the state, there is not the slightest suggestion that the principles of these cases would be extended in the absence of public emergency.

Edgar A. Leavy Leasing Co. vs. Siegel (March, 1922), 42 Sup. Ct. Rep. 289:

"In terms the acts involved are 'emergency' statutes, and, designed as they were by the legislature to promote the health, morality, comfort and peace of the people of the state, they are obviously a resort to the police power to promote the public welfare. They are a consistent inter-related group of acts essential to accomplish their professed purposes."

XII.

HEREIN WE CITE CASES WHICH BY ANALOGY ARE CLEARLY IN POINT AND IN WHICH THE DETERMINATIVE PRINCIPLES INVOLVED IN THE INSTANT CASE ARE SET FORTH.

Six cases clearly in point by analogy.

Buchanan vs. Warley, 245 U. S. 60; *Fraser vs. McConway & T. Co.*, 82 Fed. 257; *Truax vs. Raich*, 219 Fed. 273; *In re Ah Chong*, 2 Fed. 733; *In re Tiburcio Parrott*, 1 Fed. 481; *Poon vs. Miller and Wife* (Texas, Nov. 2, 1921), 234 S. W. 573.

We cannot understand why all six of the above cases are not persuasive as embodying by analogy the fundamental principles which are determinative of the instant case. A brief survey of these cases seems to be necessary, and we shall make our survey as concise as possible.

The Supreme Court of the United States has gone very far in denying to any state or political subdivision thereof the right to interfere with a person's enjoyment of private property.

Buchanan vs. Warley, 245 U. S. 60 (November 5, 1917):

This case involves the constitutionality of an ordinance of the city of Louisville, Kentucky, known as a segregation ordinance, which prevented either white persons or colored persons from moving into and occupying as a residence a house in any block in which a greater number of houses were already occupied by persons of the opposite race. Buchanan, the plaintiff, and the white man, brought an action for specific performance against the colored man of a contract for the sale of certain real estate situated in Louisville and within the segregated block. The defendant set up in his answer that he was a colored person and could not occupy the property and, therefore, should not be compelled to perform his agreement. The plaintiff in reply alleged, amongst other things, that the ordinance was in conflict with the Fourteenth Amendment to the Constitution of the United States and hence no defense to the action for specific performance. Justice Day, in deciding the case, said:

"The assignments of error in this court attack the ordinance upon the ground that it violates the Fourteenth Amendment to the Constitution of the United States (9 Fed. St. Ann. 416) in that it abridges the privileges and immunities of citizens of the United States to acquire and enjoy property, takes property without due process of law, and denies equal protection of the laws. * * *

"The right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property, and had obligated himself to take it. * * *

"This drastic measure is sought to be justified under the authority of the state in the exercise of the police power. It is said such legislation tends to promote the public peace by preventing racial impurity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color. * * *

"But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases.

"The Federal Constitution and laws passed within its authority are by the express terms of that instrument made the supreme law of the land. The Fourteenth Amendment protects life, liberty, and property from invasion by the states without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. (*Holden vs. Hardy*, 169 U. S. 366, 391; 18 S. Ct. 383; 42 U. S. [L. Ed.] 780, 791.) Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. (1 Blackstone Commentaries, Cooley's Ed., 127.)

"True it is that dominion over property springing from ownership is not absolute and unqualified. This disposition and use of property may be controlled in the exercise of the police power in the interest of the public health, convenience, or welfare. Harmful occupations may be controlled and regulated. Legitimate business may also be regulated in the interest of the public. Certain uses of property may be confined to portions of the municipality other than the resident districts. Such as livery stables, brickyards and the like, because of the impairment of the health and comfort of the occupants of the neighboring property. Many illustrations might be given from the decisions of this court and other courts of this principle, but these cases do not touch the one at bar.

"The concrete question here is: May the occupancy, and necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented makes it pertinent to inquire into the constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and occupant.

"While a principal purpose of the latter amendments was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the states. This is now the settled law. In many of the cases since arising the question of color has not been involved and the cases have been decided upon alleged violations of civil or property rights, irrespective of the race or color of the complainant.

"What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white,

shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? * * *

"The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any state action that denies this immunity to a colored man is in conflict with the Constitution.'

"In the face of these constitutional and statutory provisions, can a white man be denied, consistently without due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?

"These enactments did not deal with the social rights of men, but those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. (Civil Rights Case, 109 U. S. 3; 22 S. Ct. 18; 27 U. S. [L. Ed.] 835, 843.) The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.

"That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

"As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given, but in view of the rights secured by the Fourteenth Amendment to the Federal Constitution such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraint of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us.

"The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.

"It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

"It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results."

We have cited quite at length from this case because it seems to us to answer by anticipation every argument which can be made in the instant cases in support of the Alien Land Act. If the expression "ineligible to

citizenship" is simply a device of arbitrary classification on a race basis, and if we substitute the words "Chinese" and "Japanese" for the word "negro" wherever used in the above case, it is apparent that the case becomes an authority in support of the right of plaintiff Raymond L. Frick to sell his stock to a Japanese—a right guaranteed under the Fourteenth Amendment and of which he may not be deprived by state legislation.

Fraser vs. McConway & T. Co., 82 Fed. 257:

It was held that the statute which imposed upon employers of unnaturalized male persons a tax of three cents per day for each day such person was employed, was void under the Fourteenth Amendment since it discriminated against such persons by interposing an obstacle to the pursuit by them of their lawful avocations and imposing a burden upon them which was not laid upon others in the same calling.

Juanita Limestone Co. vs. Fagley, 187 Penn. State 193 (July, 1898):

This case presents the situation of a bill in equity to restrain the collection of a tax under a statute of Pennsylvania, the said tax being a tax of three cents imposed on every employer of an unnaturalized alien, for each day that the alien should be employed. The act was declared unconstitutional "because it offends against the Fourteenth Amendment to the Constitution of the United States."

The court in the opinion says:

"The act in question clearly belongs to a vicious species of class legislation which too often finds its way into our statute books, and we have no doubt as to its unconstitutionality on both grounds indicated by the learned president of the court below. It has already been adjudged void by the circuit court of the United States of the Western District of Pennsylvania. * * * 'The equal protection of the laws declared by the Fourteenth Amendment to the Constitution secures to each person within the jurisdiction of a state exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances.' (Railroad Tax Cases, 13 Fed. Rep. 722, 733.)

"In that case the court said: 'Unequal exactions in every form, or under any pretense, are absolutely forbidden, and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid. It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purposes of taxation must have a just and reasonable basis, which is lacking here.' (*Gulf etc. Ry. Co. vs. Ellis*, 165 U. S. 150, 165.) In the last cited case Mr. Justice Brewer said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable grounds—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'

Truax vs. Raich, 239 U. S. 33 (Nov. 1, 1915):

In this case an act passed under the initiative provision of the constitution of Arizona "provides that every employer (whether a corporation, partnership or individual) who employs more than five workers at any one time, 'regardless of kind or class of work, or sex of worker,' shall employ 'not less than eighty per cent qualified electors or native born citizens of the United States or some subdivision thereof,'" was under review. In deciding that this act was invalid and unconstitutional under the Fourteenth Amendment, Mr. Justice Hughes said:

"The question, then, is whether the act assailed is repugnant to the

Fourteenth Amendment. Upon the allegations of the bill it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union (see *Gegiow vs. Uhl, Commissioner*, decided October 25, 1915, 239 U. S. 3, 36 S. Ct. 239, 60 U. S. [L. Ed.] 114). Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws. The description 'any person within its jurisdiction,' as it has frequently been held, includes aliens. 'These provisions,' said the court in *Yick Wo vs. Hopkins*, 118 U. S. 356, 369, 6 S. Ct. 1064, 30 U. S. [L. Ed.] 220, referring to the due process and equal protection clauses of the amendment, 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.' (See, also, *Wong Wing, vs. U. S.*, 163 U. S. 228, 242, 16 S. Ct. 997, 41 U. S. [L. Ed.] 140; *U. S. vs. Wong Kim Ark*, 169 U. S. 649, 695, 18 S. Ct. 456, 42 U. S. [L. Ed.] 890.) The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against (40) both aliens and the citizens of other states. Thus in *McCreedy vs. Virginia*, 94 U. S. 391, 396 (24 U. S. [L. Ed.] 248), the restriction of the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the state, and an analogous principle was involved in *Patson vs. Pennsylvania*, 232 U. S. 138, 145, 146 (34 St. Ct. 28, 58 U. S. [L. Ed.] 539), where the discrimination against aliens upheld by the court had for its object the protection of wild game within the states with respect to which it was said that the state could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein vs. Lynham*, 100 U. S. 483 [25 U. S. (L. Ed.) 628]; *Blythe vs. Hinckley*, 180 U. S. 333, 341, 342 (21 S. Ct. 390, 45 U. S. [L. Ed.] 557); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise. * * *

Poon vs. Miller and Wife, 234 So. West. 573 (Texas, November 2, 1921):

This is the latest case which we have been able to find reaching the point here involved. The facts in this case show that there was in the State of Texas a statute under the terms of which it was necessary for any person to secure a license to engage in the business of selling fish and oysters, wholesale, and no person could procure such license without swearing that he was "a citizen of the United States by birth, or not being so shall state that he has been granted full naturalization papers." The Chinese plaintiff in the case, who was an alien, was seeking to enforce against the defendant certain rights of contract under which the plaintiff was seeking to enjoin the defendants from operating a fishing and poultry business, they having agreed not so to do in a contract with plaintiff. One of the defenses set up by the defendants was that the plaintiff could not recover because he could not and did not procure a license under the act in question. It further appears that in the treaty between China and the United States it was provided that "Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all

the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nations. * * * The Government of the United States will exert all its power to devise measures for their freedom and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nations." It was conceded that under treaties with other nations, other citizens were authorized "to carry on trade, wholesale and retail, in the nations, and generally to do anything incident to or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws then established."

The closeness of the language referred to in the treaties in this case and the language employed in the treaty between Japan and the United States must be self-evident.

The court, in deciding the case, said:

"* * * That consequence inevitably follows, and the question then presented is, Can a state pass laws which discriminate against the natives of countries who have been by treaty given the right to trade in the United States 'upon the same terms as the natives of the country,' and which guarantees to such aliens 'the same rights and privileges as are or shall be granted to the natives'? (Fed. Stats. Ann. vol. 7, p. 656.) So far as the wholesale fish business is concerned in Texas, if that part of article 3987 which in effect prohibits any alien from engaging in the wholesale fish business is upheld, the treaties giving the right to aliens to engage in trade as do the natives are nugatory and vain, and are virtually abrogated.

"Not only is no such power or authority lodged in the legislatures of the different states, but in article VI of the Constitution it is clearly and unequivocally declared:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

"Treaties made by the Federal Government are thus given the sacredness, dignity, and force of the Constitution, and judges in every state in terms are commanded to be bound by them. In the face of that imperative provision of the supreme law of our land, it is useless to argue that the State of Texas owns all her fish and has the power and authority to enact any rules and regulations she deems necessary to safeguard the interests of her citizens in such fish. Undoubtedly, the state could prohibit the sale of fish if it was deemed proper so to do; she can make rules and regulations for the sale or shipment of fish, but those rules and regulations cannot antagonize and be given higher dignity and power than the Constitution of the United States. Texas, when she voluntarily entered by treaty into the Union of American states, did not and could not reserve the right to disregard the Constitution of the United States. She entered the Union as no other state ever entered it since the adoption of the Federal Constitution, but entered under the provisions of that Constitution, bound by the same allegiance thereto which is owed by any other state. In any state, laws might be enacted and enforced against the killing or taking of its game or fish by any person except citizens of the state, for it has the property in the game and fish and can well restrict the right to appropriate them to its citizens. However, when the game and fish have been appropriated and passed out into the avenues of business and trade, a different proposition is

confronted. The difference has been recognized by the Supreme Court of the United States."

"* * * Whenever the state has absolutely parted with the ownership of its fish, and they have gone into commerce, the state may require a license to sell them as a wholesale dealer, but it cannot, in violation of a treaty of the Federal Government, prohibit anyone, alien or citizen, from selling the fish. The state may have the power to regulate the sale of property belonging to the citizen or resident which has become a part of the commerce of the country, but cannot absolutely prohibit such sale, in the face of the Federal Constitution, by an alien who has the same rights guaranteed to him as has the citizen."

"* * * We conclude that the provision of the statute denying this right to an alien to whom has been given all the rights of citizens of the most favored countries is in conflict with the treaty between the United States and China, and also is obnoxious to the provisions of the Fourteenth Amendment to the Constitution, and is of no force and effect."

Under the authority of the above case, even if we conceded the right of the State of California to prevent the issuance of the capital stock of a corporation, incorporated under the laws of the State of California, to an alien, we still would deny the right of the state to prevent an alien from buying and selling said stock after the same has been issued and "properly passed out in the avenues of business and trade." When the State of California attempts to say, through an act, such as the Alien Land Act, that the capital stock of an agricultural land owning corporation may not be freely bought and sold between aliens after it shall have been issued by the corporation then the State of California is surely interfering with the right of an alien to engage in trade, wholesale and retail, under the terms of the treaty between his nation and the United States. How can it be argued that an alien is given the "same rights and privileges as are or may be granted to native citizens or subjects" when he is not permitted as are native citizens or subjects to purchase or sell or own freely capital stock of corporations which, as it were, flow freely in the rivers and streams of trade and commerce? We ask the court to take judicial notice of the fact that all corporations generally in California are qualified, except corporations of a peculiar kind, to own agricultural land. If we deny to a Japanese alien the right to own capital stock of a corporation authorized to own agricultural land this is tantamount to denying him the right to purchase stock of practically all corporations organized under the laws of California. And this again is tantamount to saying to a Japanese alien that while under the treaty with the United States he may fish freely in the streams of trade and commerce, he must be careful and not catch on his line any of the great mass of capital stock which swarm in those same rivers and streams. It cannot be seriously argued that capital stock is not personal property. Nor can it be seriously denied that capital stock of California corporations forms the subject matter of much trade and commerce between citizens of the United States and others. To deny to a Japanese alien the right to purchase stock therefore in a California corporation is to deny him the right to "carry on trade wholesale and retail" as surely capital stock is the subject matter of trade. If we concede that the state may determine through legislation what is to be the subject matter of trade and commerce in the way of restricting trade and commerce to aliens as a class on the basis of their eligibility to citizenship, we give to the state the power to destroy utterly "the sacredness, dignity and force" of a treaty. Just as a state, though it owns fish and game, has no right, by legislation, under the Four-

teenth Amendment and under treaty rights to prevent an alien purchasing and selling fish and game after the same have become articles of trade and commerce, so a state, even conceding its rights and control over its corporations and the stock thereof, may not, under the Fourteenth Amendment and treaty provisions, prevent an alien from purchasing and selling capital stock of its corporations, after such stock has gotten into the channels of trade and commerce.

In re Tiburcio Parrott (March, 1880), 1 Federal, 481.

We cite this case as not only a leading case upon the questions herein involved but also this case together with the case of *In re Ah Chong*, 2 Federal, 733, form a text book upon the subject of legislation discriminating against aliens and we venture to assert that these two cases answer nearly every question which can be asked with respect to the Alien Land Act of California. The State of California, in pursuance of its legislative policy of driving the Chinese out of the state, had in its constitution, article XIX, sec. 2, a provision preventing corporations from employing Chinese. In 1880 the legislature of California, following the constitutional provision, passed an act to carry out the terms of the constitutional provision making it a crime for any corporation to employ a Chinese. The petitioner being arrested under the said act (approved February 13, 1880), sued out a writ of *habeas corpus* and propounded to the court three propositions:

I. The said act was void as being in violation of the Fourteenth Amendment to the Constitution of the United States.

II. The said act is in direct violation of the so-called Civil Rights Law (secs. 1977-1978-2164 Rev. Stats.).

III. Said act is in conflict with the treaty between the United States and China (Burlingame treaty).

The attorney-general argued fully, and his argument is set forth in the opinion in the case, that since the State of California created corporations and permitted their operation and reserved the right to repeal later or amend the law creating the corporations, necessarily the state had a right to put an end to the corporation's existence and further the state "could prescribe the conditions upon which their existence shall be continued."

"* * * ; that this right is theoretically and practically without limit, and may be exercised by imposing upon corporations laws for the conduct of their business, and restrictions upon the use and enjoyment of their property, which would be unconstitutional and void if applied to private persons, and which may have the effect to defeat the object of the association, or to impair or even destroy the beneficial use of its property.

"The state may, therefore, in the exercise of this reserved power, prescribe what persons may be employed by corporations organized under its laws, their number, their nationality, perhaps even their creed. It may determine what shall be their age or complexion, their height or their weight, the number of hours they shall work in a day, or the number of days in a week, and the rate of their wages. * * *"

"Such being the reserved power of the state over the creatures of its laws, it is urged that the treaty was not intended, and cannot be construed, to impair that right any more than it could be deemed to abridge the right to enact laws in the interest of the public health, safety, or morals, usually known as police laws, or to regulate the making of contracts by providing who shall be incompetent to make them, as infants, married women, and the like. * * *"

We should observe carefully that in another form this very argument

is made by the attorney-general in the instant case when he contends, if he does so contend, that since the State of California has full and complete control over its corporations, it may prescribe who shall and who shall not own capital stock in its corporations and may discriminate against aliens in providing those who may and who may not own the capital stock. It is exceedingly interesting to discover that in this old case, which arose during the anti-Chinese agitation in California, exactly the same thing was attempted in another form as is attempted in the Alien Land Act, in so far as that act attempts to provide that aliens cannot own capital stock in agricultural land-owning corporations.

Also note that the question of the police power of the state was directly involved as we see from the following language:

"* * * It need hardly be said that no reference is here intended to the power of the state to enact police laws—that is, laws to promote the health, safety, or morals of the public. To such laws corporations are amenable to the same extent as natural persons and no further.

"The law in question does not affect to be a police law. Its validity, if applied to natural persons, was not contended for at the bar. The authority to pass it was sought to be derived exclusively from the reserved power over corporations.

"It forbids the employment of Chinese. If the power to pass it exists, it might equally well have forbidden the employment of Irish, or Germans, or Americans, or persons of color, or it might have required the employment of any of these classes of persons to the exclusion of the rest."

We note also that the solution of the question in the case under consideration was approached from the angle of the rights of the corporation just as we are insisting in the instant case that the solution of the problem should be approached through the channel of the rights of the citizen plaintiff (Frick), in that he is deprived of the right to use and employ his property as he sees fit in so far as he may not sell it to a Japanese alien.

"* * * And it seems to me that their right to use and enjoy their property is as secure under constitutional guarantees as are the rights of private persons to the property they may own. That the law in question, substantially and not merely theoretically, violates the constitutional rights of the owners of corporate property, can readily be shown."

"* * * I am therefore of opinion that, irrespective of the rights secured to the Chinese by the treaty, the law is void, as not being a 'reasonable,' bona fide, or constitutional exercise of the power to alter and amend the general laws under which corporations in this state have been formed; that it would be equally invalid if the proscribed class had been Irish, Germans, or Americans; that the corporations have a constitutional right to utilize their property, by employing such laborers as they choose, and on such wages as may be mutually agreed upon; that they are not compelled to shelter themselves behind the treaty right of the Chinese, to reside here, to labor for their living, and accept employment when offered; but they may stand firmly on their own right to employ laborers of their choosing, and on such terms as may be agreed upon, subject only to such police laws as the state may enact with respect to them, in common with private individuals. * * *"

"* * * 'In every case' (where the Federal Government has acted) 'the act of Congress or the treaty is supreme, and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.' (Per Mr. C. J. Marshall, in *Gibbons vs. Ogden*, 9 Wheat. 211.)"

The provisions of the Burlingame treaty were directly involved. Article

six (VI) of said treaty provides that "reciprocally, Chinese subjects, visiting or residing in the United States, shall enjoy the same privileges, immunities and exemptions in respect to travel, or residence, as may there be enjoyed by the citizens or subjects of the most favored nation."

"* * * If the effect and purpose of the law be to accomplish an unconstitutional object, the fact that it is passed in the pretended exercise of the police power, or a power to regulate corporations, will not save it. If a law of the state forbidding the Chinese to labor for a living, or requiring them to obtain a license for doing so, would have been plainly in violation of the Constitution and treaty, the state cannot attain the same end by addressing its prohibition to corporations. * * *"

"* * * No enumeration would, I think, be attempted of the privileges, immunities, and exemptions of the most favored nation, or even a man in civilized society, which would exclude the right to labor for a living. It is as inviolable as the right of property, for property is the offspring of labor. It is as sacred as the right to life, for life is taken if the means whereby we live be taken. Had the labor of the Irish or Germans been similarly proscribed, the legislation would have encountered a storm of just indignation. The right of persons of those or other nationalities to support themselves by their labor stands on no other or higher ground than that of the Chinese. The latter have even the additional advantage afforded by the express and solemn pledge of the nation. * * *"

"* * * The attempt to attain the same object indirectly by legislation will be met with equal firmness by the courts, no matter whether it assumes the guise of an exercise of the police power, or of the power to regulate corporations, or of any other power reserved by the state; and no matter whether it takes the form of a constitutional provision, legislative enactment, or municipal ordinance. * * *"

"* * * The words 'privileges and immunities,' as used in the Constitution in relation to rights of citizens of the different states, have been fully considered by the Supreme Court of the United States, and generally defined, and there can be no doubt that the definitions given are equally applicable to the same words as used in the treaty with China. * * *"

"* * * The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is established."

"* * * Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and, as such, merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most other forms of property. (*Id.*, 127.)"

"* * * And this absolute, fundamental and natural right was guaranteed by the National Government to all Chinese who were permitted to come into the United States, under the treaty with their government, 'for the purposes of curiosity, of trade, or as permanent residents,' to the same extent as it is enjoyed by the citizens of the most favored nation. It is one of the 'privileges and immunities' which it was stipulated that they should enjoy in that clause of the treaty which says: 'Chinese subjects, visiting or residing in the United States, shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation.'"

"* * * It will be seen that in the latter clause the words are 'any

person,' and not 'any citizen,' and prevents any state from depriving 'any person' of life, liberty or property without due process of law, or from denying to 'any person within its jurisdiction the equal protection of the law.' In the particulars covered by these provisions it places the right of every person within the jurisdiction of the state, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the Constitution; and, in consonance with these provisions, the statute enacts that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.' Chinese residing in California, in pursuance of the treaty stipulations, are 'persons within the jurisdiction of the state,' and 'of the United States,' and therefore within the protection of these provisions. And contracts to labor, such as all others make, are contracts which they have a 'right to make and enforce,' and the laws under which others' rights are protected are the laws to which they are entitled to the 'equal benefit,' 'as is enjoyed by white citizens.'

"* * * And Mr. Justice Swayne: 'The equal protection of the laws places all upon an equal footing of legal equality, and gives the same protection to all for the preservation of life, liberty and property, and the pursuit of happiness.' (*Id.* 127.)"

"* * * 'But in our country, hostile and discriminating legislation by a state against persons of any class, sect, creed, or nation, in whatever form it may be expressed, is forbidden by the Fourteenth Amendment of the Constitution. * * *"

"* * * And this constitutional right is wholly independent of any treaty stipulations, and would exist without any treaty whatever, so long as Chinese are permitted to come into and reside within the jurisdiction of the United States. The protection is given by the Constitution itself, and the laws passed to give it effect, irrespective of treaty stipulations. * * *"

"* * * And whatever form the law may take on, or in whatever language be couched, the court will strip off its disguise, and judge of the purpose from the manifest intent as indicated by the effect. * * *"

"* * * In the language of Deady, J., in *Baker vs. Portland*, 'admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home and overriding the treaty-making power altogether.' (5 Saw. 750; 3 Pacific Coast Law Journal, 469.)"

And in concluding his concurring opinion in the above case, Mr. Justice Sawyer uses language not only prophetic in character, but so pertinent to the situation in California today as to justify us in quoting it as though it were written for the instant case:

"* * * Holding, as we do, that the constitutional and statutory provisions in question are void, for reasons already stated, we deem it proper again to call attention to the fact, however unpleasant it may be to the very great majority of the citizens of California, that however undesirable, or even ultimately dangerous to our civilization, an unlimited immigration of Chinese may be, the remedy is not with the state, but with the general government. The Chinese have a perfect right, under the stipulations of the treaty, to reside in the state, and enjoy all privileges, immunities, and exemptions that may there be enjoyed by the citizens and subjects of any other nation; and, under the Fourteenth Amendment to the National Constitution, the right to enjoy 'life, liberty, and property,' and 'the equal pro-

tection of the laws,' in the same degree and to the same extent as these rights are enjoyed by our own citizens; and in the language of Mr. Justice Bradley, in the Slaughterhouse Cases, 'the whole power of the nation is pledged to sustain those rights.' To persist, on the part of the state, in legislation in direct violation of these treaty stipulations, and of the Constitution of the United States, and in endeavoring to enforce such void legislation, is to waste efforts in a barren field, which, if expended in the proper direction, might produce valuable fruit; and, besides, it is little short of incipient rebellion. * * *

"* * * It ought to be understood by the people of California, if it is not now, that the same measure of justice and satisfaction which our government demands and receives from the Chinese emperor for injuries to our citizens, resulting from infractions of the treaty, must be meted out to the Chinese residents of California who sustain injuries resulting from infractions of the same treaty by our own citizens, or by other foreign subjects residing within our jurisdiction, and enjoying the protection of similar treaties and of our laws. * * *

In re Ah Chong, 2 Fed. 733 (June 9, 1880).

We cannot understand why this case is not perfectly in point, so far as analogical reasoning is concerned. Nor can we understand why this case does not involve exactly the same kind of a discrimination as is attempted in the Alien Land Act under consideration. There is, however, this important distinction which should increase rather than lessen the applicability of the Ah Chong case as an authority. We must remember that the Ah Chong case involved a discrimination in the matter of catching and selling fish. We argue that if a state is prevented from enacting discriminatory legislation in the matter of fish and game, *a fortiori* should the state be prevented from enacting discriminatory legislation with respect to matters not involving labor on public work or fish and game or other matters of like character.

In the act involved in the above case Chinese were prevented from fishing in the waters of California under a prohibition which did not mention them as such, but used the expression "all aliens incapable of becoming electors of this state are hereby prohibited from fishing, etc." We consider the case important because the discriminatory phraseology employed bears a striking and significant similarity to the phraseology employed in the Alien Land Act, to-wit: "All aliens eligible to citizenship under the laws of the United States." We have taxed our logical powers vainly in our attempt to find any distinction between the Ah Chong case in principle and the instant case and the decision in the case was based upon two grounds, to-wit: That the act was contrary to the Fourteenth Amendment to the Constitution of the United States and also contrary to the terms of the Burlingame treaty. If there is any distinction between the phraseology "rights and privileges" employed in the treaty between Japan and the United States and the phrase "privileges and immunities" employed in the Burlingame treaty, we should unhesitatingly say that the comparison is all in favor of the larger phraseology used in the Japanese treaty. In deciding the Ah Chong case, the court says:

"To him it is not a property right, but, in the strictest sense, a privilege or favor. To exclude the Chinaman from fishing in the waters of the state, therefore, while the Germans, Italians, Englishmen, and Irishmen, who otherwise stand upon the same footing, are permitted to fish *ad libitum*, without price, charge, let, or hindrance, is to prevent him from enjoying the same privileges as are 'enjoyed by the citizens or subjects of the most

favored nation;' and to punish him criminally for fishing in the waters of the state, while all aliens of the Caucasian race are permitted to fish freely in the same waters with impunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions 'as are enjoyed by the citizens or subjects of the most favored nation;' and such discriminations are in violation of articles 5 and 6 of the treaty with China, cited in full in Parrott's case. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privilege it must permit all others to enjoy, upon like terms, the same privileges, whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation.

* * *

"* * * It is obvious, also, from a consideration of these various provisions of the new state constitution, and the several statutes *in pari materia* referred to, considered in connection with the public history of the times, that the act relative to fishing in question was not passed in pursuance of any public policy relating to the fisheries of the state as an end to be attained, but simply as a means of carrying out its policy of excluding the Chinese from the state, contrary to the provisions of the treaty. * * *"

"* * * It is impossible, therefore, to say that the Chinese 'enjoy the same privileges, immunities, and exemptions' as are 'enjoyed by the citizens or subjects of the most favored nation,' as is stipulated they shall by the treaty, or that the 'state,' by this act, does not 'deny' to them 'the equal protection of the laws,' contrary to the Fourteenth Amendment to the National Constitution. * * *"

In conclusion we find words of Mr. Justice Sawyer which are prophetic and also pertinent to the question before this court:

"* * * These various provisions are referred to as instances illustrative of the crudities, not to say absurdities, into which constitutional conventions and legislative bodies are liable to be betrayed by their anxiety and efforts to accomplish, by indirection and circumlocution, an unconstitutional purpose which they cannot effect by direct means. * * *"

XIII.

THE ALIEN LAND ACT SO FAR AS IT PREVENTS A CITIZEN OF CALIFORNIA FROM SELLING PROPERTY, REAL OR PERSONAL, TO AN ALIEN SIMPLY BECAUSE OF HIS RACE OR COLOR (INELIGIBLE TO CITIZENSHIP) IS UNCONSTITUTIONAL UNDER SECTIONS 1 AND 13, ARTICLE I, OF THE CONSTITUTION OF CALIFORNIA.

Sections 1 and 13, article I, of the constitution of the State of California:

"Section 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

"Sec. 13. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself, *nor be deprived of life, liberty or property without due process of law*. The legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses, in criminal cases other than cases of homicide, when

there is reason to believe that the witness, from inability or other cause, will not attend at the trial." (Italics ours.)

The plaintiff, Frick, is a resident and citizen of California and also a citizen of the United States. We have argued in this brief to the effect that the legal meaning of the word "liberty" is the right to acquire, possess and dispose of property. We call particular attention, however, to the fact that a citizen of California is certainly given the right to acquire, possess and protect property. We submit to the court that the right of a citizen over property includes the right to dispose of it freely as he shall think best unless such right can be curtailed under a clearly proved police power of the state and no such power is shown in the instant case. In this connection we cite the case of *Sacramento O. & C. Home vs. John S. Chambers*, 25 Cal. App. Dec. 536 (Sept., 1917), in which the principle is summed up in the best short expression which we have found, "No such arbitrary and extraneous discrimination is sanctioned by our fundamental law."

Courts have gone further than the Fourteenth Amendment in holding that a covenant in a written instrument *inter partes* restraining one of the parties thereto from alienating his property to a person of a given race, is void.

We cite in this connection: *Gandolfo vs. Hartman et al.* (Circuit Court, S. D., California, January 24, 1892), 49 Fed. Rep. 181; *Title Guarantee & Trust Company vs. Garrott* (July 10, 1919), Cal. App. Court, vol. 29, Cal. App. Dec. 200; *Los Angeles Investment Co. vs. Gary*, 181 Cal. 680 (December 11, 1919).

CONCLUSION.

We have surveyed the field of American law as well as we could with the means at hand. We have endeavored with impartiality to present to the court all decisions and comments of textbook writers, which we could find, on both sides of this very important question.

So far as the treaty between the United States and Japan is concerned, with the question of political policy or expediency, courts can have nothing to do; with the construction and interpretation of the treaty courts have all to do. We venture to assert that were the treaty in fact a contract between individuals, there would not be the slightest doubt as to its construction. A broad and liberal construction and interpretation which gives to clear-cut English words their real meaning will result in a finding that the Alien Land Act of California either does not intend to deny to Japanese aliens their right to own capital stocks of agricultural land owning corporations, or if such is the intention of the act, then such intention must yield to the treaty.

Should there be any doubt as to a Japanese alien's right to own such stock under both the letter and spirit of the treaty, we contend further that the Fourteenth Amendment protects him to the extent of rendering void the Alien Land Act. We have gone quite fully into the question of the judicial interpretation of the phrase "equal protection of the law." We regret that we have not sufficient power or eloquence to give adequate expression to our devotion to this, the great American charter of human rights and human liberties. When the last decision shall have been written in interpretation of the Fourteenth Amendment, we doubt if words shall be found which pulsate more with the throbbing soul and spirit of democracy, or which shall so clearly demonstrate the genius of American statesmanship for government. What a pity if the Fourteenth Amendment shall in fact become what Governor Shaw calls a "vanishing landmark" or shall be sacrificed to the demands of a mere political expediency!

We have not denied to states the right to classify the subjects and objects of legislation. We have upheld the sovereign police powers of the state and have tried to outline the sphere of their proper activity. But hovering in the sky over all states and the people thereof, is the breathing spirit of the National Constitution, protecting our rights and liberties, guarding us against ill-advised legislative action and furnishing to us light on our voyage. All our citizens and all those who dwell in our land—aliens of any color or race—receive the protection of that spirit. Once deny to aliens who have lived amongst us in peace, the right to life and liberty and the equal protection of the law, for any reason over which such aliens have no moral control, and we have turned our backs upon the guiding spirit of our Constitution. And surely liberty means the right to work for a living and to secure by contract the fruits of labor. Take these away from citizen or alien by the mere arbitrament of government, state or national, and liberty is gone. When confronted by such legislations, citizen or alien may well exclaim:

"You take my house, when you do take the prop
That doth sustain my house;
You take my life, when you do take the means
Whereby I live."—*Merchant of Venice*, Act IV; Scene 1.

Respectfully submitted,

ALBERT H. ELLIOT and
GUY E. CALDEN,
Solicitors for Plaintiff.

3. DEFENDANTS' BRIEF.

We have read very carefully the voluminous brief prepared by counsel for plaintiffs. In our judgment the bulk of this brief, while quoting unquestioned principles and rules of law from cases and textbooks, is in no way helpful as a solution of the issue before the court in the case at bar. We shall, therefore, not attempt to discuss the very many cases and textbook authorities that are cited on points concerning which there can be no dispute. We conceive it our duty to be of more assistance to the court by limiting ourselves to what we understand are the issues in this case. We shall, therefore, pass undiscussed, though not unread, the bulk of the brief filed by counsel for plaintiffs.

It will not be out of place to recall briefly at the outset some of the objects which the legislature sought to accomplish by the enactment of the California Alien Land Act.

It was not the acquirement of title in fee alone that this legislation was designed to prevent. It was intended to withhold from ineligible aliens all of the advantages which the ownership of agricultural lands gives. It was intended to withhold from them dominion, occupancy, possession, enjoyment. It was intended to prevent ineligible aliens from having that use, that control of agricultural lands which would give to them, in whole or in part, the fruits thereof. It was intended to free the American farmer from the competition upon American soil of the Oriental farmer. The act was drawn by those who know, and in recognition of the established fact, that the American farmer cannot live in competition with the Oriental farmer. It was drawn by those who know, and in recognition of the established fact, that the American farm which is in competition with the Oriental farm will cease to be cultivated, or be cultivated by Orientals. It was to save the American farmer and the American farm laborer from the competi-

tion of unlimited hours of labor of the Oriental; indeed, from the competition of the labor of wives, widows and children. The act was designed to protect the American home life from competition with the Oriental home life. The American farm home, which is our country's boast, will not long endure if the Oriental farm home is to become its competitor. The members of the American farm home cannot continue the respective activities which now ennoble farm life, if such home and such activities are to be sustained against Oriental habit and custom. Wife and daughter cannot confine their activities to keeping the home; the children of suitable age can not be kept in schools with father and sons in the hopeless struggle of tilling the farm in competition with all the members of the family of the Oriental engaged in farm labor. The labor of the Oriental paid for by fixed compensation is not destructive. The labor of the Oriental when the compensation is to be increased by Oriental habit and custom is destructive. The American farm was not builded upon the idea of wives and daughters tilling the soil. This act was designed to protect the farm as it now exists in California, and elsewhere in the agricultural areas of the United States. The destruction of our farm life is not the more desirable because destroyed by a horde of Orientals holding stock in agricultural corporations, rather than by the same people holding the title in fee. It is the destruction of the farm life that is to be prevented, not the method of its destruction.

STATEMENT OF THE CASE.

Raymond L. Frick, a citizen of the United States and of the State of California, and N. Satow, a subject of the Emperor of Japan, born in the Empire of Japan, of Japanese parents, and also a resident of California, are the plaintiffs in this proceeding. U. S. Webb, as attorney-general of the state, and Matthew Brady, as district attorney of the City and County of San Francisco, are the defendants. The bill of complaint is brought against defendants in their official capacity to enjoin them from bringing any proceeding at law or in equity to escheat certain shares of stock owned by the citizen plaintiff, under the terms of the California Alien Land Act of 1920. (Stats. 1921, p. lxxxiii.) It is alleged that the defendants so threatened to prosecute escheat proceedings under section 8 of the act. The citizen intends to sell, for the sum of \$4,250, to the alien plaintiff, twenty-nine shares of the capital stock of the Merced Farm Company, a corporation organized under the laws of California, which corporation is the owner of and by its articles of incorporation authorized to acquire, possess, enjoy and convey agricultural land, which agricultural land consists of twenty-two hundred acres in Merced County, California. A majority of the issued capital stock of the corporation is owned by citizens of the United States. So far as the petition shows, the said twenty-two hundred acres of agricultural land is the only property belonging to the said Merced Farm Company. There is no allegation of the said Merced Farm Company engaging in any business of any character whatsoever, except this allegation that it so owns this agricultural land in this state, and that it is so authorized to acquire, possess, enjoy and convey such agricultural land in this state.

Section 3 of the Alien Land Act provides that if a majority of the capital stock of this corporation belonged to ineligible aliens, the corporation could acquire agricultural lands only as permitted by the treaty between this country and the nation or country of which such stockholders are citizens or subjects.

With reference to the corporation before the court in this case, where there is no such majority ownership in aliens, the same section 3 provides that any ineligible alien may acquire shares of stock in such a corporation

only as permitted by any treaty between this country and the nation or country of which such alien is a citizen or subject.

Section 7 of the act provides that any property acquired by the corporation in which the majority of stock is owned by ineligible aliens, and where such a treaty does not protect such ownership, may be escheated to the state.

Section 8 provides that any shares of stock so owned by ineligible aliens where such ownership is not protected by such a treaty, may be escheated to the state.

It is the theory of defendants that the treaty between the United States and Japan does not protect the particular ownership of these twenty-two shares of stock in the hands of the plaintiff ineligible alien, and that, therefore, they may be escheated to the state under the procedure outlined in section 8 of the act.

The injunction sought in the bill of complaint is asked for on the theory that the citizen plaintiff is entitled to relief under the protection of the Fourteenth Amendment to the United States Constitution, and that the alien plaintiff is entitled to such relief by reason of the said Fourteenth Amendment, and also by reason of the treaty existing between this country and Japan.

As we view this case, the vital and all-important question to be answered is,

First. Does the ownership of a share of stock in a California corporation whose assets are agricultural lands of this state constitute an interest in real property in this state?

If so, there can be no question that the Alien Land Act of California prohibits such ownership in an alien ineligible to citizenship in this country. This point has been definitely decided by this court in the case of "*W. L. Porterfield and Y. Mizuno, plaintiffs, vs. U. S. Webb, as Attorney-General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, defendants*," No. F-61, in equity. This decision was rendered on application for preliminary injunction, by his Honor Circuit Judge William H. Hunt, and their Honors District Judges Maurice T. Dooling and Benjamin F. Bledsoe. A copy of this decision is attached hereto and marked "Exhibit A".

We also call the attention of the court to the printed briefs filed by this office on behalf of the defendants in said action. We are filing herewith copies of this brief for the court, in the event the court cares to refer to the same. In said briefs were reviewed exhaustively the question of the validity of the Alien Land Act of California in its relation to both the United States Constitution and to the existing treaty between Japan and the United States. We shall not, at this time, consider it necessary to go into the question then before this court, of the validity of said Alien Land Act, so far as it prohibits the acquisition by an ineligible alien of an interest in and to agricultural lands in the State of California.

Counsel are asking this court to reverse its decision rendered in the Porterfield case. We refuse to enter into a discussion on that basis. It has been decided, and we believe finally, by this court, at least until the United States Supreme Court has passed on the matter in the appeal which is there now pending in the Porterfield case, not only that an ineligible alien can not own land in this state, but also that a citizen can not sell land to such a person who is so disqualified from having an interest in such land.

Counsel also ask the court to ignore the decision of the United States District Court for the Western District of Washington, sustaining the Alien Land Act of that state. (*Terrace vs. Thompson*, vol. 274 Fed. Rep., p. 841,

decided July 25, 1921. See p. 44 of our Porterfield brief for the text of this opinion.)

Counsel become quite eloquent in their plea for preserving the Constitution of the United States. We say to them that the rule which has already been established by this court in the Porterfield case, and by the Washington court in the Terrace case, is not "sacrificing the Fourteenth Amendment to the demands of a mere political expediency," as suggested by counsel. Nor is it taking away "the right to work for a living and to securely contract the fruits of labor," as stated by counsel in the conclusion to their brief, where counsel close with Shakespeare, a great dramatist but an indifferent lawyer, as their last hope.

We are doing no more than to read the Fourteenth Amendment as the United States courts have consistently construed it, ever since its adoption, every time that the question herein involved has been presented to them. The refusal of counsel to subscribe to these decisions by the courts in no way limits the paramount necessity for such judicial construction, which is based on the necessity of the nation itself. This necessity is so recognized by our courts as a heritage from both the common law and the civil law. It is grounded in the very self-preservation of all nations. Unless all nations may have absolute control over their agricultural lands and limit their ownership to their own citizens, the time might come when the incorporation of such a guaranty as the Fourteenth Amendment in the bill of rights of any people would be but futile phraseology written in the books for future generations to peruse in studying the annals of a people that did not have the political wisdom to profit by the reading of recorded history.

Counsel say that practically all of the cases cited to the point that a state may control the devolution of its own lands were decided before the Fourteenth Amendment to the United States Constitution. This amendment was adopted in 1868. We call the court's attention to the decisions cited by the court in the Terrace case to this point and the date of these decisions.

Chirac vs. Chirac, 2 Wheat. 259, 272, decided Feb., 1817; *Hauenstein vs. Lynham*, 100 U. S. 483, 484, decided October, 1879; *DeVaughan vs. Hutchinson*, 165 U. S. 566, 570, decided March 1, 1897 (counsel, at p. 197 of their brief, erroneously state that this case was decided before the Fourteenth Amendment); *Clarke vs. Clarke*, 178 U. S. 186, decided May 21, 1900; *Blythe vs. Hinckley*, 180 U. S. 333, decided Feb. 3, 1901.

The Porterfield case and the Terrace case have both definitely settled the point, so far as this district court is concerned, that the classification of persons ineligible to citizenship, as distinguished from those eligible to citizenship, is a proper classification, and does not violate the provisions of the Fourteenth Amendment. This is all that need be said at this time in answer to the argument of counsel, that this is not a legitimate classification.

Counsel attempt to distinguish the Terrace case from the case at bar. We respectfully call the court's attention to our treatment of the Terrace case in our brief filed in the Porterfield case (pp. 6 to 10, inclusive), where we clearly showed that the California statute is really more liberal in recognizing the alleged rights of ineligible aliens than is the Washington statute that was sustained by the district court in the Terrace case.

Counsel refer to section 6 of the California act, which provides for probate sale of shares of stock, and also of realty, when an heir or devisee is prohibited by the act from holding the same. We are not concerned with the right of inheritance, but it may be profitable to consider this point for a moment.

Counsel urge that shares of stock are personal property, and as such can be devised or inherited. They state that "the theory upon which the act is founded is that aliens can not acquire title to real property by descent."

The act no more prohibits the acquisition by an ineligible alien of a tract of land by descent than it prohibits the similar acquisition of stock in a corporation owning such land.

The language of section 2 limiting the rights of ineligible aliens to the right of owning real property only as permitted by treaty is practically identical with the language of section 3 so limiting the right of the same alien to own stock in the character of corporation we are considering.

Counsel urge that "the transmission to heirs or devisees of shares of stock as personalty seems to be unquestionably a proper incident and necessity of trade, and since obviously there is no law in California which prevents a citizen of the United States from transmitting shares of stock to heirs or devisees or receiving such shares of stock as an heir, it would seem to be clear that this provision at least runs contrary to the treaty between the United States and Japan and is, therefore, invalid."

The above statement requires the consideration of two vital points in this case: In the first place, there is the question of whether, for the purposes of this case, shares of stock in such a corporation as is now before the court are to be considered personal property. In the second place, there is the question of what the treaty between Japan and the United States guarantees as to the transmission to heirs or devisees of such shares of stock as are being here considered.

Capital stock in corporations in this state is, of course, personal property, as that expression is commonly used with reference to the usual ownership of such shares of stock. However, they represent an interest of the owner of the stock in the corporation itself. Assuming that the corporation owns real property, the stockholder has an interest therein to the extent of his shares of stock. The legal title, of course, is in the corporate entity. The corporation, however, owns the same only as an agency for the real owners, who are the stockholders. As such owners of stock representing an interest in real property, these ineligible aliens are subject to the control by this state of their interest in the agricultural lands of this state.

The treaty, on the other hand, might possibly be held to guarantee the right of this ineligible to own or inherit corporate shares of stock in an ordinary commercial corporation engaged in trade or commerce, where we are not involved with the question of any interest in the agricultural lands of California. But that is not the case here.

Now let us assume a California corporation which owns nothing but agricultural lands in the State of California. Let us assume further that 100 per cent of the capital stock of said corporation belongs to aliens who are ineligible to citizenship in the United States. We submit that it is obvious that to permit of such a situation, and prohibit some one person who is so ineligible to citizenship owning the identical land, would be ridiculous. The purpose of the act is to prevent dominion over and control of such lands in this state by aliens ineligible to citizenship. This court, with courts generally, has held that there is inherent in the states of the Union the power to so control their lands. That question has been settled and, we respectfully submit, is no longer open for serious debate.

If that be so, of what value would such judicial settlement be to the states, if the identical prohibited purpose might be accomplished through the mechanical device of setting up a legal entity known as a corporation and permitting ownership of its stock by the same class of ineligible aliens, and

then saying that merely by reason of this incorporeal entity being so created, these ineligible aliens might be permitted to so possess and enjoy the agricultural lands of the state?

A share of stock in a corporation is personal property for ordinary purposes. But here we have a purpose which has grown up through the years ever since the year books of the common law, to permit the citizens and residents native of any country to control their lands. The foundation for the rule that has been established for so many years is the prime necessity of self-preservation. Unless the native citizens of any state are permitted to control the ownership and interest in lands of that state, the state is not secure against foreign attack. As said by the United States district court for the Western District of Washington in the Terrace case:

"It is obvious that one who is not a citizen and can not become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incompetent of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a Tower of Babel from which the tenants in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged."

The above statement by the Washington district court summarizes in a few words the entire case that has been presented throughout the years in the different treatises and judicial decisions that have passed on this general proposition of the right of control of lands as against alien domination.

We see counsel attempting to defeat this most important and fundamental purpose, the reason for which is so well understood in the law, by setting up the technical and peculiar attributes of shares of stock in corporations. The rules laid down by our courts with reference to the character of shares of stock, as to their being personalty rather than realty, have been enunciated without any reference to the subject which we are here considering. A share of stock in a corporation may be personalty, for instance, for the purposes of taxation. But what has this to do with our question, which deals with an entirely different subject matter and is addressed to corporate shares of stock from an entirely different viewpoint? The law does not permit of absurdities, and it would be an absurdity to conclude that a share of stock in the corporation before the court is so far personal property that the state is without the right to control as to the ownership thereof by ineligible aliens when it is stock in a corporation owning and dealing in the agricultural lands of this state.

Counsel say that they have been "unable to find a single case where any state has even made the attempt by legislation to prevent a resident alien from purchasing and owning personal property." They continue:

"So far as our study has gone, we affirm that the Alien Land Act of California is unique in this regard and goes further than any statute which has been called to our attention."

Counsel, of course, insist on referring to this ownership of stock as being the ownership of personal property. We desire to call their attention, however, to the Washington Alien Land Act, which was before the court in the Terrace case. It is to be found in chapter 50 of the Laws of Washington, 1920-21, at page 156. Section 2 of said act provides that no alien shall own land or take or hold title thereto, and that no person shall take or hold

title to land for an alien. Further, that land now held by or for aliens in violation of the constitution of the state is forfeited and declared to be the property of the state, and that land hereafter conveyed to or for the use of aliens, in violation of the constitution, or of the said Washington Alien Land Law, shall thereby be forfeited to and become the property of the state.

It is, then, necessary to determine what is meant in said law by the word "alien," and also by the word "land." We find these definitions in section 1 of the act. Section 1, subdivision a, provides:

"'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and *all corporations* and other organized groups of persons *a majority of whose capital stock is owned or controlled by aliens*, or a majority of whose members are aliens."

We see that a corporation in Washington, the majority of whose stock is owned or controlled by aliens, is to be considered, for the purposes of that act, as an alien.

Subdivision c of said section 1 defines land as follows:

"'Land' also includes *any share or interest in a corporation* or other organized group of persons deemed an alien in this act which has title to land either heretofore or hereafter acquired."

We therefore see that if the plaintiff in our case, Satow, was in Washington and owned a share in the land owning corporation the majority of whose stock was owned by aliens, that share of stock, by specific statutory provision, would be land. But land is land, not by reason of statutory expression, but rather by reason of its inherent characteristics. The interest in land, in Washington, would be an interest in real property, without the legislative declaration.

It is our contention that so far as the California Act is concerned, the identical result is reached, only in another way. The purpose of the two acts is the same. It is the intention of the legislation in each case, that alien ownership of agricultural lands of the state be made impossible. California accomplishes this purpose by specifically saying that ineligible aliens can not hold shares of stock in a corporation that owns agricultural lands. In giving expression to this rule, the California act, in effect, says that such a share of stock in such a corporation is an interest in land. It would be no more such an interest in land, if the act, as in the Washington statute, described it as "land."

Washington accomplishes the identical purpose, only by different technical means. Instead of prohibiting the ownership of such a share of stock, the Washington act defines such a share as being land, and then prohibits the ownership of "land." Of course, there is the additional difference, of no importance to us in this case, that Washington appears to limit the prohibition to cases where a majority of the stock is owned by aliens.

We can see no real difference between the method pursued in Washington and the method pursued in California. Mere phraseology can not defeat the fundamental and clear purposes of the two acts.

Let us assume that this California corporation in our case were dissolved.

It is provided in section 400 of the Civil Code of California that the directors of a corporation, at the time of its dissolution, are trustees for the creditors and stockholders, with full powers to sell the assets thereof, in such manner as the court may direct, and distribute the proceeds of such sales *and all other assets* to the stockholders.

If the best interests of the stockholders require it, property may be

distributed without its being sold. Agricultural land, for instance, could be divided among the different stockholders. This would be an instance showing, in a practical way, how the corporation is merely holding the legal title for the benefit of the real owners of the land.

The California Alien Land Act treats of the ownership of stock in such corporations, as before the court, as an interest in real property. Section 3 provides that a corporation in which a majority of the shares of stock is owned by ineligible aliens, can own real property only as a treaty may permit.

Further, to prevent the building up of a corporation so that a minority alien ownership of stock may change to a majority alien ownership, the same section provides that no one share of stock may be acquired by such an alien in such a corporation, except as may be permitted by treaty.

In section 8 the escheat for leasehold and lesser interests in real property is provided for. Again in the same section the escheat of any such shares of stock as are here in question is provided for. The identical procedure is found in the escheat in each of these two cases: the attorney-general or district attorney of the proper county institutes escheat proceedings, as provided in section 7. In such proceedings the court determines the value of such leasehold or other interest, or of such share or shares of stock, and enters judgment for the state for the amount thereof, together with costs. Thereupon the court orders a sale of such leasehold or other interest or shares of stock, in the manner provided by section 1271 of the Code of Civil Procedure. Out of the proceeds arising from such sale of such leasehold or other interest, or shares of stock, the amount of the judgment so rendered for the state shall be paid into the state treasury, and the balance shall be deposited with and distributed by the court, in accordance with the interests of the parties therein. Here we see that the statute considers this character of stock just as much an interest in land as is a leasehold interest.

Again, in section 6 of the act, which deals with the inheritance by an alien of real property and of shares of stock, the section fixes the same procedure in a probate court in both cases. There is a probate sale and a distribution of the proceeds of the sale to the heir or distributee, in lieu of this property. The land, or any interest therein, and shares of stock of the character that we are considering, are treated as identical for this probate procedure.

Counsel urge that section 3 of the act practically denies to ineligible aliens the right to hold any stock in any California corporation, because almost all of such corporations are "authorized to acquire, possess, enjoy or convey agricultural land."

We are concerned, however, only with the facts as here presented, and in paragraphs III and IV of the bill of complaint it is shown that so far as this particular corporation, Merced Farm Company, is concerned, it does own agricultural lands, and no other properties of said corporation are described.

Plaintiffs here are in no position to argue from the point of view of a holder-of-stock in a corporation authorized to own real property, but not in fact so owning any such realty.

"It is a firmly established principle of law that the constitutionality of a statute may not be attacked by one whose rights are not affected by the operation of the statute." (Vol. 12 C. J., p. 760, and the following pages to p. 764, with many cases cited.)

Included in this text is the following at pages 762 and 763:

"In other words, one attacking the constitutionality of a statute must show that it affects him injuriously and actually deprives him of a constitutional right. It is not sufficient that the statute is unconstitutional as to other persons or classes of persons; it must affirmatively appear that the person attacking the statute comes within the class of persons affected by it."

It is not necessary for us to consider a point which, in some other case, might be of importance in this connection. We refer to the argument which may be made in support of a construction of the act that would prohibit the ownership of stock by an ineligible alien in corporations having the power to acquire agricultural lands, even though, at the time the stock is acquired, no such stock is so owned by the corporation. That point is not before this court, and plaintiffs are in no position to urge it. It might, however, be urged in case the question does arise in some other case, that the state would be justified in taking steps to prevent the possible owning of an interest by an ineligible alien in agricultural lands of this state, by prohibiting the acquisition of such stock under such circumstances, which stock might, in the future, be evidence of an interest in such agricultural lands.

However, as above noted, this is mere academic discussion. Counsel state that unless the articles of incorporation limit the right, that such a company would enjoy the privilege of owning agricultural lands without any express authorization. The rule is that the corporation could not hold agricultural land unless

First—It is expressly authorized in its articles of incorporation or by statute so to do; or

Second—If not so expressly authorized then there must not be any limitation, by the describing of some particular commercial purpose, for instance, which purpose would not necessarily by implication carry with it the right to own realty.

It is difficult for us to follow the attempted analysis of section 3 of the Alien Land Act which is made by counsel for plaintiffs. The purpose of this section seems clear. In the first place, and applying the section to this case, it is provided that any corporation in which a majority of the issued capital stock is owned by aliens subject to the Emperor of Japan and therefore ineligible to citizenship, may acquire, possess, enjoy and convey real property or any interest therein in this state in the manner and to the extent and for the purposes prescribed by the treaty existing between Japan and the United States, and not otherwise. The effect of this provision is identical with the effect of the provision in section 2 of the act that the same aliens might acquire, possess, enjoy and transfer real property or any interest therein in this state in the manner and to the extent and for the purposes prescribed by this same treaty and not otherwise. That is, the alien mentioned in section 2 and the corporation just described and mentioned in section 3, can not acquire any interest at all in any such real property. The reason for this is that the existing treaty between the United States and Japan does not permit of any such enjoyment or possession of real property in this state by aliens subject to the Emperor of Japan. This point has been definitely decided by this court in the Porterfield case. The only purpose of the affirmative provision that these aliens might hold these interests in the lands of this state, so far as the treaty permits, is to recognize any rights granted by the treaty. But there are no such rights granted.

Now, continuing to the final paragraph in section 3, of the Alien Land Act, this paragraph, for the purposes of this case, refers to ownership of stock by the identical aliens, rather than to the ownership by the corporation itself of lands in this state. Obviously the act having dealt with a

corporation where a majority of the stock is owned by ineligible aliens, now takes up other corporations where no such majority ownership by aliens exists. Its purpose is clearly to prevent and discourage such a corporation from changing its character to one where the majority of the stock is owned by ineligible aliens. This is done by again providing, as in the first paragraph and as we found in section 2 of the act, with reference to the ownership of real property that any such ineligible alien may acquire stock in a corporation that is authorized to acquire, possess, enjoy or convey agricultural land in the manner, to the extent and for the purposes prescribed by the treaty existing between the United States and Japan, and not otherwise.

Our theory is that no such right is given by the said treaty. If correct in that theory, plaintiffs can not rely upon the treaty. If incorrect, then the act itself recognizes the right of such an ineligible alien as plaintiff here to own shares of stock in such a corporation.

Counsel say in their brief:

"If we refer to section 3 of the act and subject said section to careful analysis, we discover that obviously any corporation might shift from one class to the other over night, thus making necessary new classifications daily, even hourly—a fact which shows how unworkable and therefore unreasonable such a statutory provision is."

As above suggested, it is for the very purpose of preventing this "change overnight" and thus discouraging ownership of agricultural lands in this state by corporations, the majority of whose stock is owned by ineligible aliens, that this last paragraph is inserted in section 3 of the act. But such a corporation is not before the court.

We need not here follow the ramifications suggested by counsel with reference to any real property other than the agricultural lands that are described as being owned by the particular corporation before the court in our case.

If the theory of counsel for plaintiffs should prevail, one of the primary purposes of the treaty between Japan and the United States would be defeated. We refer to the purpose expressly shown by the history of the diplomatic negotiations to prohibit the nationals of either country claiming any right to acquire interest in real property in the other country. This diplomatic history has been pointed out by us in our brief filed in the Porterfield case, pages 14 and 15, and pages 18 to 24 inclusive, and pages 26 to 39 inclusive.

It can not be made too clear that the California Alien Land Act does not discriminate against Japanese ineligible aliens as such. All aliens, of whatever race or country, who are ineligible to citizenship in the United States are set up in a class by themselves.

There is absolutely no justification for the statement by counsel, that:

"The discrimination * * * appears to be entirely a matter of the color of a man's skin or his race."

On the contrary, the act makes the most natural of classifications, as has been decided in the Porterfield case and by the Washington court in the Terrace case. The basis for the classification is the impossibility, by reason of federal legislation over which this state has no control, for these particular aliens to become citizens of the United States, and so responsive to the United States in the event of serious trouble, such as war. It requires no argument to show that those who are citizens of our country must primarily be the defenders of our country, and make possible the very existence of our government in the event of that existence being threatened.

But if it be considered "entirely a matter of the color of a man's skin or his race," this will not startle anyone who is familiar with the history of the United States and knows something of the design of its founders.

It was the color of a man's skin and his race that originally determined the right of a man to participate in this government and entitled him to the citizen's full measure of right and privilege, or withheld from him the privilege of participation and limited the rights and privileges which he could here claim. Indeed, it was the color of his skin and his race that made citizenship, with all that such political status brought him, his as of right, or withheld from him citizenship and made whatever he here obtained the gift of government, to be granted or withheld, enlarged or diminished as the government might determine. The first naturalization law restricted the privileges of naturalization to "aliens being free white persons," and here the color of the skin and the race were made the determinative features. The privileged color was white, the privileged race Caucasian. This has continued to be the law for one hundred and thirty-three years unchanged except by that widening of the privilege to include "aliens of African nativity and to persons of African descent," which was a result of the Civil War. Legislation recognizing the classification thus made by the naturalization law has been by the states and the nation so frequently enacted, and by the courts so universally upheld, that we can hardly anticipate that the present belated cry will be effective.

Counsel suggest that the California Alien Land Law, by reason of discrimination between Japanese subjects and foreigners of other nationalities in the matter of the acquisition of property, might amount to a violation of that comity which should exist between nations and that "such violation is an act of sufficient unfriendliness under the recognized principles of international law to justify the Japanese Government in acts of retorsion, should it determine that such a course was the appropriate one for it to pursue."

We were somewhat surprised when we came upon this expression in counsel's brief, and regret that the urge of a particular employment was permitted to drive counsel to such length. So far as we are aware, the thought expressed in this quotation has heretofore found expression only in that part of the press of Japan that is willing to print the expressions of Japanese jingoists. If the exigencies of plaintiffs' case drive counsel to the attempt to support it by Japanese authority, this alone would make plaintiffs' position one of sufficient misfortune, but more unfortunate still does plaintiffs' position appear when the Japanese authority quoted is the authority of the jingoist instead of the real statesman, for, indeed, it has been clearly established by the diplomatic correspondence between this country and Japan, that there is and can be no just claim upon the part of Japan against legislation of this character by any of the American states.

In our brief in the Porterfield case, at pages 14 and 15, and pages 18 to 24, inclusive, thereof, we have set forth the correspondence between Secretary of State Bryan and the Japanese ambassador following the enactment of the California Alien Land Law of 1913. We call this court's attention to that portion of said brief as a convincing refutation to the suggestion of counsel that there can be any possible exception taken to the California Alien Land Law, from the standpoint of the unquestioned right of the peoples of either of the two nations to enact this character of legislation. It was, as a matter of fact, conceded by the diplomatic representatives of Japan that California was well within her legal rights in the adoption of such legislation.

It is not necessary for us to discuss the very interesting and important

question suggested in counsel's brief, as to the supremacy of the treaty over a state statute in controversies affecting the rights of aliens in real estate. The fact is that the California act expressly recognizes all rights guaranteed by the treaty, and that question is therefore not before this court.

It is not necessary to consider counsel's discussion of section 9 of the act, which section they construe as prohibiting the transfer by an ineligible alien of real property lawfully acquired by such alien to one qualified to hold the property. The point is not involved in this case. We desire to emphatically state, however, that we do not agree with this construction of the act. We do not believe that the act is applicable to an ineligible alien who did lawfully acquire such real property, except as it is applicable to any citizen who likewise lawfully acquired such property. Such an ineligible alien so lawfully acquiring stock in a land holding corporation, of course, could not transmit it to ineligible alien residents or relatives any more than the citizen could do so. A citizen could transmit the property to his relatives if they were citizens or eligible to citizenship, but he could not transmit it to one ineligible to citizenship. However, these points are not involved in this litigation.

If correct in the contention that the stockholder has an interest in real property, that is an end to this litigation.

The only possibility, then, as we understand the issues in this case, of an adverse holding against the defendants, is that it might be determined that this interest of the plaintiff Frick or of plaintiff Satow in the capital stock of the Merced Farm Company is personal property, and of such a character as personal property that there must be a conclusion in law that the rights of the alien plaintiff Satow, or the rights of the citizen plaintiff Frick, are violated, as such rights are guaranteed either by the United States-Japan treaty or by the Fourteenth Amendment to the United States Constitution.

We are confident that the case will be disposed of on the first point suggested in this brief, and that the court will conclude that in fact the interest in stock of a corporation of this character is such as to be an interest in real property consisting of agricultural lands in this state and, therefore, properly subject to such state control, as has been recognized by the decisions of said court and of other United States district courts.

We shall, however, now consider this other phase of the question as to the possibility of considering the interest of the plaintiffs herein in stock in this agricultural land-holding corporation to have certain characteristics of personal property, and the bearing that the treaty with Japan and the Fourteenth Amendment to the United States Constitution have upon such a possible conclusion of the court.

We shall first consider the treaty.

Our position with reference to the treaty is that its history and its context show that it is peculiarly a treaty of commerce, trade and navigation, and intended to cover those subjects only. Further, it is our position that the matter of interest in a corporation, which corporation in turn owns agricultural lands in this state which it may either hold for agricultural uses or sell, does not come within the scope of a treaty that deals with commerce, trade and navigation.

So far as development of such lands by the corporation itself is concerned, certain comments by the court in the Terrace case are of interest. In that case the district court addressed itself to the claim that the complainant Nakatsuka's business of farming was incidental to his business as a whole-

sale and retail trader in farm products, and used the following language with reference to this argument:

"A clear intention being shown not to supersede, in the particular now in question, the state's authority to regulate the rights of title and possession in lands within its boundaries, that intent may not be defeated by the claim now made that complainant Nakatsuka's business of farming is incidental to his business as a wholesale and retail trader in farm products, for there is no more reason for considering farming an incident of the latter than for considering the latter an incident of the former. The language of the treaty is: 'and generally to do anything incidental to or necessary for trade upon the same terms as native citizens or subjects * * *.' (37 Stats. at L. 1504.)

"In the most liberal construction of this language that may be indulged in, it can not fairly be said that truck farming is incidental to trading, either wholesale or retail, in the products of a farm, any more than conducting a sheep ranch or growing mulberry trees is incidental to the dry goods trade. *Kidd vs. Pearson*, 128 U. S. 1; *U. S. vs. E. C. Knight Co.*, 156 U. S. 1; *Joyce vs. Auten*, 179 U. S. 591, at 594; *Capital City Dairy Co. vs. Ohio*, 185 U. S. 238, 245."

The petition in this case alleges that "the Merced Farm Company, a corporation duly organized under the laws of the State of California * * * is the owner of, and by its articles of incorporation authorized to acquire, possess, enjoy and convey agricultural land." (Par. III of the petition.)

Also, in paragraph IV of the petition, there is the allegation "that the said Merced Farm Company is a corporation organized and existing under the laws of the State of California and is authorized to acquire, possess, enjoy and convey agricultural land in the State of California, and is now the owner of and in the possession of a large amount of agricultural land, to-wit: about twenty-two hundred acres in the County of Merced, in said State of California, * * *."

There is no allegation as to the use to which this land is being put, but, in any event, it is submitted that no possible use of the land could be considered as engaging in commerce or trade.

By "commerce" and "trade," of course, is meant the ordinary commercial relationships and the purpose is to guarantee to the nationals of the high contracting parties the right to engage in trade as such in both countries.

The preamble to the United States-Japan treaty recites that the President of the United States of America and His Majesty, the Emperor of Japan, being desirous to strengthen the relations of amity and good understanding between two nations "and believing that the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries will contribute to the realization of this most desirable result, have resolved to conclude a treaty of commerce and navigation for that purpose, * * *."

Article I provides that:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel, and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incidental to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

Article II provides that:

"The dwellings, *warehouses, manufactories and shops* of the citizens or subjects of each of the high contracting parties in the territories of the other, and all premises appertaining thereto used for purposes of residence or *commerce*, shall be respected."

Article IV provides that:

"There shall be between the territories of the two high contracting parties reciprocal freedom of *commerce* and navigation. The citizens or subjects of each of the contracting parties, equally with the citizens or subjects of the most favored nation, shall have liberty freely to come *with their ships and cargoes* to all places, ports and rivers in the territories of the other which are or may be open to foreign *commerce*, subject always to the laws of the country to which they thus come."

Article VI provides that:

"The citizens or subjects of each of the high contracting parties shall enjoy in the territories of the other exemption from all transit duties and a perfect equality of treatment with native citizens or subjects *in all that relates to warehousing, bounties, facilities and drawbacks*."

Article VII provides that:

"*Limited-liability and other companies and associations, commercial, industrial and financial*," in either of said countries are authorized in the territories of the other to exercise their rights.

Article XI provides that:

"No duties of *tonnage, harbor, pilotage, lighthouse, quarantine*, or other similar or corresponding duties of whatever denomination," levied in the name or for the profit of government, etc., shall be imposed in the ports or the territories of either country upon the vessels of the other unequally.

Article XIII provides that:

"The *coasting trade* of the high contracting parties is excepted from the provisions of the present treaty," etc.

Article XIV provides that:

"Except as otherwise expressly provided in this treaty, the high contracting parties agree that, *in all that concerns commerce and navigation*," there shall be a "most favored nation" agreement.

Article XV provides that:

"The citizens or subjects of each of the high contracting parties shall enjoy in the territories of the other the same protection as native citizens or subjects *in regard to patents, trade-marks and designs*, upon fulfillment of the formalities prescribed by law."

We have above quoted extensively from the treaty for the purpose of showing, and particularly with reference to the language which we have underscored, that this treaty is essentially one dealing with commerce and trade.

Shares of stock in such a mercantile corporation, for instance, as a department store, or a store dealing in Japanese articles, might be considered such personal property as to come within the treaty guaranty of ownership thereof. This is a far cry from owning shares of stock in a corporation which, so far as the bill of complaint herein is concerned, does not, in any single particular engage in a mercantile, commercial or trade pursuit. If, indeed, the shares of stock in this particular corporation are, as a matter of law, to be considered personal property, then we submit that for the purposes of this case and having in view the objects sought to be attained not only by the Alien Land Act but by the treaty itself, this stock is so impressed with an interest in agricultural lands of this state as to take it

without the guarantees of the treaty. The quotation from Blackstone (Blackstone's Commentaries, p. 372) cited in plaintiffs' brief, concerning the right of an alien to hold chattels real and all kind of personal property, does not refer to this character of personalty, even though we treat these shares of stock as personal property. And so the quotation from *Corpus Juris*, found at the same page of plaintiffs' brief, has reference to movable property in general, and does not contemplate any such situation as we here have.

No complaint can be found with these quotations from the common law. Blackstone but expressed the rule obtaining at the time he wrote, and that rule, limited in its application to the life and the activities of his day, did no violence. But Blackstone was not speaking of the shares of stock in a corporation. We are not to be chained to the fetish of a dead past, unless there be such an identity of the conditions then and now as to warrant the application of the rule adopted to meet the situation then to the conditions now existing. Some one has expressed a truth that should be inscribed on the cover of every law book, in the following language:

"Our law is not a memorial to the dead, but a rule for the living."

Justice Crane of New York recently said:

"The two sources of the law are to be found, first in the books, and second, in the life about us."

Counsel's brief, in its great length and in its copious quotations from the books, shows much industry in his search of the first source mentioned, but evidences a total failure to devote either thought or investigation to the second.

Counsel quote from section 1, article I, of the constitution of the State of California, being a part of the bill of rights of this state, as follows:

"All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

Counsel continue:

"Since aliens are men, in view of the reading of the words of the treaty and since capital stock is certainly property, we fail to understand why an alien under California's declaration of rights is not guaranteed his right to acquire, possess, and enjoy property."

The above statement in counsel's brief is an example of how extreme may be the misapplication of the section of the constitution to the facts of a given case. Following counsel to a logical conclusion would compel us to say that the decision by this court in the Porterfield case is erroneous, inasmuch as the plaintiffs there are men, and the agricultural land there involved is property.

Those who negotiated the treaty between the United States and Japan had very definitely in mind just what guaranties were to be given to the nationals of the respective countries, and they also had just as definitely in mind what limitations were to be placed upon these nationals. It was intended that citizens or subjects of the respective countries might engage in trade, commerce and navigation in either country. It was also intended and particularly provided by amendments to the treaty during the course of the diplomatic negotiations, that no national of either country could claim any interest in the agricultural lands of the other country. If the theory of plaintiffs is sustained, this fundamental purpose of the treaty makers will be defeated.

Counsel quote the language from the next to the last paragraph of article I of the treaty, which provides:

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

Counsel then argue that every right and every privilege which would attach to a given piece or kind of property in the hands of a citizen of the United States would equally attach to the same property in the hands of a subject of Japan in this state.

There can be no disputing this doctrine if counsel will but remember the first condition that must be met before such a rule can be applied. That condition is that we first have lawful ownership of such property in such an ineligible alien. Counsel appear to leap this barrier, disregarding the fundamental right in all the states of the Union to control in the matter of the ownership of lands. They then assume, without regard to such right of ownership, that they can invoke this section of the treaty without reference to the treaty as a whole, which in fact clearly refuses to recognize this preliminary right of ownership of such lands.

This same confusion of thought is found in their brief, under their subdivision VI (a). This division of their brief is headed:

"Some examples where the Alien Land Act of California denies to Japanese aliens the equality of treatment to which they are entitled under the terms of the treaty between the United States and Japan."

They then proceed to "pick the Alien Land Act up from its four corners and read it critically" and "spell out from it the following particulars in which Japanese aliens are denied equality of treatment:"

They itemize such "unequal treatment," as for instance, prohibiting the ineligible alien Japanese to inherit real property which would be descendable to heirs, if owned by American citizens; and then follow several other alleged instances of inequality of treatment.

It is respectfully submitted that counsel fail to perceive the most elementary of considerations in this whole matter by making such an argument. Would counsel claim that when a treaty specifically limits the rights of the respective nationals on a given subject-matter, that such a right so limited and refused recognition in the treaty can be claimed, under other language that guarantees equal treatment only with reference to rights that are recognized?

The question would seem to answer itself. We take the time to consider it only because it is vital to the entire case. A failure of counsel to perceive this principle, which is fundamental to our entire discussion, would seem to indicate their failure to grasp the rules that must govern the court in this proceeding.

We therefore urge that counsel can not successfully rely upon the treaty to support their thesis.

Now as to the Fourteenth Amendment to the United States Constitution. Plaintiff Frick, the citizen, is entitled to claim the protection of all of the Fourteenth Amendment above quoted, and the alien plaintiff, Satow, is entitled to claim the protection only of that portion which prohibits any state from depriving any person of life, liberty, or property, without due process of law, or denying to any person within its jurisdiction the equal protection of the laws. The decisive answer to any argument by citizens or by aliens

that they are entitled to the protection of the Fourteenth Amendment in such a case as we are here considering is, that the federal courts of this country have determined, in many cases, that that amendment can not be used as an instrument to deprive the states of the Union of their inherent and historical power to control in the matter of ownership or other interest in lands, when a question arises as to prohibiting such an interest being vested in an alien. This point has been decided in the Terrace case and in the many cases cited in that decision. *Chirac vs. Chirac*, 2 Wheat. 259, 272; *Hauenstein vs. Lynham*, 100 U. S. 483, 484; *DeVaughan vs. Hutchinson*, 165 U. S. 566, at 570; *Clarke vs. Clarke*, 178 U. S. 186; *Blythe vs. Hinckley*, 180 U. S. 333.

We again submit on this point that if these shares of stock are to be treated as having some of the characteristics of personal property, in the nature of things the court must recognize that flowing from the ownership of such "personal property" is the inevitable right to share in the profits and proceeds of the agricultural lands of the State of California. It is because of that right which accompanies the ownership of this stock that we are justified in basing our defense on long established precedent, which refuses to recognize the Fourteenth Amendment as being intended to guarantee any such right to an alien.

Respectfully submitted.

U. S. WEBB,
Attorney-General of the State of California;
FRANK ENGLISH,
Deputy Attorney-General;
MATTHEW BRADY,
District Attorney of the City and County of San Francisco,
State of California,
Attorneys for Defendants.

4. DECISION OF THE COURT.

MEMORANDUM.

Before Hon. Wm. W. Morrow, circuit judge, and Hon. Wm. H. Sawtelle and Hon. M. T. Dooling, district judges.

Albert H. Elliot, Esq., and Guy C. Calden, Esq., solicitors for plaintiffs.
U. S. Webb, Esq., attorney-general of the State of California, and Frank English, Esq., deputy attorney-general of the State of California, attorneys for defendant, U. S. Webb.

Sawtelle, D. J.: It is the unanimous opinion of this court that the plaintiffs herein are not entitled to injunctive relief and that their application for a temporary injunction should be denied; that the California statute here involved violates no provision of the Constitution of the United States, nor does it conflict with any provision or stipulation of the treaty between Japan and the United States.

We are entirely satisfied with the decision of the court in the recent cases of *Terrace vs. Thompson*, 274 Fed. 841; *Porterfield and Mizuno vs. Webb, Attorney-General, et al.*, and *O'Brien and Inouye vs. Webb, Attorney-General, et al.*, and believe the opinions in each of those cases is sound law and correctly interprets those provisions of the Constitution and treaty here involved.

Plaintiff's application for a temporary injunction will be denied and an order will be entered accordingly.

Morrow, circuit judge, and Dooling, D. J., concur.

MEMORANDUM.

Albert H. Elliot and Guy C. Calden, attorneys for plaintiffs.

U. S. Webb, attorney-general of California, and Frank English, deputy attorney-general of California, attorneys for defendants.

Before Morrow, circuit judge, and Dooling and Sawtelle, district judges.

Morrow, C. J.: The California Alien Land Law of 1920 (Statutes of California, 1921) provides in section 2:

"All aliens other than those mentioned in section 1 of this act (that is to say, all aliens ineligible to citizenship) may acquire, possess, enjoy, and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, *and not otherwise.*"

It is alleged in the complaint that Satow is a subject of the Emperor of Japan, born in the Empire of Japan, of Japanese parents, and is also a resident of California. Satow is an alien, and he is ineligible to citizenship under the laws of the United States. He is therefore one of the aliens who may not acquire, possess, enjoy, and transfer real property or any interest therein, in this state, unless it is so provided in the treaty between this country and Japan. Our attention has not been called to any provision in the treaty between this country and Japan providing that such an alien may acquire, possess, enjoy, and transfer real property or any interest therein in this state, other than land for residential or commercial purposes.

The remaining material question is: "Is the ownership of 28 shares of the capital stock of the Merced Farm Company, a corporation organized under the laws of the State of California for agricultural purposes, such an interest in real property as to bring him within the prohibitory provisions of this act?"

It is alleged that said Merced Farm Company is a domestic corporation, authorized by its articles of incorporation to acquire, possess, enjoy, and convey agricultural land, and that the corporation is in fact the owner of approximately 2200 acres of agricultural land situated in the County of Merced in this state. The land is not for residential or commercial purposes. We think the ownership of stock in such a corporation would be an interest in real property which would bring the alien owner of such stock (who is ineligible to citizenship) within the prohibitory provisions of the act, and that under section 2 of the act the attorney-general is authorized by sections 7 and 8 of the act to institute proceedings to have the escheat of such interest in real property in the manner provided by section 474 of the Code of Civil Procedure of this state, and that such proceedings would not be in violation of the treaty between the United States and Japan or the Fourteenth Amendment of the Constitution of the United States.

Dated May 23, 1922.

IN THE UNITED STATES SUPREME COURT.

OCTOBER TERM, 1922. No. 555.

1. APPELLANTS' POINTS, BY LOUIS MARSHALL.

This is an appeal from an order denying an interlocutory injunction, the application for such order having been heard by Honorable William W. Morrow, circuit judge, and Honorable William H. Sawtelle and Honorable Maurice T. Dooling, district judges, pursuant to statute, the purpose being to restrain the defendants from directly or indirectly permitting any proceeding in law or equity to be brought against the appellants for the enforce-

ment of the Alien Land Law submitted by the initiative and approved by the electorate of California on November 2, 1920, from causing the appellants to be arrested for violating the terms and provisions of the act, and from preventing the appellants from carrying out a transaction for the sale and purchase of shares of stock of a corporation organized under the laws of California and owning agricultural lands in that state; the appellants contending that the act is unconstitutional, in that it denies to them the equal protection of the laws, deprives them of their liberty and property without due process of law, and is in conflict with section 1977 of the Revised Statutes of the United States and repugnant to the treaty between the United States of America and the Empire of Japan (Rec., pp. 5, 19).

THE BILL OF COMPLAINT.

The appellant Frick is a citizen of the United States and of the State of California; the appellant Satow, a Japanese and a subject of the Emperor of Japan and a resident of California. The defendant Webb is the attorney-general of the State of California, and the defendant Brady is the district attorney of the City and County of San Francisco, in that state (Rec., p. 1.)

Frick is the owner of twenty-eight shares of the capital stock of the Merced Farm Company, a corporation organized under the laws of the State of California, a majority of whose stock is owned by citizens of the United States. By its articles of incorporation that company is authorized to acquire, possess, enjoy and convey agricultural land. It is in fact the owner of approximately twenty-two hundred acres of such land situated in Merced County. The appellant Satow wishes to purchase these shares at their present market value, \$4,250, and the appellant Frick is willing to sell the shares at that price, which Satow is prepared to pay for them (Rec., p. 2).

Assuming to act under the Alien Land Law, the defendants have threatened to enforce its provisions against the appellants in the event that they should enter into a contract for the sale and purchase of these shares, and will attempt to institute escheat proceedings to forfeit these shares (Rec., pp. 3, 4).

The appellants are deterred from consummating the transaction for fear of the escheat proceedings, and they are prevented from testing the constitutionality and validity of the act because of the drastic character of this enactment, so that, unless the court shall pass upon the validity of the statute in this action, the appellants will be compelled to submit to it whether it be valid or not, and thereby would be deprived of their liberty and property without due process of law and denied the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States and of the terms of the treaty between the United States and the Empire of Japan (Rec., pp. 4, 5).

THE CALIFORNIA ALIEN LAND LAW.

The full text of this statute is to be found in Appendix A of the brief in *Porterfield and Mizuno vs. Webb and Woolwine*, submitted herewith. The controlling provisions applicable to this case will be briefly quoted (Dec., pp. 6, 7).

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Sec. 2. All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest

therein, in this state, in the manner and to the extent, and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

"Sec. 3. Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in section 1 of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy and convey real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise. Hereafter all aliens other than those specified in section 1 hereof may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Section 7 provides for the escheat of real property acquired in fee (Rec., p. 8).

Section 8 provides for the escheat of any leasehold or other interest in real property less than the fee acquired in violation of the provisions of the act by any alien mentioned in section 2 of the act, or by any company, association or corporation mentioned in section 3 of the act.

After providing for the institution of proceedings to have the escheat adjudged in the manner provided in section 7, section 8 also provides (Rec., p. 9):

"Any share of stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section 3 of this act shall escheat to the State of California. Such escheat shall be adjudged and enforced in the same manner as provided in this section for the escheat of a leasehold or other interest in real property less than the fee."

Section 10 provides (Rec., p. 10):

"If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

Articles I and II of the Treaty of Commerce and Navigation with Japan, dated February 21, 1911, read (Rec., pp. 12, 13):

"Article I.

"The citizens or subjects of each of the high contracting parties shall have the liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

"They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions.

"Article II.

"The dwellings, warehouses, manufactories and shops of the citizens or subjects of each of the high contracting parties in the territories of the other, and all premises appertaining thereto used for purposes of residence or commerce, shall be respected. It shall not be allowable to proceed to make a domiciliary visit to, or a search of, any such buildings and premises, or to examine or inspect books, papers or accounts, except under the conditions and with the forms prescribed by the laws, ordinances and regulations for nationals."

ASSIGNMENTS OF ERROR.

Stated in abridged form, they are as follows:

(1) That the court below erred in adjudging the California Alien Land Law to be a constitutional act.

(2) That it erred in adjudging that the act did not deprive the appellant Frick of his liberty and property without due process of law or deny to him the equal protection of the law.

(3) That it erred in adjudging that the act did not deny to the appellant Satow the equal protection of the laws in violation of section 1 of the Fourteenth Amendment.

(4) That it erred in adjudging that the act did not deprive the appellant Satow of the liberty of pursuit of a lawful occupation, to wit, the purchase of shares of stock in a California corporation authorized to acquire, possess, enjoy and convey agricultural land and which was in fact the owner of such land, in violation of section 1 of the Fourteenth Amendment.

(5) That it erred in adjudging that the act did not deprive the appellant Satow of his rights, privileges and immunities secured to him under the treaty between the United States of America and the Empire of Japan.

(6) That it erred in adjudging that the Fourteenth Amendment did not give the appellant Frick the right to sell the shares of stock owned by him in a California corporation which had the title to agricultural lands in the state, to the appellant Satow, although an alien of the Japanese race.

(7) That it erred in adjudging that the appellant Satow, an alien of the Japanese race, did not have the right to acquire, possess and enjoy shares of stock in a California corporation having the title to agricultural lands in the state.

(8) That it erred in refusing to decide that the California Alien Land Law was unconstitutional and in violation of the Fourteenth Amendment, in that it discriminated against the appellant Satow on the ground of color, race and nationality.

(9) That it erred in refusing to decide that the act deprived the appellant Satow of the rights, privileges and immunities secured to him under the treaty between the United States of America and the Empire of Japan (Rec., pp. 23 to 27).

POINTS.

I.

Assuming that the ownership of shares of stock in a California corporation having the title to agricultural land constitutes an interest in such land, the California Alien Land Law, which forbids aliens ineligible to citizenship under the laws of the United States to acquire such shares, although the right to do so has been conferred on all other aliens, denies to the former the equal protection of the laws within the meaning of the Fourteenth Amendment.

In the brief submitted herewith in *Porterfield and Mizuno vs. Webb and Woolwine*, we have so fully considered and discussed the California Alien Land Law in its general aspects and in the light of authorities, that we ask that the appellants' argument in that case may be regarded as in all respects applicable to the case at bar, in order to avoid needless repetition.

This is the more important in view of the fact that the appellees, in their argument below, practically treated the case on the theory that a share of stock in a corporation owning land constitutes an interest in land. This contention was sustained in the court below, where, in the opinion rendered, the proposition to be decided was stated thus (Rec., p. 21):

"The remaining material question is: 'Is the ownership of twenty-eight shares of the capital stock of the Merced Farm Company, a corporation organized under the laws of the State of California for agricultural purposes, such an interest in real property as to bring him (Satow) within the prohibitory provisions of this act?'"

The answer given in the opinion to this interrogatory is:

"We think the ownership of stock in such a corporation would be an interest in real property which would bring the alien owner of such stock (who is ineligible to citizenship) within the prohibitory provisions of the act, and that the attorney-general is authorized by sections 7 and 8 of the act to institute proceedings to have the escheat of such interest in real property in the manner provided by section 474 of the Code of Civil Procedure of this state, and that such proceedings would not be in violation of the treaty between the United States and Japan or the Fourteenth Amendment to the Constitution of the United States." (Rec., p. 21.)

The court thus made section 3, which relates to the acquisition of shares of stock by an alien ineligible to citizenship under the laws of the United States, the equivalent of the other provisions of the act relating to the ownership of the fee, or of a leasehold, or of an interest less than the fee, in real property.

If that be true—although we contend that it is not—then it would necessarily follow, if our argument in the *Porterfield* case is sound, that the judgment rendered herein by the court below cannot be sustained.

II.

The prohibition of the acquisition by an ineligible alien of shares of stock in a California corporation owning agricultural land, such shares being personal property, while all other aliens are expressly permitted to acquire such shares, denies to the former the equal protection of the laws.

Section 1 of the act, in broad terms, lays down the general principle that all aliens eligible to citizenship may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in the state.

Section 2 declares that all aliens other than those eligible to citizenship may acquire, possess, enjoy and transfer real property, or any interest therein, in the state, in the manner, to the extent and for the purpose

prescribed by treaty with the country of which the alien is a citizen or subject, and not otherwise.

The first sentence of section 3 relates to the acquisition of "real property, or any interest therein, in this state," by a corporation of which a majority of the members are ineligible aliens or in which a majority of the issued capital stock is owned by such aliens.

Section 6 provides, that whenever it appears to the court in any probate proceeding that by reason of the provisions of the act any heir or devisee "cannot take real property in this state or membership or shares of stock in a company, association or corporation," a sale of the property is to be made in the manner prescribed.

Section 7 relates to the escheat of "any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section 2 of this act, or by any company, association or corporation mentioned in section 3 of this act."

Section 8 refers to the escheat of "any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section 2 of this act, or by any company, association or corporation mentioned in section 3 of this act."

At the end of the section is to be found the provisions that "any share of stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section 3 of this act shall escheat to the State of California. Such escheat shall be adjudged and enforced in the same manner as provided in this section for the escheat of a leasehold or other interest in real property less than the fee."

This language clearly indicates that a share of stock or the interest of any member in a company, acquired in violation of section 3, is not regarded as an interest in real property, but as something separate and independent; otherwise it would have been included within the term by proper definition, assuming, but not conceding, that that could be done. The company referred to in section 3 is one acquiring the title to the real property itself. Its ownership is, throughout the act, differentiated from that of a stockholder. The latter's ownership is in no way described as an interest in real property. To have undertaken to do so would have been inconsistent not only with the common law, but with the practically uniform statute law of this country and the well-conceived theories of property and public policy that have long prevailed.

The disability of aliens at common law in respect to the ownership of real estate does not extend to personal property. Aliens are capable of acquiring, holding and transmitting it in the like manner as citizens. This includes the right to take and hold personal property by bequest, and the right of an alien testator to pass his personality by will.

In Calvin's Case, 7 Coke, 17a, it is said:

"An alien friend, as at this time, a German, a Frenchman, a Spaniard (all kings and princes in Christendom being now in league with our sovereign; but a Scot, being a subject cannot be said to be a friend, nor Scotland to be *solum amici*) may by the common law have, acquire, and get within this realm, by gift, trade, or other lawful means, any treasure, or goods personal whatsoever, as well as an Englishman, and maintain any action for the same." See also *Fourdrin vs. Gowdey*, 3 Mylne & Keen, 397, 408.

In 1 Blackstone's Commentaries, 372, we read:

"Yet an alien may acquire property in goods, money, and other personal

estate, or may have a house for his habitation, for personal estate is of a transitory and movable nature; and besides, this indulgence to strangers is necessary for the advancement of trade. Aliens also may trade as freely as other people, only they are subject to higher duties at the custom house and there are also some obsolete statutes of Henry VIII prohibiting alien artificers to work for themselves in this Kingdom, but it is generally held that they were virtually repealed by Statute 5 Eliz. c., 7. Also an alien may bring an action concerning personal property, and may make a will to dispose of his personal estate, not as it is in France, where the king at the death of an alien is entitled to all he is worth by the *droit d'aubaine* or *jus albinatus*, unless he has a peculiar exemption."

To the same effect is 2 Kent's Commentaries, 62.

The American decisions support this doctrine.

In *McLearn vs. Wallace*, 10 Pet. 624, it was recognized that the personal estate of a decedent went to his alien next of kin.

In *Beck vs. McGillis*, 9 Barb. (N. Y.) 35, it was likewise held that the disability of aliens to take an interest in real property does not extend to personal property.

To like effect is the decision in *Meakings vs. Cromwell*, 5 N. Y. 136.

In *Cosgrove vs. Cosgrove*, 69 Conn. 416, which involved a gift of stock to aliens by a testator, the court said:

"The stock, however, is personal estate and the alien sisters can share in this gift."

In *Detwiler vs. Commonwealth*, 131 Pa. 614, 18 Atl. Rep. 990, Mr. Justice Williams said:

"We put the right of the stockholder not so much on the provision of the Constitution of the United States which was discussed with so much learning by the judge of the court below, as upon the nature of the stock as a personal chattel, and the right of an alien friend at the common law to deal in personal goods, embark in trade, loan money, sue and be sued for the collection of debts, and the protection of his person and personal estate."

In *Cleveland etc. Ry. Co. vs. Osgood*, 73 N. E. Rep. 285, the appellate court of Indiana said:

"The disability of aliens at common law in respect to the ownership of real estate did not extend to personal property, and aliens were capable of acquiring, holding and transmitting movable property in like manner as citizens."

In *Marx vs. McGlynn*, 88 N. Y. 357, it was held that while a devise of real estate to an alien is void under the statute, a devise to executors, who are citizens, in trust, to pay the income to an alien, is valid, since the beneficiary takes no interest in the lands. Judge Earl said:

"Bradley has no estate whatever in the land. What he gets is a personal right, and the income of the real estate, when it comes to him, will come as personal property."

It has long been well settled that shares of stock in a corporation are personal property, whether they be declared such by statute, as is sometimes the case, or not, and whether the property of the corporation itself consists of realty, as in the case of mining companies, land companies, realty companies, canal companies, and the like, or of personal property only.

Section 324 of the Civil Code of California provides:

"Whenever the capital stock of any corporation is divided into shares and certificates therefor are issued, such shares of stock, except as herein-after provided, are personal property, and may be transferred by endorse-

ment by the signature of the proprietor, his agent, attorney, or legal representative, and the delivery of the certificate. * * *

The only exception is in the case of corporations organized for the sale and distribution of water for irrigation purposes or for domestic use, as to which it is declared that the by-laws may provide that water shall only be supplied to the owners of the capital stock and that such stock shall be appurtenant to certain lands when they are described in the certificate issued therefor.

Among the various cases decided by the courts of California in which shares of stock have been held to be personalty are: *Atkins vs. Gamble*, 42 Cal. 86; *People vs. Mills National Gold Bank*, 51 Cal. 508; *Payne vs. Elliot*, 54 Cal. 339; *San Francisco vs. Flood*, 64 Cal. 504; *Tregear vs. Eliwanda Water Co.*, 76 Cal. 537; *Mattingly vs. Roach*, 84 Cal. 207; *Calkins vs. Equitable Bldg. & Loan Assn.*, 126 Cal. 531.

Among the many decisions recognizing that shares of stock are personalty rendered in various jurisdictions are the following: *Tappan vs. Merchants National Bank*, 19 Wall. 490; *Jellenik vs. Huron Copper Min. Co.*, 177 U. S. 1; *Hawley vs. Malden*, 232 U. S. 1, 12; *Stanwood vs. Stanwood*, 17 Mass. 57; *Bellows Falls Power Co. vs. Commonwealth*, 222 Mass. 51; *DeNunzio vs. DeNunzio*, 90 Conn. 342; *Wuller vs. Chuse Grocery Co.*, 241 Ill. 398; *Weaver vs. Burden*, 49 N. Y. 286; *Matter of Jones*, 172 N. Y. 575; *United States Radiator Co. vs. New York*, 208 N. Y. 152; *Arnold vs. Ruggles*, 1 R. I. 165, 167, 168; *Lowndes vs. Cooch*, 87 Md. 478; *Lee vs. Sturgis*, 46 Ohio St. 153; *McKeon vs. Northampton County*, 49 Pa. 519.

In *Jellenik vs. Huron Copper Mining Co.*, *supra*, Mr. Justice Harlan said:

"We need not discuss, in the light of the authorities, whether the shares of stock in the defendant company may not be accurately described as chattels or choses in action, or property in the nature of choses in action. Chief Justice Shaw, in *Hutchins vs. State Bank*, 12 Met. 421, 426, said: 'If a share in a bank is not a chose in action, it is in the nature of a chose in action, and what is more to the purpose it is personal property.'"

In *Arnold vs. Ruggles*, *supra*, quoted with approval in *Matter of Jones*, *supra*, the court, considering the nature of a share of stock, said:

"Is a share, then, thus made up, to be deemed real estate, or as necessarily partaking of the realty? A share must pass one way or the other, as an entire thing. It cannot be resolved into the elements, of which the assets of the corporation consist, and a part pass to the heir and a part to the executor without destroying it and with it the whole concern. It is an entirety and must be either real or personal. And which is it? It will not do to make the property or the corporation a criterion, for the property of almost every corporation is more or less mixed. We must make the share itself, those rights which constitute its beneficial interest, the criterion. Its right then to receive a dividend of the whole concern, whether real or personal, is the interest by which it is to be judged."

In *Hawley vs. Malden*, *supra*, Mr. Justice Hughes said:

"It is well settled that the property of the shareholders in their respective shares is distinct from the corporate property, franchises and capital stock, and may be separately taxed."

In *Cummings vs. People*, 211 Ill. 392, 71 N. E. Rep. 1031, Mr. Justice Wilkin said:

"Being a stockholder in the corporation gave him no right, title or interest in the real estate owned by the corporation. 'A share of stock may be defined as a right which its owner has in the management, profits, and ultimate assets of the corporation.' (Cook on the Law of Stock and Stockhold-

ers, sec. 5.) 'With reference more particularly to the essential nature of shares of stock, it has been well settled that such property is personality, and not realty. It is said that a share of stock is not real estate; 'has nothing to give it the character of real estate; is not land, nor a hereditament, nor an interest in either of them.' (*Id.*, sec. 6.) 'It is now a well established principle that the shares of the capital stock of corporations are personal property. And this applies equally to all corporations, including those whose property consists of real estate, although attempts were formerly made to give to the stock of those companies the character of an interest in real estate.' (Beach on Private Corporations, sec. 612.) 'A stockholder has no legal title to the corporation property, or to any separate part thereof, until a division is made on the winding up or dissolution of the corporation; and prior to that time he has no right to take any of the corporate property for his own purpose.' (26 Am. & Eng. Ency. Law, p. 946.) The assets of a private corporation, whether consisting of real estate or personal property, belong to the corporate body, and the stockholders are not in any sense the owners thereof. We think this proposition so well established that the citation of authorities in support of it is unnecessary."

In *Champollion vs. Corbin*, 71 N. H. 78, the plaintiff claimed the title to certain shares of stock as the only heir at law of the deceased owner of the shares. This contention was rejected, Mr. Justice Chase saying:

"The subject-matter of this suit is ten shares of the capital stock of the Blue Mountain Forest Association, a corporation organized under the general laws of the state. Although the property of the corporation consisted largely of real estate, the shares are choses in action, or property in the nature of choses in action—not realty."

A sale of shares of stock comes within the terms of the Statute of Frauds, whether the act refers to "goods, wares and merchandise," or to "personal property," or to "goods or choses in action." This doctrine is recognized, with practical unanimity, by the American courts. *Mayer vs. Child*, 47 Cal. 142; *Ayres vs. French*, 41 Conn. 142; *Tisdale vs. Harris*, 20 Pick. 9; *Berwin vs. Bolles*, 183 Mass. 340; *Baltzen vs. Nicolay*, 53 N. Y. 467; *Tompkins vs. Sheehan*, 158 N. Y. 617; *McIlroy vs. Richards*, 148 Mich. 694; *Sprague vs. Hosie*, 155 Mich. 30, 118 N. W. 497; *Greenwood vs. Law*, 55 N. J. Law 168; *Hewson vs. Peterman Mfg. Co.*, 76 Wash. 600, 136 Pac. Rep. 1158; *Korrer vs. Madden*, 152 Wis. 646; *Southern Life Ins. & Tr. Co. vs. Cole*, 4 Fla. 359; *Hinchman vs. Lincoln*, 124 U. S. 38; *Franklin vs. Matao Gold Min. Co.*, 158 Fed. Rep. 941, 16 L. R. A. [N. S.] 381; *Snow Storm Min. Co. vs. Johnston*, 186 Fed. Rep. 745.

In the light of these authorities this case presents an entirely different aspect from one where the state is seeking to debar aliens from the ownership of real property in accordance with a policy that quite generally prevails and which, if applied equally to all aliens, would not militate against any constitutional prohibition. Even had the California act undertaken to declare a share of stock real estate, that would not have made it so, or have brought it within the reason of the rule which permits a state to inhibit ownership by aliens of real property within its territory. The mere fact that the legislature should term a horse, or an automobile, or household furniture, or a promissory note, or the stock in trade of a merchant, or products of the soil, such as lumber, grain, sugar, fruit, tobacco, real property would be entirely futile and a mere evasion of the equality clause of the Fourteenth Amendment.

Such legislation, even if made applicable to all aliens regardless of race, color or nationality, would come within the rule laid down in *Truax vs.*

Raich, 239 U. S. 39; *Ex parte Kotta*, 62 Cal. Dec. 315, 200 Pac. Rep. 957; *Fraser vs. McConway & Torley Co.*, 82 Fed. Rep. 257; *State vs. Montgomery*, 94 Me. 192, and *Truax vs. Corrigan*, 257 U. S. 312, and would sin against the fundamental principle laid down in *Yick Wo vs. Hopkins*, 118 U. S. 268; *Gulf, Colorado & Santa Fe Ry. Co. vs. Ellis*, 165 U. S. 150, and the other leading cases in which the equality clause of the Fourteenth Amendment has been interpreted and applied.

Any other conclusion would enable the state, through its legislature, to forfeit all the belongings of any alien, to make it criminal for him to own goods, chattels, or choses in action of any kind, and to strip him, not only of every vestige of property, but of his liberty to engage in any occupation or employment, or to earn a livelihood. He might be forbidden to till the soil as a farmhand, or to extract ore from a mine as a laborer, because it might be said in both cases that his livelihood would be derived from the land which he cultivates or mines, and because in each instance the legislature might, with as much justification as in the case at bar, declare that such employment creates an interest in real property.

The nature of a share of stock as property must be determined by its inherent characteristics and physical qualities, and not by a legislative fiat. In this act we have not, however, a prohibition of all aliens against the acquisition of the ownership of shares of stock in a corporation owning agricultural lands, but such right of ownership is sought to be withheld from aliens ineligible to citizenship solely because of their race, color and nationality. All of the shares of stock of the Merced Farm Company might with impunity be acquired by anybody of the Caucasian or African race, and yet Satow, a Japanese, if he undertook to purchase a single share of the stock from the owner, would have it forfeited in escheat proceedings, and might find himself subjected to criminal prosecution.

Assuming that the corporation had issued 100 shares of stock and all of it had been acquired by a British alien, the latter might lawfully distribute those shares to German, Austrian, Bulgarian, Turkish, Russian, Polish, Italian, Hungarian and Greek aliens; but the moment that a Japanese alien appeared upon the scene the right to sell and to buy would at once cease and the free disposition of the shares of stock would end.

By the same token, the legislature might make like restrictions with regard to the acquisition of shares of stock in a company authorized to possess lands for other than agricultural, residential and commercial purposes. That would include corporations operating mines, railways, oil properties, quarries and waterworks, all of which are basically founded on the ownership of land.

If it comes within the legislative competency of a state to say today to one of the Japanese race that he shall not be permitted to acquire any shares of stock in a corporation owning land of any kind, then it must have like power tomorrow to exclude aliens of other races and nationalities, British or French, for example, and withdraw the ban now laid upon Japanese and Chinese and permit them to acquire such shares.

Weighing these potentialities, it is difficult to imagine a case which comes so directly within the beneficent purpose of the equality clause as does the present.

III.

Under a fair interpretation of that portion of section 3 of the Alien Land Law on which the appellees rely the proposed sale to and purchase by Satow of the twenty-eight shares of stock of the Merced Farm Company is not prohibited.

Examining that section more closely, we find that it contains two provisions. The first is directed against any corporation organized under the laws of California "or any other state or nation," of which a majority of the members are aliens ineligible to citizenship or in which a majority of the issued capital stock is owned by such aliens. That provision is not involved in the present case, because it is not claimed that even if Satow were permitted to purchase the twenty-eight shares of stock of the Merced Farm Company a majority of the members of that company would be aliens or that a majority of its issued capital stock would be owned by aliens. It expressly appears that the majority of the stock is owned by citizens.

The second provision is the one involved in the case at bar, and provides that all aliens other than those specified in section 1—consequently referring to aliens ineligible to citizenship—"may become members of or acquire shares of stock" in any corporation "that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed" by treaty, "and not otherwise."

The Merced Farm Company is authorized by its articles of incorporation to acquire, possess, enjoy and convey agricultural land. The appellees contend that Satow is an alien other than one specified in section 1 of this act, that section relating, as it does, to aliens eligible to citizenship under the laws of the United States. We have, therefore, an alien not specified in section 1, and shares of stock in a company authorized to acquire, possess, enjoy and convey agricultural land, and permission that the alien referred to may become a member of or acquire shares of stock in such a company.

The phrase following the words "agricultural land," namely, "in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject," does not detract from the legal effect of the right conferred of acquiring shares of stock in a corporation authorized to hold agricultural land. It is certain that the corporation referred to in section 3 may own agricultural land, and if the treaty with Japan does not specifically refer to such land the rule *falsa demonstratio non nocet* would come into play. This is especially true when one considers that this is a highly penal statute, one involving a forfeiture. In so far as the statute refers to a treaty, the latter must be read into it, and the rule relating to the interpretation of a treaty, namely, that if it admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is preferred, is likewise applicable.

Shanks vs. DuPont, 3 Pet. 242; *Hauenstein vs. Lynham*, 100 U. S. 483; *Lee vs. Boise Development Co.*, 21 Idaho, 461, 122 Pac. Rep. 851.

Consequently, whatever may have been the purpose of the draftsman of this measure, he has not accomplished that purpose, even in the absence of a constitutional obstacle to his doing so.

In this connection we refer to the controlling canons of interpretation as laid down in the authorities collated at pages 18 and 19 of the Appellees' Points in *Webb vs. O'Brien* submitted herewith.

IV.

The act is likewise unconstitutional because it deprives Frick, who is a citizen of the United States, of the right to enter into a contract for the sale of his shares of stock and because it deprives Satow of his liberty by debarring him from entering into a contract for the purchase of corporate shares.

In this aspect of the case the decisions in *Yick Wo vs. Hopkins*, *Truax*

vs. *Raich*, *Butchers' Union Co. vs. Crescent City Co.*, 111 U. S. 746; *Allgeyer vs. Louisiana*, 165 U. S. 578, 589, 590; *Smith vs. Texas*, 233 U. S. 630, and *Coppage vs. Kansas*, 236 U. S. 1, are in point.

V.

Section 3 of the Alien Land Law as interpreted by the state, offends against the treaty between the United States and Japan, which permits the citizens or subjects of the respective parties to have liberty "to carry on trade, wholesale and retail," in the respective territories of the contracting nations, "and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects."

Here Satow is seeking to complete a transaction involving the purchase of twenty-eight shares of the capital stock of the Merced Farm Company. These shares of stock are a chose in action, and, therefore, personal property. Such a transaction is as much the carrying on of trade as would be a purchase of government bonds, or of negotiable paper, or of merchandise. If Satow opened a broker's office in San Francisco for the purpose of dealing in stocks, would he not be literally carrying on trade; would not the treaty protect him in the exercise of that right to the full extent that it would a citizen of the United States engaged in a like enterprise?

To carry on trade is to engage in commerce in any or all of its various phases. It is the business of exchanging commodities by buying and selling them for money. Those commodities need not necessarily be merchandise, but, in the colloquial sense of the word, they may be such securities as are "traded in" on the exchanges or in transactions between man and man.

United States vs. American Tobacco Co., 164 Fed. Rep. 700, 708; *United States vs. Douglas*, 190 Fed. Rep. 482, 484; *Finnegan vs. Noerenberg*, 52 Minn. 239, 18 L. R. A. 778; *People vs. Blake*, 19 Cal. 579, 584.

In *State vs. Hunt*, 129 N. C. 686, 40 S. E. Rep. 216, 217, it was said that "trade comprehends every species of exchange or dealing, either in the produce of land, manufactures, or bills, or in money; but it is chiefly used to denote the barter or purchase and sale of goods, wares, or merchandise, either by wholesale or retail."

In *May vs. Sloan*, 101 U. S. 231, 237, it was said:

"The word 'trade' in its broadest signification, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money or commerce and traffic generally."

Hence a sale of land was held to be "a trade."

In *Bank of the United States vs. Norton*, 10 Ky. 422, 425, it was held that the charter of a bank declaring that it should not directly or indirectly "deal or trade" in anything except bills of exchange, gold or silver bullion, or in the sale of goods really and truly pledged for money loaned, and not redeemed in due time, does not prohibit the corporation from purchasing promissory notes, but only denotes what may or may not be bought and sold by the bank.

See, also, *Fleckner vs. United States Bank*, 8 Wheat. 338, 351.

The word "trade" is frequently used in the sense of commerce. Dealing in lottery tickets has therefore been regarded as carrying on commerce.

Champion vs. Ames, 188 U. S. 321.

VI.

It is respectfully submitted that the order of the district court should be reversed and the case remanded with instructions to grant the injunction prayed for by the appellants.

LOUIS MARSHALL,
Appellants' Counsel.

2. BRIEF FOR APPELLEES, BY U. S. WEBB.
STATEMENT OF THE CASE.

Raymond L. Frick, a citizen of the United States and of the State of California, and N. Satow, a subject of the Emperor of Japan, born in the Empire of Japan, of Japanese parents, and also a resident of California, are the plaintiffs and appellants in this proceeding. U. S. Webb, as attorney-general of the state, and Matthew Brady, as district attorney of the City and County of San Francisco, are the defendants and appellees. The bill of complaint is brought against defendants in their official capacity to enjoin them from bringing any proceeding at law or in equity to escheat certain shares of stock owned by the citizen plaintiff, under the terms of the California Alien Land Act of 1920. (Statutes 1921, p. 83.) It is alleged that the defendants so threatened to prosecute escheat proceedings under section 8 of the act. The citizen intends to sell, for the sum of \$4,250, to the alien plaintiff, twenty-nine shares of the capital stock of the Merced Farm Company, a corporation organized under the laws of California, which corporation is the owner of and by its articles of incorporation authorized to acquire, possess, enjoy and convey agricultural land, which agricultural land consists of twenty-two hundred acres in Merced County, California. A majority of the issued capital stock of the corporation is owned by citizens of the United States. So far as the petition shows, the said twenty-two hundred acres of agricultural land is the only property belonging to the said Merced Farm Company. There is no allegation of the said Merced Farm Company engaging in any business of any character whatsoever, except this allegation that it so owns this agricultural land in this state, and that it is so authorized to acquire, possess, enjoy and convey such agricultural land in this state.

Section 3 of the Alien Land Act provides that if a majority of the capital stock of this corporation belonged to ineligible aliens, the corporation could acquire agricultural lands only as permitted by the treaty between this country and the nation or country of which such stockholders are citizens or subjects.

With reference to the corporation before the court in this case, where there is no such majority ownership in aliens, the same section 3 provides that any ineligible alien may acquire shares of stock in such a corporation only as permitted by any treaty between this country and the nation or country of which such alien is a citizen or subject.

Section 7 of the act provides that any property acquired by the corporation in which the majority of stock is owned by ineligible aliens, and where such a treaty does not protect such ownership, may be escheated to the state.

Section 8 provides that any shares of stock so owned by ineligible aliens, where such ownership is not protected by such a treaty, may be escheated to the state.

It is the theory of defendants that the treaty between the United States and Japan does not protect the particular ownership of these twenty-two shares of stock in the hands of the plaintiff ineligible alien, and that, therefore, they may be escheated to the state under the procedure outlined in section 8 of the act.

The injunction sought in the bill of complaint is asked for on the theory that the citizen plaintiff is entitled to relief under the protection of the Fourteenth Amendment to the United States Constitution, and that the alien plaintiff is entitled to such relief by reason of the said Fourteenth

Amendment, and also by reason of the treaty existing between this country and Japan.

ARGUMENT.

I.

THE OWNERSHIP OF A SHARE OF STOCK IN A CALIFORNIA AGRICULTURAL CORPORATION CONSTITUTES AN INTEREST IN AGRICULTURAL LANDS, PROHIBITED TO INELIGIBLE ALIENS BY THE CALIFORNIA ALIEN LAND ACT.

As we view this case, the vital and all-important question to be answered is,

Does the ownership of a share of stock in a California corporation, whose assets are agricultural lands of said state, constitute an interest in real property in said state?

If so, there can be no question that the Alien Land Act of California prohibits such ownership in an alien ineligible to citizenship in this country.

That such an interest in the agricultural lands of the state may be prohibited without violating the United States Constitution or the United States-Japan treaty has been decided by the United States district court of California, and by the United States district court in the State of Washington, in the two cases which are to be argued before this court at the same time that this case is argued. That is, our California case of *Porterfield vs. Webb*, 279 Fed. 114, and the State of Washington case of *Terrace vs. Thompson*, 274 Fed. 841, said cases being respectively, October Term, 1922, No. 299, and October Term, 1922, No. 302.

We are assuming that the motion of appellants to advance this cause for argument to November 27, 1922, will probably be granted. We plan to have our brief in this case filed with the court one week before the said date, in order to conform to the rules, though under the circumstances we will not have the usual advantage of examining the brief of appellants prior to the preparation of this brief.

Also, the transcript has not yet been printed, which renders it impossible for us to refer by folio numbers to the transcript.

We reserve for the *Porterfield* and *Terrace* cases a discussion of the sound reasoning advanced by the district courts which led to their conclusion that the Alien Land Acts of California and Washington do not violate either the United States Constitution or the treaty.

In this case we need give but small consideration to any constitutional or treaty question. We need consider practically nothing except whether the interest owned by the ineligible alien is such an interest in agricultural lands as to amount to a violation of the California act. The United States district court held that the act was violated and we believe that decision to be so manifestly sound as not to require extensive argument to sustain it.

It will not be out of place to recall briefly at the outset some of the objects which the people sought to accomplish by the enactment of the California Alien Land Act.

It was not the acquirement of title in fee alone that this legislation was designed to prevent.

It was the purpose of those who understood the situation to prohibit the enjoyment or possession of, or dominion over, the agricultural lands of the state by aliens ineligible to citizenship. It was the purpose of the people in a practical way to prevent ruinous competition by the Oriental farmer against the American farmer. Those who drafted this legislation fully realized that such competition, working through the means of corporate entities, would have the exact practical effect as in the case of the

identical individuals competing without having been organized in such corporate entities. It was understood that the American farm home would be subjected to the same ruinous attack and by the same class of Oriental labor whether the individual aliens were organized in corporate bodies or not.

The economic clash which it is the sovereign right of the state to prevent is none the less disastrous by reason of the existence of such corporations as the California statute was designed to prohibit.

The destruction of our farm life is not the more desirable because accomplished by Orientals holding stock in agricultural corporations, rather than by the same people individually holding the title in fee. California is interested in preventing the destruction of the farm life. California is not particularly interested in one method of destruction, as opposed to another.

Capital stock in corporations in California is, of course, personal property, as that expression is commonly used with reference to the usual ownership of such shares of stock. However, they represent an interest of the owner of the stock in the corporation itself. Assuming that the corporation owns real property, the stockholder has an interest therein to the extent of his shares of stock. The legal title, of course, is in the corporate entity. The corporation, however, owns the same only as an agency for the real owners, who are the stockholders. As such owners of stock representing an interest in real property, these ineligible aliens are subject to the control by this state of their interest in the agricultural lands of this state.

The United States-Japan treaty might possibly be held to guarantee the right of this ineligible alien to own or inherit corporate shares of stock in an ordinary commercial corporation engaged in trade or commerce, where we would not be concerned with the question of any interest in the agricultural lands of California. But that is not the case here.

Now let us assume a California corporation which owns nothing but agricultural lands in the State of California. Let us assume further that 100 per cent of the capital stock of said corporation belongs to aliens who are ineligible to citizenship in the United States. We submit it is obvious that to permit of such a situation, and prohibit some one person who is so ineligible to citizenship owning the identical land, would be ridiculous. The purpose of the act is to prevent dominion over and control of such lands in this state by aliens ineligible to citizenship. The courts have held that there is inherent in the states of the Union the power to so control their lands. That question has been settled and, we respectfully submit, is no longer open for serious debate.

If that be so, of what value would such judicial determination be to the states, if the identical prohibited purpose might be accomplished through the mechanical device of setting up a legal entity known as a corporation and permitting ownership of its stock by the same class of ineligible aliens, and then saying that merely by reason of this incorporeal entity being so created, these ineligible aliens might be permitted to so possess and enjoy the agricultural lands of the state?

A share of stock in a corporation is personal property for ordinary purposes. But here we have a rule which has grown up through the years ever since the Year Books of the common law, to permit the citizens and residents native of any country to control their lands. The foundation for the rule that has been established for so many years is the prime necessity of self-preservation. Unless the native citizens of any state are permitted to control the ownership and interest in lands of that state, the state is not secure against foreign attack.

In this case we see an attempt to defeat this most important purpose,

the reason for which is so well understood in the law, by setting up the technical and peculiar attributes of shares of stock in corporations. The rules laid down by our courts with reference to the character of shares of stock, as to their being personalty rather than realty, have been enunciated without any reference to the subject which we are here considering. A share of stock in a corporation may be personalty, for instance, for the purposes of taxation. But what has this to do with our question, which deals with an entirely different subject matter and is addressed to corporate shares of stock from an entirely different viewpoint? The law does not permit of absurdities, and it would be an absurdity to conclude that a share of stock in the corporation before the court is so far personal property that the state is without the right to control as to the ownership thereof by ineligible aliens when it is stock in a corporation owning and dealing in the agricultural lands of the state.

We call attention to the Washington Alien Land Act, which was before the court in the Terrace case. It is to be found in chapter 50 of the Laws of Washington, 1920-21, at page 156. Section 2 of said act provides that no alien shall own land or take or hold title thereto, and that no person shall take or hold title to land for an alien. Further, that land now held by or for aliens in violation of the constitution of the state is forfeited and declared to be the property of the state, and that land hereafter conveyed to or for the use of aliens, in violation of the constitution, or of the said Washington Alien Land Law, shall thereby be forfeited to and become the property of the state.

It is, then, necessary to determine what is meant in said law by the word "alien," and also by the word "land." We find these definitions in section 1 of the act. Section 1, subdivision a, provides:

"'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and *all corporations* and other organized groups of persons *a majority of whose capital stock is owned or controlled by aliens*, or a majority of whose members are aliens;"

A corporation in Washington, the majority of whose stock is owned or controlled by aliens, is to be considered, for the purposes of that act, as an alien.

Subdivision c of said section 1 defines land as follows:

"'Land' also includes *any share or interest in a corporation* or other organized group of persons deemed an alien in this act which has title to land either heretofore or hereafter acquired;"

We therefore see that if the plaintiff in our case, Satow, were in Washington and owned a share in a land-owning corporation the majority of whose stock was owned by aliens, that share of stock, by specific statutory provision, would be land. But land is land, not by reason of statutory expression, but rather by reason of its inherent characteristics. The interest in land, in Washington, would be an interest in real property, without the legislative declaration.

It is our contention that so far as the California act is concerned, the identical result is reached, only in another way. The purpose of the two acts is the same. It is the intention of the legislation in each case, that ownership by ineligible aliens of agricultural lands of the state be made impossible. California accomplishes this purpose by specifically saying that ineligible aliens can not hold shares of stock in a corporation that owns agricultural lands. In giving expression to this rule, the California act, in effect, says that such a share of stock in such a corporation is an interest

in land. It would be no more such an interest in land, if the act, as in the Washington statute, described it as "land."

Washington accomplishes the identical purpose, only by different technical means. Instead of prohibiting the ownership of such a share of stock, the Washington act defines such a share as being land, and then prohibits the ownership of "land." Of course, there is the additional difference, of no importance to us in this case, that Washington appears to limit the prohibition to cases where a majority of the stock is owned by aliens.

We can see no real difference between the method pursued in Washington and the method pursued in California. Mere phraseology can not defeat the fundamental and clear purposes of the two acts.

Let us assume that this California corporation in our case were dissolved.

It is provided in section 400 of the Civil Code of California that the directors of a corporation, at the time of its dissolution, are trustees for the creditors and stockholders, with full powers to sell the assets thereof, in such manner as the court may direct, and distribute the proceeds of such sales "*and all other assets*" to the stockholders.

The said section 400 reads in part as follows:

"Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation, collect and pay outstanding debts, sell the assets thereof in such manner as the court shall direct, and distribute the proceeds of such sales and all other assets to the stockholders. * * *"

If the best interests of the stockholders require it, property may be distributed without its being sold. Agricultural land, for instance, could be divided among the different stockholders. This would be an instance showing, in a practical way, how the corporation is merely holding the legal title for the benefit of the real owners of the land.

The California Alien Land Act treats of the ownership of stock in such corporations as before the court as an interest in real property. Section 3 provides that a corporation in which a majority of the shares of stock is owned by ineligible aliens, can own real property only as may be permitted by treaty.

Further, to prevent the building up of a corporation so that a minority alien ownership of stock may change to a majority alien ownership, the same section provides that no one share of stock may be acquired by such an alien in such a corporation, except as may be permitted by treaty.

In section 8 the escheat for leasehold and lesser interests in real property is provided for. Again in the same section the escheat of any such shares of stock as are here in question is provided for. The identical escheat procedure is provided in each of these two cases. The attorney-general or district attorney of the proper county institutes escheat proceedings, as provided in section 7. In such proceedings the court determines the value of such leasehold or other interest, or of such share or shares of stock, and enters judgment for the state for the amount thereof, together with costs. Thereupon the court orders a sale of such leasehold or other interest or shares of stock, in the manner provided by section 1271 of the Code of Civil Procedure.

Said section 1271 provides in part that:

"in any judgment rendered, or that has heretofore been rendered by any court, escheating property to the state, on motion of the attorney-general, the court must make an order that such property, unless it consists of

money, be sold by the sheriff of the county where it is situate, at public sale, for gold coin, after giving notice of the time and place of sale, as may be prescribed by the court in such order; * * *

Out of the proceeds arising from such sale of such leasehold or other interest, or shares of stock, the amount of the judgment so rendered for the state shall be paid into the state treasury, and the balance shall be deposited with and distributed by the court, in accordance with the interests of the parties therein. Here we see that the statute considers this character of stock just as much an interest in land as is a leasehold interest.

Again, in section 6 of the act, which deals with the inheritance by an alien of real property and of shares of stock, the section fixes the same procedure in a probate court in both cases. There is a probate sale and a distribution of the proceeds of the sale to the heir or distributee, in lieu of this property. The land, or any interest therein, and shares of stock of the character that we are considering, are treated as identical for this probate procedure.

Counsel for appellants urged before the district court that section 3 of the act practically denies to ineligible aliens the right to hold any stock in any California corporation, because almost all of such corporations are "authorized to acquire, possess, enjoy or convey agricultural land."

We are concerned, however, only with the facts as here presented, and in paragraphs III and IV of the bill of complaint it is shown that so far as this particular corporation, Merced Farm Company, is concerned, it does own agricultural lands, and no other properties of said corporation are described.

Plaintiffs here are in no position to argue from the point of view of a holder of stock in a corporation authorized to own real property, but not in fact so owning any such realty.

"It is a firmly established principle of law that the constitutionality of a statute may not be attacked by one whose rights are not affected by the operation of the statute." (Vol. 12 Corpus Juris, p. 760, and the following pages to p. 764, with many cases cited.)

Included in this text is the following at pages 762 and 763:

"In other words, one attacking the constitutionality of a statute must show that it affects him injuriously and actually deprives him of a constitutional right. It is not sufficient that the statute is unconstitutional as to other persons or classes of persons; it must affirmatively appear that the person attacking the statute comes within the class of persons affected by it."

It is not necessary for us to consider a point which, in some other case, might be of importance in this connection. We refer to the argument which may be made in support of a construction of the act that would prohibit the ownership of stock by an ineligible alien in corporations having the power to acquire agricultural lands, even though, at the time the stock is acquired, no such stock is so owned by the corporation. That point is not before this court, and appellants are in no position to urge it. It might, however, be urged in case the question does arise in some other case that the state would be justified in taking steps to prevent the possible owning of an interest by an ineligible alien in agricultural lands of this state, by prohibiting the acquisition of such stock under such circumstances, which stock might, in the future, be evidence of an interest in such agricultural lands.

However, as above noted, this is mere academic discussion. Counsel also argued in the district court that unless the articles of incorporation limit the right, such a company would enjoy the privilege of owning agricultural land without any express authorization. The rule is that the corporation could not hold agricultural land unless

First—It is expressly authorized in its articles of incorporation or by statute so to do; or

Second—If not so expressly authorized then there must not be any limitation, by the describing of some particular commercial purpose, for instance, which purpose would not necessarily by implication carry with it the right to own realty.

The purpose of section 3 of the California act seems clear. In the first place, and applying the section to this case, it is provided that any corporation in which a majority of the issued capital stock is owned by aliens subject to the Emperor of Japan and therefore ineligible to citizenship, may acquire, possess, enjoy and convey real property or any interest therein in this state in the manner and to the extent and for the purposes prescribed by the treaty existing between Japan and the United States, and not otherwise. The effect of this provision is identical with the effect of the provision in section 2 of the act that the same aliens might acquire, possess, enjoy and transfer real property or any interest therein in this state in the manner and to the extent and for the purposes prescribed by this same treaty and not otherwise. That is, the alien mentioned in section 2 and the corporation just described and mentioned in section 3, cannot acquire any interest at all in such real property. The reason for this is that the existing treaty between the United States and Japan does not permit of any such enjoyment or possession of agricultural lands in this state by aliens subject to the Emperor of Japan. *Porterfield vs. Webb*, 279 Fed. 114; *Terrace vs. Thompson*, 274 Fed. 841.

The only purpose of the affirmative provision that these aliens might hold these interests in the lands of this state, so far as the treaty permits, is to recognize any rights granted by the treaty. But there are no such rights granted. The only right granted is "to lease land for residential and commercial purposes." (U. S.-Japan Treaty of Feb. 21, 1911: Art. I.)

Now, continuing to the final paragraph in section 3 of the Alien Land Act, this paragraph, for the purposes of this case, refers to ownership of stock by the identical aliens, rather than to the ownership by the corporation itself of lands in this state. Obviously the act having dealt with a corporation where a majority of the stock is owned by ineligible aliens, now takes up other corporations where no such majority ownership by aliens exists. Its clear purpose is to prevent and discourage such a corporation from changing its character to one where the majority of the stock is owned by ineligible aliens. This is done by again providing, as in the first paragraph and as we found in section 2 of the act, with reference to the ownership of real property, that any such ineligible alien may acquire stock in a corporation that is authorized to acquire, possess, enjoy or convey agricultural land in the manner, to the extent and for the purposes prescribed by the treaty existing between the United States and Japan, and not otherwise.

Our theory is that no such right is given by the said treaty. If correct in that theory, plaintiffs cannot rely upon the treaty. If incorrect, then the act itself recognizes the right of such an ineligible alien as plaintiff here to own shares of stock in such a corporation.

If the theory of counsel for appellants should prevail, one of the primary purposes of the treaty between Japan and the United States would be defeated. We refer to the purpose expressly shown by the history of the diplomatic negotiations to prohibit the nationals of either country claiming any right to acquire interest in agricultural lands in the other country. This diplomatic history has been pointed out by us in our brief filed with this court in the case of *Porterfield vs. Webb*, *supra*.

A. *Textbook and judicial expressions supporting our argument that the owner of a share of stock in a landowning corporation has an interest in the lands of such corporation.*

While the legal title to the land rests in the corporation, the equitable interest and beneficial use are in the shareholders.

The principle in the statement just made is announced in *Corpus Juris*, vol. 14, page 63, secs. 27 and 28, as follows:

"(Sec. 27) (7). 'Interest' in corporate property or business.—While the title and ownership of property and business of a private business corporation is vested in the corporation as a distinct legal entity and artificial person, the stockholders or members are nevertheless 'interested' therein, within the meaning of statutes and rules of law, since the beneficial interest is in them.

"(Sec. 28) (8). Action of stockholders or members individually sustained as action of corporation.—Even when there is no question of fraud or illegality, it is held in some cases, in view of the fact that the property of a corporation really belongs beneficially to the stockholders or members, that the fiction of corporate entity may be disregarded, where no rights of creditors or third persons are affected, and effect may be given in equity to the action of all the stockholders and members of a corporation although as individuals and without formal corporate action, in distributing among themselves or otherwise disposing of the property of the corporation, or authorizing its officers to do so, just as if there had been formal corporate action in the premises. The rule has also been applied in other cases."

Recognition of this principle is shown by Mr. Justice Marshall in *Huber vs. Martin*, 105 N. W. 1031, at page 1037:

"Where is the ownership of the net assets of a mutual insurance company located? That the legal title is in the corporation goes without saying. The rule in that regard must be the same in case of one corporation as another. Why is not the equitable right—the real beneficiary interest—independently of the corporate use, vested in the members of the corporation in one case the same as in the other? It would seem that after the corporate purposes are exhausted, the property of every business corporation belongs to its members, is self-evident."

The principle is clearly set out by Mr. Pomeroy in his "Equity Jurisprudence," vol. 3, at page 982, as follows:

"According to this theory, every ownership—property itself—consisted of a legal title and of a use. These two might be combined and held by the same person, and their union would thus constitute the highest or ideal dominion; or they might be, and often were, separated, and held by different persons; but of the two, the use was the more important, since it represented the real, substantial, usufructuary proprietorship, while the other might be the naked legal estate, drawing after it or conferring no beneficial rights of enjoyment whatsoever. While the legal title and the seisin always existed in some person, and remained subject to the common law dogmas, the use, being a creature of equity, was entirely free from the feudal burdens and from the restrictions growing out of the common law theory as to seisin."

Mr. Fletcher in his "Cyclopedia Corporations," vol. 5, paragraph 3417, page 5595, recognizes the rule in this language:

"It was said in a New York case that 'the right which a shareholder in a corporation has by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts.'"

And at pages 5596 and 5597, same paragraph:

"The equitable interest of the shareholder in the property of the corporation is represented by the term 'stock,' and the extent of his interest is described by the term 'shares.' The expression 'shares of stock,' when qualified by words indicating number and ownership, expresses the extent of the owner's interest in the corporation property."

This interest of the shareholders in the property of a corporation is set forth in Clark & Marshall's "Private Corporations," at pages 23 and 24:

"(f) Stockholders are 'interested' in property of corporation.—Though the title to the property of a corporation is in the corporation, and not in the stockholders, the stockholders are undoubtedly *interested* therein. Though the title is in the corporation, the beneficial interest is in the stockholders in proportion to their shares. It has been held, therefore, that the stockholders of a corporation have an insurable interest in its property.

"For the same reason, a stockholder is *interested* in an action by or against the corporation, although not technically a party thereto, and would be within a statute disqualifying, as judge or juror, a person interested in an action. And under a statute imposing a tax upon 'persons interested in the use' of a distillery, it has been held that the stockholders of a corporation operating a distillery are liable.

"(g) Mortgage by stockholders enforceable in equity.—Since a corporation is in reality a collection of persons, who have the beneficial interest in its property, a court of equity may give effect to their acts in relation to the property, although they may have been done by them as individuals, and not as the agents of the corporation, nor in its name. As we have seen in another section, a mortgage executed by all the stockholders of a corporation in their own names merely, and as individuals, and covering the property of the corporation, is not a good *legal* mortgage, for in law they do not own the property of the corporation. It is, otherwise, however, in equity. A court of equity, in such a case, will look beyond the corporation, regarded as a legal entity distinct from its stockholders, and will recognize *the fact* that the substantial, beneficial ownership of the property is in them, and that the corporation holds it for them, and will enforce the mortgage not only against the stockholders, but also as against the equitable demands of subsequent purchasers or incumbrances with notice from the corporation."

The same doctrine is recognized by Morawetz, who in "Morawetz on Private Corporations," at page 1, says:

"The existence of a corporation independent of its shareholders is a fiction; its rights and duties are in reality the rights and duties of persons who compose it, and not of an imaginary being."

This is quoted approvingly by the supreme court of California, in *San Diego Gas Company vs. Frame*, 137 Cal. 447. The court says:

"The stockholders individually can not sue or be sued in respect to their interests in the property held in the name of the corporation; the litigation must be by or against the corporation. And to turn a corporation out of court summarily, as in this case, is to deny the real parties in interest—the stockholders—the right to protect their property according to law."

The doctrine, as thus presented by the above text, is universally observed and applied by the courts. So far as we are aware, the correctness of these rules has never been judicially questioned.

II.

THE UNITED STATES-JAPAN TREATY DOES NOT PROTECT THE INELIGIBLE ALIEN APPELLANT IN HIS ACQUIRING THE SHARES OF STOCK IN THIS CASE ON ACCOUNT OF SAID SHARES HAVING CERTAIN ATTRIBUTES OF PERSONAL PROPERTY.

The position of appellants in this case, which the district court refused to follow, must be that the interest of the plaintiff Frick or of plaintiff Satow in the capital stock of the Merced Farm Company is personal property, and of such a character as personal property that there must be a conclusion in law that the rights of the alien plaintiff Satow, or the rights of the citizen plaintiff Frick, are violated, as such rights are guaranteed either by the United States-Japan treaty or by the Fourteenth Amendment to the United States Constitution.

We are confident that the case will be disposed of on the first point suggested in this brief, and that the court will conclude that in fact the interest in stock of a corporation of this character is such as to be an interest in real property consisting of agricultural lands in California and, therefore, properly subject to such state control, as has been recognized by the decisions of the United States district courts.

We shall, however, now consider this other phase of the question as to the possibility of considering the interest of the appellants herein in stock in this agricultural landholding corporation to have certain characteristics of personal property, and the bearing that the treaty with Japan and the Fourteenth Amendment to the United States Constitution have upon such character of property.

We shall first consider the treaty.

Our position with reference to the treaty is that its history and its context show that it is peculiarly a treaty of commerce, trade and navigation, and intended to cover those subjects only. Further, it is our position that the matter of interest in a corporation, which corporation in turn owns agricultural lands in this state which it may either hold for agricultural uses or sell, does not come within the scope of a treaty that deals with commerce, trade and navigation.

So far as development of such lands by the corporation itself is concerned, certain comments by the court in the Terrace case, *supra*, are of interest. In that case the district court addressed itself to the claim that the complainant Nakatsuka's business of farming was incidental to his business as a wholesale and retail trader in farm products, and used the following language with reference to this argument:

"A clear intention being shown not to supersede, in the particular now in question, the state's authority to regulate the rights of title and possession in lands within its boundaries, that intent may not be defeated by the claim now made that complainant Nakatsuka's business of farming is incidental to his business as a wholesale and retail trader in farm products, for there is no more reason for considering farming an incident of the latter than for considering the latter an incident of the former. The language of the treaty is: 'and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects * * *.' (37 Stat. at L. 1504.)

"In the most liberal construction of this language that may be indulged in, it can not fairly be said that truck farming is incidental to trading, either wholesale or retail, in the products of a farm, any more than conducting a sheep ranch or growing mulberry trees incidental to the dry goods trade. *Kidd vs. Pearson*, 128 U. S. 1; *United States vs. E. C. Knight*

Co., 156 U. S. 1; *Joyce vs. Auten*, 179 U. S. 591, at 594; *Capital City Dairy Co. vs. Ohio*, 185 U. S. 238, 245."

The petition in this case alleges that "the Merced Farm Company, a corporation duly organized under the laws of the State of California * * * is the owner of, and by its articles of incorporation authorized to acquire, possess, enjoy and convey agricultural land." (Par. III of the petition.)

Also, in paragraph IV of the petition, there is the allegation "that the said Merced Farm Company is a corporation organized and existing under the laws of the State of California, and is authorized to acquire, possess, enjoy and convey agricultural land in the State of California, and is now the owner of and in the possession of a large amount of agricultural land, to-wit: about twenty-two hundred acres in the County of Merced, in said State of California, * * *."

There is no allegation as to the use to which this land is being put, but, in any event, it is submitted that no possible use of the land could be considered as engaging in commerce or trade.

By "commerce" and "trade," is meant the ordinary commercial relationships and the purpose is to guarantee to the nationals of the high contracting parties the right to engage in trade as such in both countries.

We shall now quote from the United States-Japan treaty and italicize language showing that the treaty is essentially one dealing with commerce and trade.

The treaty is entitled "Treaty of Commerce and Navigation with Japan."

The preamble to the United States-Japan treaty recites that the President of the United States of America and His Majesty, the Emperor of Japan, being desirous to strengthen the relations of amity and good understanding between two nations "and believing that the fixation in a manner clear and positive of the rules *which are hereafter to govern the commercial intercourse between their respective countries* will contribute to the realization of this most desirable result, have resolved to conclude a treaty of *commerce and navigation for that purpose*, * * *."

Article I provides that:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel, and reside in the territories of the other, to *carry on trade, wholesale and retail*, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and *commercial purposes*, and *generally to do anything incident to or necessary for trade* upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

Article II provides that:

"The dwellings, *warehouses, manufactories and shops* of the citizens or subjects of each of the high contracting parties in the territories of the other, and all premises appertaining thereto used for purposes of residence or *commerce*, shall be respected."

Article IV provides that:

"There shall be between the territories of the two high contracting parties reciprocal freedom of *commerce and navigation*. The citizens or subjects of each of the contracting parties, equally with the citizens or subjects of the most favored nation, shall have liberty freely to come *with their ships and cargoes* to all places, ports and rivers in the territories of the other which are or may be open to foreign *commerce*, subject always to the laws of the country to which they thus come."

Article VI provides that:

"The citizens or subjects of each of the high contracting parties shall enjoy in the territories of the other exemption from all transit duties and a perfect equality of treatment with native citizens or subjects *in all that relates to warehousing, bounties, facilities and drawbacks.*"

Article VII provides that:

"*Limited-liability and other companies and associations, commercial, industrial and financial,*" in either of said countries are authorized in the territories of the other to exercise their rights.

Article XI provides that:

"No duties of *tonnage, harbor, pilotage, lighthouse, quarantine*, or other similar or corresponding duties of whatever denomination," levied in the name or for the profit of government, etc., shall be imposed in the ports of the territories of either country upon the vessels of the other unequally.

Article XIII provides that:

"The *coasting* trade of the high contracting parties is excepted from the provisions of the present treaty," etc.

Article XIV provides that:

"Except as otherwise expressly provided in this treaty, the high contracting parties agree that, in *all that concerns commerce and navigation,*" there shall be a "most favored nation" agreement.

Article XV provides that:

"The citizens or subjects of each of the high contracting parties shall enjoy in the territories of the other the same protection as native citizens or subjects *in regard to patents, trade-marks and designs*, upon fulfillment of the formalities prescribed by law."

Shares of stock in such a mercantile corporation, for instance, as a department store, or a store dealing in Japanese articles, might be considered such personal property as to come within the treaty guaranty of ownership thereof. This is a far cry from owning shares of stock in a corporation which, so far as the bill of complaint herein shows, does not, in any single particular, engage in a mercantile, commercial or trade pursuit. If, indeed, the shares of stock in this particular corporation are, as a matter of law, to be considered personal property, then we submit that for the purposes of this case and having in view the objects sought to be attained not only by the Alien Land Act but by the treaty itself, this stock is so impressed with an interest in agricultural lands of this state as to take it without the guarantees of the treaty.

Counsel for appellants in the district court quoted from Blackstone's Commentaries concerning the right of an alien to hold chattels real and all kinds of personal property.

No complaint can be found with these quotations from the common law. Blackstone but expressed the rule obtaining at the time he wrote, and that rule, limited in its application to the life and the activities of his day, did no violence. But Blackstone was not speaking of the shares of stock in a corporation. We are not to be chained to the fetish of a dead past, unless there be such an identity of the conditions then and now as to warrant the application of the rule adopted to meet the situation then to the conditions now existing. Some one has expressed a truth that should be inscribed on the cover of every law book, in the following language:

"Our law is not a memorial to the dead, but a rule for the living."

Justice Crane of the New York court of appeals said:

"The two sources of the law are to be found, first in the books, and second, in the life about us."

Those who negotiated the treaty between the United States and Japan had very definitely in mind just what guarantees were to be given to the nationals of the respective countries, and they also had just as definitely in mind what limitations were to be placed upon these nationals. It was intended that citizens or subjects of the respective countries might engage in trade, commerce and navigation in either country. It was also intended and particularly provided by amendments to the treaty during the course of the diplomatic negotiations, that no national of either country could claim any interest in the agricultural lands of the other country. If the theory of appellants is sustained, this fundamental purpose of the treaty-makers will be defeated.

We give a full discussion of the diplomatic history of the treaty in our brief here filed in the Porterfield case, *supra*.

We therefore urge that counsel can not successfully rely upon the treaty to support their thesis.

III.

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT PROTECT EITHER THE INELIGIBLE ALIEN APPELLANT OR THE CITIZEN APPELLANT IN THEIR DEALING WITH THE SHARES OF STOCK IN THIS CASE ON ACCOUNT OF SAID SHARES OF STOCK HAVING CERTAIN ATTRIBUTES OF PERSONAL PROPERTY.

Now as to the Fourteenth Amendment to the United States Constitution. Appellant Frick, the citizen, and also the alien appellant, Satow, are entitled to claim the protection of that portion of the Fourteenth Amendment which prohibits the states from depriving any person of life, liberty, or property, without due process of law, or denying to any person within their jurisdiction the equal protection of the laws.

The citizen appellant, but not the alien appellant, may also claim the protection of that part of the Fourteenth Amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

The decisive answer to any argument by citizens or by aliens that they are entitled to the protection of the Fourteenth Amendment in such a case as we are here considering is that the federal courts of this country have determined, in many cases, that amendment can not be used as an instrument to deprive the states of the Union of their inherent and historical power to control in the matter of ownership or other interest in lands, when a question arises as to prohibiting such an interest being vested in an alien. This point has been decided in the Porterfield and Terrace cases and in the many cases cited in those decisions. *Chirac vs. Chirac*, 2 Wheat. 259, 272; *Hawenstein vs. Lynham*, 100 U. S. 483, 484; *DeVaughan vs. Hutchinson*, 165 U. S. 566, at 570; *Clarke vs. Clarke*, 178 U. S. 186; *Blythe vs. Hinckley*, 180 U. S. 333.

We again submit on this point that if these shares of stock are to be treated as having some of the characteristics of personal property, in the nature of things the courts must recognize that flowing from the ownership of such "personal property" is the inevitable right to share in the profits and proceeds of the agricultural lands of the State of California. It is because of that right which accompanies the ownership of this stock that

we are justified in basing our defense on long established precedent, which refuses to recognize the Fourteenth Amendment as being intended to guarantee any such right to an alien.

Respectfully submitted.

U. S. WEBB,

Attorney-General of the State of California;

FRANK ENGLISH,

Deputy Attorney-General;

MATTHEW BRADY,

District Attorney of the City and County of San Francisco,
State of California.

Attorneys for Defendants and Appellees.

IN THE UNITED STATES SUPREME COURT.

OCTOBER TERM, 1923. No. 111.

3. DECISION OF THE COURT (NOVEMBER 19, 1923).

Mr. Justice Butler delivered the opinion of the court.

This is a suit brought by the appellants to enjoin the above named attorney-general and district attorney from enforcing the California Alien Land Law, submitted by the initiative and approved by the electors, November 2, 1920, on the grounds that it is in conflict with the due process and equal protection clauses of the Fourteenth Amendment, and with the treaty between the United States and Japan.

Appellants are residents of California. Frick is a citizen of the United States and of California. Satow was born in Japan of Japanese parents and is a subject of the Emperor of Japan. Frick is the owner of 28 shares of the capital stock of the Merced Farm Company, a corporation organized under the laws of California, that owns 2200 acres of farm land in that state. Frick desires to sell the shares to Satow and Satow desires to buy them. By the complaint, it is alleged in substance that the appellees have threatened to and will enforce the act against appellants if Frick sells such stock to Satow, and will institute proceedings to escheat such shares to the state as provided in the act; that, but for the provisions of the act and such threats, Frick would sell and Satow would buy the stock. And it is averred that the act is so drastic and the penalties attached to its violation are so great that appellees are deterred from carrying out the sale, and that unless the court shall determine its validity in this suit, appellants will be compelled to submit to it whether valid or invalid.

Appellants applied for an interlocutory injunction to restrain appellees during the pendency of the suit from instituting any proceeding to enforce the act against appellants. The application was heard by three judges as provided in section 266 of the Judicial Code. The motion was denied, and the case is here on appeal from that order.

In *Porterfield vs. Webb* (———U. S.———) and *Webb vs. O'Brien*, decided this day, we held that the act does not conflict with the Fourteenth Amendment or with the treaty between the United States and Japan. In the case first mentioned, we held that the act prohibits the leasing of agricultural land by citizens of the United States to a Japanese alien, and in the latter that it prohibits the making of a cropping contract between a citizen and a Japanese alien.

The treaty does not grant permission to the citizens or subjects of either of the parties in the territories of the other to own, lease, use or have the

benefit of lands for agricultural purposes, and, when read in the light of the circumstances and negotiations leading up to its consummation, the language shows that the parties respectively intended to withhold a treaty grant of that privilege. (*Terrace vs. Thompson, supra; Same vs. Same*, 274 Fed. 841, 844, 845.) The applicable provision of section 3 of the act is: "Hereafter all ineligible aliens may * * * acquire shares of stock in any * * * corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty * * * and not otherwise." The provisions of the act were framed and intended for general application and to limit the privileges of all ineligible aliens in respect of agricultural lands to those prescribed by treaty between the United States and the nation or country of which such alien is a citizen or subject. The state has power, and the act evidences its purpose to deny to ineligible aliens permission to own, lease, use or have the benefit of lands within its borders for agricultural purposes. (*Webb vs. O'Brien, supra.*) "As the state has the power * * * to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective." (*Crane vs. Campbell*, 245 U. S. 304, 307, and cases cited; *Hebe Company vs. Shaw*, 248 U. S. 297, 303.) It may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens. The right "to carry on trade" given by the treaty does not give the privilege to acquire the stock above described.

To read the treaty to permit ineligible aliens to acquire such stock would be inconsistent with the intention and purpose of the parties. We hold that the provision of section 3 above referred to does not conflict with the Fourteenth Amendment or with the treaty.

The order appealed from is affirmed.

Mr. Justice McReynolds and Mr. Justice Brandeis think there is no justiciable question involved and that the case should have been dismissed on that ground.

Mr. Justice Sutherland took no part in the consideration or decision of this case.

A true copy.

CHAPTER VI.—YANO GUARDIANSHIP CASE.

THE STATE OF CALIFORNIA, Plaintiff, vs. HAYAO YANO and TETSUBUMI YANO, Defendants.

IN THE CALIFORNIA SUPERIOR COURT.

SAC. No. 3191.

1. COMPLAINT.

Now comes the plaintiff, the State of California, and for cause of action against the above named defendants, alleges:

I.

That during all the times mentioned in this complaint the defendant, Hayao Yano, was, and he now is, a Japanese person and native citizen and subject of the Empire of Japan, and was and is not eligible to citizenship under the laws of the United States.

II.

That at no time mentioned in this complaint was there, nor is there now any treaty existing between the Government of the United States and the Government of Japan, under which a native-born Japanese citizen and subject of the Empire of Japan could acquire, possess, enjoy or transfer real property, or any interest therein, in the State of California or elsewhere in the United States.

III.

That U. S. Webb is duly elected, qualified and acting attorney-general of the State of California and has been informed that the property hereinafter described has escheated to the State of California, through and by reason of the facts in this complaint alleged.

IV.

That on and prior to the sixth day of December, 1919, William Freeman, Eva L. Freeman, Charles A. Wetmore, Jr., and J. H. Lee were the owners in fee, in the possession of and entitled to the possession of all that certain real property, the same being agricultural land, situate in the County of Butte, State of California, and described particularly as follows, to-wit:

Beginning at a point on the south line of the northeast quarter of section twenty, township 17 north, range 3 east, M. D. B. & M., thirteen hundred and twenty feet distant thereon east of the point of intersection of said half section line with the easterly line of the county road running north and south through the center of section twenty, and running thence north six hundred and sixty-six (666) feet; thence east nine hundred ninety (990) feet; thence south six hundred sixty-six (666) feet to the south line of the northwest quarter of section twenty (20); and thence in a direct line west nine hundred ninety (990) feet to the point of beginning, containing fifteen and 36/100 acres, more or less.

Together with water right in the Sutter-Butte Canal Company, located on and supplying said land with water.

V.

That on the said sixth day of December, 1919, said William Freeman, Eva L. Freeman, Charles A. Wetmore, Jr., and J. H. Lee sold and conveyed by deed all the above-described real property to Hayao Yano and in the deed so conveying said property, by direction of said Hayao Yano the name of defendant Tetsubumi Yano was written as grantee.

VI.

That plaintiff is informed and believes and on such information and belief alleges that the consideration for said deed and the purchase price of said property was three thousand dollars and that the whole of said purchase price was paid by defendant, Hayao Yano, at the time of the execution of said deed to William Freeman, Eva L. Freeman, Charles A. Wetmore, Jr., and J. H. Lee, and that by virtue thereof the said defendant Hayao Yano became the owner of said described real property.

VII.

That plaintiff is informed and believes, and upon such information and belief alleges, that defendant, Hayao Yano, paid from his own means the entire purchase price of said property and that he caused the said conveyance to be made to Tetsubumi Yano, as the grantee therein, for the sole purpose of violating and avoiding the provisions of an act of the legislature of the State of California entitled "An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, and repealing all acts or parts of acts inconsistent or in conflict herewith" (approved May 19, 1913), and found in the Statutes of 1913, pages 206, 207 and 208 thereof, and that defendant, Tetsubumi Yano, acquired by virtue of said conveyance no interest in said real property and now holds the legal title thereof in trust for defendant Hayao Yano.

VIII.

That defendant is informed and believes and on such information and belief alleges that the said real property so conveyed as above alleged, was and is of a value in excess of three thousand dollars.

IX.

That defendant, Hayao Yano, entered in the possession of said real property and of every part thereof and continuously since the date of the execution of said deed, as above set forth, has continued in the actual possession thereof.

X.

That Tetsubumi Yano is a minor under four years of age and that no guardian of the person or estate of said minor has ever been appointed.

XI.

That by reason of the facts hereinbefore alleged all of said real property in this complaint described has escheated to the plaintiff.

Wherefore, plaintiff prays that it be adjudged and decreed:

1. That the real property in this complaint described, and the whole thereof, has escheated to the State of California;
2. That the said property be ordered sold in conformity with the pro-

visions of title VIII, part III, of the Code of Civil Procedure of the State of California, and the proceeds thereof paid into the treasury of said state;

3. That plaintiff have and recover its costs herein;

4. That plaintiff have such other and further relief as the facts may warrant.

U. S. WEBB,

Attorney-General of the State of California.

2. BRIEF OF APPELLANT, BY ALGERNON CROFTON.

STATEMENT OF THE CASE.

This is an appeal by Hayao Yano from an order of the superior court in Sutter County, made on November 6, 1920, denying to appellant letters of guardianship of the person and estate of his minor daughter, Tetsubumi.

Yano's petition for guardianship, filed October 23, 1920, alleged that he was the father of Tetsubumi, a minor, aged two years, residing with him, that Tetsubumi owned fifteen acres of land in California and that it was necessary that a guardian be appointed for her person and estate.

At the hearing of the petition it appeared, in addition to the foregoing facts, that the minor, Tetsubumi Yano, was an American citizen, born in California; that her father, Hayao Yano, the petitioner and appellant, was a Japanese subject and not able to hold land, and that he had paid for the fifteen-acre tract, but that the deed was made to Tetsubumi because Tetsubumi was an American citizen.

The court denied the petition on the ground that the child had no property, and that the deed was taken in the child's name only to evade the laws of California.

SPECIFICATION OF ERROR.

The court erred in denying the petition, it being mandatory upon the court to grant it.

SYNOPSIS OF ARGUMENT.

The argument of the appellant is intended to sustain these points:

I.

That the right of a father to guardianship of the person and estate of his minor child cannot be denied except upon the ground that the father is an unfit person;

II.

That under the Japanese-American treaty of 1911 this right cannot be denied to a Japanese subject resident in the United States;

III.

That a minor child born in the United States holding title to real estate is entitled to the appointment of its father as guardian.

I.

THE RIGHT OF A FATHER TO GUARDIANSHIP OF THE PERSON AND ESTATE OF HIS MINOR CHILD CANNOT BE DENIED EXCEPT UPON THE GROUND THAT HE IS AN UNFIT PERSON.

As a preliminary, we apprehend, appellant must establish that the right of a father to guardianship of his minor child is one which cannot be denied except upon the ground that he is morally an unfit person.

The law in this regard seems well settled in California, as in other

states. We cite as typical the following excerpt from a comparatively recent case:

"It is well settled that under the provisions of section 1751 of the C. C. P. the father or mother of a minor child under the age of fourteen (14) years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed guardian in preference to any other person, and that the court must appoint a parent seeking to be appointed unless it finds such parent incompetent." (Italics ours.)

In re Mathews, 169 Cal. 26; 145 Pac. 503.

That it is the duty of the court to appoint the father unless expressly found incompetent and that the law presumes that the father is a competent person, is set out clearly in the following additional cases, to the citations of which we have prefixed the exact point covered in each:

C. C. P. 1751 must be construed to read that "the father is to be appointed, if not found to be incompetent." *Campbell & Wright*, 1330 Cal. 380; 62 Pac. 613; *In re Salter*, 142 Cal. 412; 76 Pac. 51.

The law presumes that the father is a competent person. *Id.*

It is the duty of the court to appoint the father if competent.

Re Forrester, 162 Cal. 493; 123 Pac. 283.

A parent is entitled to the guardianship of his child under the age of fourteen years if he is a competent person, in preference to any other person. *Re Gallagher*, 2 Cal. App. 364; 84 Pac. 352.

C. C. P. 1751 gives to parent a primary right of guardianship which should be recognized in the absence of proof compelling a finding of unfitness. *Re Snowball's Estate*, 156 Cal. 240; 104 Pac. 444.

Parent must be appointed unless by act enumerated in C. C. 246 she has forfeited right. *Re Mathews*, 174 Cal. 679; 164 Pac. 8.

Nor is the law in California different to that in other jurisdictions, as is witnessed by the rule laid in 21 Cyc. 34 as follows:

"It is a rule well settled by statute and judicial decision that the father is entitled to appointment as guardian of his minor children under fourteen (14) years, and his claim to preference cannot be disregarded except upon the most compelling reasons proven and sustained before the court."

As in the case at bar no finding of the father's incompetency was or could have been made, we believe his right to guardianship stood before the lower court unquestioned in law.

If, for the sake of argument, we concede the novel theory that an alleged, but undetermined, lack of estate in the minor is a sufficient reason for denial of a guardianship petition, the obvious answer is that it was affirmatively shown that the minor did possess an estate.

The validity of the minor's title could not be determined on the hearing of a petition for guardianship. The testimony elicited by the cross-examination of the court would indicate that the validity of the title in the case at bar could be questioned, if at all, only by the attorney-general of the State of California and then only in certain proceedings as limited in title VIII, part 3, of the Civil Code of Procedure.

Moreover, the hypothesis defeats itself because any attack upon the title of a minor would *ipso facto* call for the appointment of a guardian. A minor is entitled to have a guardian to defend even a bad title.

The code does not require the estate of a minor to be in any certain form, before a guardian may be appointed, nor must his title to it be clear. Indeed we take it that even if the estate of the minor were of the most vague and uncertain description he would still be entitled to have a guardian of that estate, and the discretion of the court could be exercised

only in the determination of the question of whether the appointee were a suitable person.

Support for this view is found in a California case where the minor was over the age of fourteen years and nominated his guardian. Said the court:

"The whole scheme contemplates the absolute right of a minor to have a guardian of his own selection after he is fourteen years of age * * * the discretion of the court can be exercised only in the determination of the question whether the nominee is a suitable person."

Re Kirkman's Estate, 168 Cal. 688; 144 Pac. 745.

The nominee of a minor over fourteen years stands in no better position than the father of a minor under that age. The decisions cited limit the discretion of the court equally in both cases to a consideration of competency.

Turning for a moment to the dictum of the trial court that the deed was taken in the minor's name to evade the law of California, we submit that even were that true the appointment of a guardian could in no way remedy any defect in the title or avoid its discovery. If the title be bad, proceedings to escheat the property can be taken, guardian or no guardian. On the other hand, if the title be good the child is entitled to a guardian for the estate.

One thing is certain: Title to the land in question rests somewhere. It cannot be in the grantors, who have divested themselves of it by deed. It may eventually pass to the state but only after escheat, and at present it surely vests in Tetsubumi. If this be true she is entitled to have a guardian of the estate.

In the case of *Racouillat vs. Sansevain*, 32 Cal. 376, 386, a defense of alienage was set up to declare the argument *nudum pactum*. The court held that the right of a non-resident alien to hold property was a matter between the alien and the government and could not be called in question in a collateral proceeding. "The proceeding at common law to divest an alien of property purchased, is by an inquest of office, and until office found an alien may hold real estate," so the court concluded.

It may be the law in California that an American citizen by birth cannot hold land because his parents are Japanese or it may be that Japanese cannot buy land for their child even though that child be American born, or it may be that the courts will set aside such a title as is here shown, but we think that such rulings must be made in other proceedings than the one at bar.

The question here is one of guardianship, not ownership, of the land. The right of Tetsubumi Yano to hold the land in question is a matter between her and the State of California, and cannot be called in question in a collateral proceeding nor in the hearing of a petition for guardianship.

Thus we arrive at this conclusion: That there being no finding of incompetency, the father, Hayao Yano, was entitled to letters of guardianship of the person and estate of his minor child, Tetsubumi.

II.

THE FATHER HAD A RIGHT TO GUARDIANSHIP OF THE PERSON AND ESTATE OF HIS CHILD UNDER THE JAPANESE-AMERICAN TREATY OF 1911.

While we think the father, Hayao Yano, was entitled to this guardianship as would be any other father, whether citizen or alien, by virtue of the fact that he was a resident of the United States, subject to its laws and entitled, as all men, to their equal protection, he possessed an added guar-

antee of this right in the treaty existing between the United States and Japan signed in 1911.

The treaty between the United States and Japan, signed in 1911 and not yet terminated or expired, and of which the court will take judicial notice, contains in article I the following language:

"Subjects or citizens of either country shall receive in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are granted to native subjects or citizens."

Turning first to the binding nature of a treaty upon the courts it will be noted that a treaty is in the United States more than a mere contract between nations, being declared by the Constitution itself to be the supreme law of the land and binding upon all courts, both state and federal. (U. S. Const., art. 6.)

A treaty, the terms of which prescribe a rule by which private rights may be determined, is in the nature of a legislative act (*Edye vs. Robertson*, 112 U. S. 580) and is ranked by the Federal Constitution as superior to any state constitution or law (*Ware vs. Hylton*, 3 Dall. U. S. 199). The treaty with Japan, therefore, is as much a part of the law of California as the state constitution or codes, and to it, as a rule of decision, the court will doubtless resort.

That the courts have authority to construe treaties goes without saying, but as treaties in their effect on private rights are in the nature of legislative acts, it becomes not optional but obligatory upon all courts to construe them.

In doing this the courts cannot annul or disregard any of the provisions of a treaty unless those provisions violate the Federal Constitution; nor can the courts dispense with any condition or requirement of a treaty upon any consideration of equity, general convenience or even substantial justice (*Teti vs. Coal Co.*, 217 Fed. 443; *Doc vs. Braden*, 16 How. [U. S.] 635.)

So in the instant case, neither public desire, popular election results, acts of the legislature nor anything but the cold language of the treaty can be considered in deciding what rights or privileges are by it awarded mutually to Japanese subjects and to American citizens residing in the other's country.

It is held that courts in construing treaties will adopt the same general rules which are applicable to the construction of statutes and written instruments generally. (*Matter of Lobrasciano*, 77 N. Y. Supp. 1040.) But in addition various rules have been laid down with special reference to the construction of treaties. So a treaty must be construed in the light of the objects which the parties were desirous of effecting (*Matter of Lobrasciano*, *supra*). The construction should be such as tends to the common advantage of the contracting parties and tends to place them upon an equality (*La Republique Francaise vs. Saratoga Co.*, 24 S. C. 145). Words of a treaty are to be taken in their ordinary meaning as understood in the public law of nations (*De Geofroy vs. Riggs*, 10 S. Ct. 295). And where the treaty admits of two constructions, one restrictive of the rights which may be claimed under it and the other liberal, the latter is to be preferred. (*Matter of Lobrasciano*, *supra*.)

The theory of appellant on this point is that the father's right to guardianship of his child is one of the rights and privileges referred to in the treaty, and, if this be so, that the appellant is entitled to the "most constant protection and security" in this right. Appellant maintains further

that he must be accorded "the same rights and privileges" in this respect as are granted to citizens of the United States.

One right and privilege granted to citizens of the United States is the right to guardianship of their children except where there is an affirmative showing that the parent is an unfit person. In the absence of such a showing the court has no alternative to granting the petition.

"A father's right to guardianship, at least so far as the services of the child are concerned, is strictly a property right for the loss of which an action could at common law be maintained, and in other respects the right, though not commonly spoken of as such, is of essentially the same nature as the right of property. It is a right vested in him for his own benefit and of which it would be a personal injury to deprive him. The right must, therefore, be regarded as coming within the reason if not the strict letter of the constitutional provisions for the protection of property." (*Campbell vs. Wright*, 130 Cal. 380; 62 Pac. 613.)

If, then, the right of the parent here is a property right he must be accorded in it under the treaty the most constant protection and also the same rights and privileges as are granted to American citizens in similar circumstances.

If an American father of a minor child holding the record title to land has a right to guardianship unless expressly found incompetent, then Hayao Yano has that right here. If the state desires to attack the title of his ward, that is a matter to be determined later in statutory proceedings.

It cannot be well contended that no guardian is necessary for the proper care and conduct of fifteen acres of orchard owned by a minor, nor that reason exists in this case why the child's estate should be subject to the expense of administration under a stranger.

No niceties of construction need be invoked to hold that this treaty calls imperatively for mutual rights and obligations, and were the case one of a child born of American parents resident in Japan, the injustice of a Japanese court refusing guardianship to the father would be clearly apparent.

III.

A MINOR CHILD, BORN IN THE UNITED STATES, POSSESSED OF THE RECORD TITLE TO REAL ESTATE HAS A RIGHT TO HAVE A GUARDIAN OF HER PERSON AND ESTATE APPOINTED, AND THAT GUARDIAN PRIMARILY SHOULD BE HER FATHER.

The law of equity makes no distinction between citizens, nationals or aliens. The general right to life, liberty and property, provided by the Constitution applies to all men alike. (*Wong Wing vs. U. S.*, 16 Sup. Ct. 977.) Thus in behalf of the minor, Tetsubumi, we introduce into the argument the premise that she is born in the United States, only as good measure, believing that the law which we contend is applicable to her case would be equally applicable to any minor child resident in the United States and thus entitled to the protection of its courts.

If a few years from now Tetsubumi, aged fourteen, stood before the court, she would have, on the authority of Chief Justice Angellotti, speaking in the matter of *Kirkman's Estate*, 168 Cal. 688, 144 Pac. 745, the absolute right to a guardian of her own selection, always excluding incompetent persons. Does she not now have the same right minus only the power of selection? And in the absence of that power, which at her tender age rests temporarily in the court, is it not the duty of the court to select for her her father, the guardian to which she has a natural and inherent right as indicated in *Campbell vs. Wright*, 130 Cal. 380?

To this point the principles of law contended for previously in this brief

the father's right are applicable and we will not unnecessarily lengthen the argument by repeating them. Suffice it to say that the reasons which make a father's right primary give, in the mutual relations of guardian and ward, the same right to the child.

We respectfully submit that the order appealed from should be reversed.

ALGERNON CROFTON,
CHAS. A. WETMORE, JR.,
Attorneys for Appellant.

GILLOGLEY, CROFTON & PAYNE,
Of Counsel.

3. REPLY BRIEF BY U. S. WEBB.

OPENING STATEMENT.

This appeal is from an order of the superior court of the State of California in and for the County of Sutter, denying to appellant letters of guardianship of his minor daughter, a citizen of the United States, in accordance with his petition therefor.

It appears without dispute from the record herein that appellant is an alien of Japanese nativity, ineligible to citizenship in the United States of America, and owing allegiance to the Emperor of Japan; but that his minor daughter, Tetsubumi, is a native-born American citizen, now aged about three years.

REPLY TO APPELLANT'S POINTS AND ARGUMENT.

We will first take up the points directly presented in appellant's opening brief, which he has numbered I, II and III, thereafter presenting other matters which we consider pertinent.

I.

In the first subdivision of appellant's opening brief it is stated that "the right of a father to guardianship of the person and estate of his minor child cannot be denied except upon the ground that he is an unfit person," and in support thereof the case of *In re Mathews*, 169 Cal. 26, is cited among others.

However, the case of *In re Mathews*, *supra*, goes only to the question of custody of the *person* and not to the question of guardianship of the *estate* of the minor, which is the point directly presented in this appeal and seemingly the only point considered by the court of first instance.

Not only by statute but by judicial decision the rule is made clear that the same guardian need not be appointed for both the person and the estate of a minor. Code of Civil Procedure, sec. 1747; *Estate of Bedford*, 158 Cal. 145; *Estate of Rose*, 66 Cal. 240.

Such being the case, even though we concede for the purpose of this presentation (which, however, we do not) that appellant could be considered a fit and competent person to be appointed guardian of the *person* of his minor daughter, yet such a condition would not necessarily make him a fit and competent person to be appointed guardian of her *estate*, nor entitle him to demand as of right such appointment.

II.

We therefore pass to appellant's third point, for the reason that his second, involving the Japanese-American treaty of 1911, has no effect upon the instant matter. That portion of the treaty referred to only provides that "subjects or citizens of either country shall receive in * * * the other * * * the same rights and privileges as are granted to native subjects or citizens" and the court of first instance did not seek to deny to appellant

herein any right which under like facts would not be denied to a native subject or citizen of the United States of America.

III.

Appellant states his third point as follows: "A minor child born in the United States possessed of the record title to real estate has a right to have a guardian of her person and estate appointed and that guardian primarily should be her father."

Had appellant stated as his third point that a minor child born in the United States and possessed of real estate has a right to have a guardian of her estate appointed—that guardian to be her father if in all respects a fit and competent person and not disqualified, we might not quarrel with the point.

However, such is not the case. It is true that we here have a minor child born in the United States with the paper title to a piece of real estate standing in her name, but we submit that this does not vest any estate in the minor nor necessitate or authorize the appointment of a guardian for what appellant claims to be the estate of such minor.

There is nothing in the record on appeal which shows that this minor has any estate or is about to come into possession of any estate.

The petitioner testified (Tr., p. 7, f. 21; p. 8, f. 22) that he paid for the real property in question; that he did not take the deed in his own name because he was a Japanese and knew that he could not hold it (Tr., p. 8, f. 23), and that his sole reason for having the paper title to the property in question in the name of his minor daughter was the fact that she was a citizen of America (Tr., p. 8, f. 23 and 24; p. 9, f. 25 and 26).

From this testimony not only does it clearly appear that appellant intended to and was then endeavoring to work a fraud upon the law, but it as clearly appears that this minor child is possessed of no estate. Under the provisions of section 853 of the Civil Code the minor child under such circumstances possesses no estate herself, the estate in contemplation of law being that of her father. Civil Code, sec. 853; *Moultrie vs. Wright*, 154 Cal. 520; *Los Angeles etc. Co. vs. Occidental Oil Co.*, 144 Cal. 528 (and other cases too numerous to need citation).

The provisions of section 853 of the Civil Code are applicable to transactions between parent and child. *Madsen vs. Madsen*, 35 Cal. App. 486; *Faylor vs. Faylor*, 136 Cal. 92.

It is true that it is said in *Russ vs. Mebius*, 16 Cal. 350, and in *Spitler vs. Kaeding*, 133 Cal. 500, that no implication of trust arises where a parent purchases property in the name of a child for the reason that the same is prima facie an advancement. However, such a doctrine cannot be successfully urged in the instant case for two reasons. In the first place, the appellant has directly testified (Tr., p. 8, f. 23 and 24; p. 9, f. 25 and 26) that his sole reason for taking paper title in the name of the minor child was his alienage and her citizenship. This directly negatives any thought or idea of an advancement. In the second place, although it is true that petitioner testified (Tr., p. 7, f. 21) that he gave the real estate in question to the minor child, yet such cannot be the legal effect of the transaction, as there is no showing either of a delivery to or acceptance of the conveyance by the minor, and it is affirmatively shown by the record that it was not the intention that the minor grantee was to be, in fact, the beneficiary thereof.

Further than this, the attempted transfer of title to the real estate here involved is void for lack of delivery and acceptance of the deed of conveyance.

Guardianship by nature extends only to the person and not to estate.

Kendall vs. Miller, 9 Cal. 592.

It appears that the minor herein had no guardian.

A deed takes effect from its delivery, and if a valid delivery, or acceptance thereof, be wanting, the deed is void *ab initio*.

Bank of Healdsburg vs. Bailhache, 65 Cal. 327; 8 R. C. L. 975.

"A minor cannot * * * under the age of eighteen, make a contract relating to real property, or any interest therein." (Civil Code, sec. 33.)

Therefore, there being no person *in esse* capable of accepting delivery of the deed, the attempted conveyance was void. The grantee herein, being a minor, had not the capacity to accept and could not consent to the attempted transfer of the property to her. The transaction falls because of the absence of one of the two necessary parties.

CLOSING STATEMENT.

The appointment of an alien as guardian of the person or estate of a native-born American citizen is a matter of great importance and grave concern. Citizens of the United States of America should be, and as a rule are, attached to the principles of government which have so long prevailed in this country and enable it to occupy the proud position which it now holds among the powers and civilizations of the world. It is true that we welcome, and have welcomed, to our shores those of alien birth whom we have considered the proper material for the making of future citizens of our country, but from certain alien races, among which is that of the appellant, we have withheld the privilege of citizenship for the reason that we have conceived and believed, as a country, that they had not within them the possibility of becoming good citizens of their adopted country, attached to and supporting its principles of government, and therefore were not readily, if at all, assimilated and amalgamated in the great body of our citizenry.

We feel that the court can properly take judicial cognizance of the fact that the manners, principles, customs, language, manner of living and government of the Japanese are not the same or even similar to those of the United States of America—in fact, they are the very antithesis of those prevailing in our country. The natural and logical presumption, therefore, must be that the appointment of this alien appellant as guardian of the person or estate of his minor citizen daughter would result in that citizen daughter being raised to years of maturity in accordance with the principles, customs, language and manner of living of the Japanese, actually attached and giving allegiance to the ruler and principles of Government of the Empire of Japan and therefore almost, if not quite, without knowledge of the principles, customs, language and manner of living of the country to which she should, and as a matter of law does, owe allegiance.

While it does not appear clearly from the transcript for how long a period appellant has been a resident within the United States of America, it does appear that he has been here for at least three and one-half years prior to November 6, 1920 (Tr., p. 9, f. 27), and it clearly appears from his examination by the court (Tr., pp. 8 and 9, fs. 22 to 27) that appellant is woefully lacking in knowledge and understanding of the language of this country.

Nor should one be held competent to do for another that which he cannot do for himself. Appellant is declared by the law of California incompetent to hold or exercise dominion over real property, yet seeks the aid of our courts to permit him to hold and exercise dominion over real property as guardian of a minor citizen. That this minor citizen hap-

pens to be his own child does not change the situation, and he should not be held competent to do in a representative capacity that which he is incompetent to do in his individual capacity.

Can he therefore, within the provisions of section 1751 of the Code of Civil Procedure and the cases cited by counsel for appellant in their opening brief, be considered a competent person to be appointed guardian of a minor citizen of this country? We submit that such is not the case, and that upon this ground alone the trial court could properly have denied appellant's petition.

The controlling consideration for the courts in deciding who shall have the custody of the person of a minor is the welfare and best interest of the minor, and if a sufficient reason exists why the father should not have its custody, it should not and will not be granted to him.

Civil Code, sec. 246, sub. 1; *In re Lundberg*, 143 Cal. 402; *Brooke vs. Logan* (Ind.), 13 N. E. 669; *Garner vs. Gordon*, 41 Ind. 92; 21 Cyc. 63, Note 3; Schouler, Domestic Relations, secs. 248, 250.

Therefore, even though this was not the ground upon which the trial court based its action, the reviewing court is entitled to review the whole proceeding and sustain the decision upon other grounds.

Burke vs. Maguire, 154 Cal. 456.

A further matter which is perhaps not directly presented by the transcript and opening brief of appellant, yet which we feel it incumbent upon the court to consider, is as follows:

1. It appears from the transcript (p. 8, f. 23 and 24) that the appellant is an alien Japanese.

2. Being an alien Japanese, appellant is ineligible to citizenship.

3. The initiative Alien Land Act adopted by the people at the election in November, 1920, proclaimed December 4, 1920, and effective December 9, 1920, provides in section 4 thereof that "hereafter no alien * * * may be appointed guardian of * * * the estate of a minor" consisting of real property.

It is true that subdivision (a) of section 12 of the same act provides that the same "shall not affect pending actions or proceedings," but we submit that this proviso does not contemplate such a matter as is presented in this appeal and that this is neither an action or a proceeding within the meaning of the proviso referred to.

It should be borne in mind that this initiative act, which became effective December 9, 1920, is, in effect, an amendment and amplification of the Alien Land Act of 1913; the latter in its general provisions being continued in effect. The act of 1913 deals solely with the title to real property and the acquisition thereof. Therefore the proviso found in subdivision (a) of section 12 of the initiative act must perforce relate solely to an action or proceeding involving the title to real property which was governed by or could have been instituted under the act of 1913. The effect of the proviso therefore is to except from the operation of the initiative act of 1920 any "action" or "proceeding" relating to the title of real property, where the right of action was given by or the action or proceeding could have been instituted under the provisions of the act of 1913. Further than this, such action or proceeding must also have been actually brought to court and thereby come within the term "pending," also found in the proviso. This was in brief no more than a saving clause to make sure that a proceeding instituted under the 1913 act could be continued to final judgment notwithstanding the adoption of the act of 1920.

The special proceeding for the appointment of a guardian which is involved in this appeal does not in any manner relate to or depend upon the act of 1913. It, therefore, does not come within the classification or meaning of the proviso as to "pending actions or proceedings" found in subdivision (a) of section 12 of the initiative act of 1920.

We therefore submit that the action of the supreme court of the State of California in and for the County of Sutter in denying appellant's petition or letters of guardianship should be affirmed.

U. S. WEBB,
Attorney-General of the State of California.

4. BRIEF OF ALBERT H. ELLIOT AND GUY C. CALDEN, AMICI CURIAE.

Come now Albert H. Elliot and Guy C. Calden, attorneys at law, and by leave of court, file this their brief, as *amici curiae*, as follows:

THE QUESTIONS DISCUSSED IN THE BRIEF.

We shall discuss four questions herein:

A. The judgment of the lower court denying to the Japanese alien father guardianship of the person and estate of his own child, assuming that the father is otherwise competent to act as such guardian, is a denial to the father of the equal protection of the laws under section 1, article XIV of the Constitution of the United States.

B. The judgment of the lower court denying to the Japanese alien father the right to be guardian of the person and property of his own child, he being otherwise competent to act, is in conflict with the treaty between the United States and Japan, proclaimed April 5, 1911, and particularly the third paragraph of article I of said treaty.

C. The judgment of the lower court, denying to the Japanese child, who is a citizen of the United States and of California, the right to have her own father appointed guardian of her person and estate (said father not being shown to be otherwise incompetent) is a denial to said child citizen of her "privileges or immunities" under section 21 of article I of the constitution of the State of California.

D. The judgment of the lower court denying to the Japanese child citizen the right to have her own father appointed guardian of her person and property (said father being competent to act), is a denial to the child citizen of both her "privileges or immunities" and also "the equal protection of the laws", under section I of article XIV of the Constitution of the United States.

PROPOSITIONS OF LAW WHICH WE SHALL ASSUME HAVE BEEN ESTABLISHED TO THE SATISFACTION OF THE COURT IN THE INSTANT CASE.

1. A father or mother is entitled to guardianship of the person and estate of his or her child unless there is a positive finding of unfitness or incompetency. *In re Mathews*, 169 Cal. 26; C. C. P., 1751; *Campbell vs. Wright*, 130 Cal. 380; *In re Salter*, 142 Cal. 412; *Re Forrester*, 162 Cal. 493; *Re Gallagher*, 2 Cal. App. 364; *Re Snowball's Estate*, 156 Cal. 240; *Re Mathews*, 174 Cal. 679; 21 Cyc. 34; *Re Kirkham's Estate*, 168 Cal. 688; *Lord vs. Hough*, 37 Cal. 657; C. C., 197; *Estate of Lindner*, 13 Cal. App. 208; *Estate of Moore*, 179 Cal. 302; *Estate of Wise*, 170 Cal. 423; *In re Gates*, 95 Cal. 461.

2. The right of a parent to be appointed guardian of the person and

estate of his minor child rises in California to the dignity of a property right and is so denominated. *Ex parte Miller*, 109 Cal. 643, and cases above cited.

3. Even the opinion of the lower court that the interest of a child would be subverted thereby, does not justify such court in depriving the parent of his right to the guardianship of his child. *Guardianship of Salter*, 142 Cal. 412; *In re Mathews*, 174 Cal. 679; *In re Mathews*, 169 Cal. 26.

4. The same rules of law apply on an application for guardianship of either person or property of a minor. (See cases cited above.)

5. The minor in the instant case did have an estate and therefore there was a necessity for the appointment of a guardian. (See brief of appellant.)

The four larger questions which we have raised should be discussed from two angles; *the right of the alien father; the right of the citizen child*. From both angles the protection of rights, privileges and immunities are involved, both the rights, privileges and immunities of the participating parties in the instant case and those of a great many persons who are not before this court but who may be directly affected by the decision herein.

THE RIGHTS OF THE JAPANESE FATHER.

A.

A STATE LAW WHICH ON THE GROUND OF INELIGIBILITY TO CITIZENSHIP ALONE DENIES TO AN ALIEN FATHER THE RIGHT TO BE APPOINTED GUARDIAN OF EITHER THE PERSON OR ESTATE OF HIS MINOR CHILD IS IN CONFLICT WITH THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

Since the attorney-general in the instant case has argued that the so-called Alien Land Law of 1920 is applicable to the case (see pp. 10-11-12 of his brief) no complaint can be made if we discuss it from that point of view.

Section 4 of said Alien Land Law reads as follows:

"Sec. 4. Hereafter no alien mentioned in section two hereof and no company, association or corporation mentioned in section three hereof, may be appointed guardian of that portion of the estate of a minor which consists of property which such alien or such company, association or corporation is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of this act. The public administrator of the proper county, or any other competent person or corporation, may be appointed guardian of the estate of a minor citizen whose parents are ineligible to appointment under the provisions of this section.

"On such notice to the guardian as the court may require, the supreme court may remove the guardian of such an estate whenever it appears to the satisfaction of the court:

"(a) That the guardian has failed to file the report required by the provisions of section five hereof; or

"(b) That the property of the ward has not been or is not being administered with due regard to the primary interest of the ward; or

"(c) That facts exist which would make the guardian ineligible to appointment in the first instance; or

"(d) That facts establishing any other legal ground for removal exist."

In other words, an alien under this act is absolutely deprived of the right to be appointed guardian of any part of the agricultural property of his minor child (citizen or alien) because said alien may not himself own similar property. The act itself does not state, nor in fact can the wildest guessing suggest a reason, why inability to own real property should disqualify a father from acting as guardian of real property owned

by his child. The lack of ownership of real property has never been a disqualification which would prevent a father from acting as guardian. There are eight disqualifications specified in section 253 of the Civil Code and three in section 1801 Code of Civil Procedure. A mere cursory examination of the disqualifications discloses the fact clearly that all of them affect directly *the capacity of a person to perform properly the duties of guardian*. We are not contending that other disqualifications might not be added. In fact we are confronted in the act under review with an added disqualification. We could understand it, if general alienage were added to the Code as a further disqualification, because such a classification between alien and citizen *might* be justified through some reason inhering in the very nature of alienage itself which might disqualify a person from properly attending to the duties of guardian. But under the act in question a further classification is attempted within the class itself of aliens, based upon the arbitrary and artificial distinction between aliens who can and those who cannot own real property. When we remember that the subject matter concerning which we are legislating is the proper administration of the estate of a minor (citizen or alien) and the securing of a proper guardian therefor, how can it be claimed that the proposed disqualification tends even remotely to secure such a result, as between a public administrator and a father. A rough analysis of the situation shows that the section of the act above quoted is arbitrary, unjust, discriminatory and artificial, and based, as is the entire act, upon race prejudice and that alone. A non-resident executor named in a will is prevented from appointment as such executor under C. C. P. 1354. The reason for a distinction of that character is obvious and easily defended. Suppose, however, that among non-resident executors a further classification were made between those resident in New York who were made qualified, and those resident of Nebraska who were not, could such an arbitrary classification be defended? Could not a non-resident executor resident in Nebraska complain of such a state law under the Fourteenth Amendment.

The Fourteenth Amendment, section 1, reads as follows:

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Two questions are now important: (a) What does "equal protection of the laws" mean? (b) Is the denial to an alien Japanese father of the right to be appointed guardian of the person and property of his own child, while all other fathers of children in California (excepting only those among aliens ineligible to citizenship) are granted that right, a denial of the equal protection of the laws?

The best definition which we have of the expression "equal protection of the laws" is found in *Yick Wo vs. Hopkins*, 118 U. S. 356, 30 U. S. (L. Ed.) 220, where the court defines it as "the equal protection of the laws is a pledge of the protection of equal laws."

The supreme court of Tennessee prior to the coming of the Fourteenth Amendment used language prophetic of its advent and vindictive of its policy in *Wally's Heirs vs. Kennedy*, 2 Yerg. (Tenn.) 554:

"The rights of every individual must stand or fall by the same rule

or law that governs every other member of the body politic or land under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar circumstances, is unconstitutional and void."

Chapter 40 of the act given by King John June 15, 1215, "Magna Charta," uses language indicative of the spirit behind the Fourteenth Amendment:

"To no one will we sell, to no one will we deny, to no one will we delay, right or justice."

American school boys are acquainted with the eloquent sentence:

"Equal rights to all, special privileges to none."

"Cicero said in his work *De Republica* that equality of right was the basis of the commonwealth; for as property could not be equal, and talents are not equal, rights ought to be held equal among all citizens of the state, which is in itself nothing but a community of right. This great doctrine reigns in all lands where liberty exists and especially in this land under the imperative mandate of the supreme constitution, and it tells the governors that they must make and execute fair and impartial laws for the millionaire in his palace, for the man holding the curule dignity of lofty public station, and for the laborer with the pick or plow."

Brannan—The Fourteenth Amendment, pp. 317-318.

We are indebted to one of the appellate judges of this state for the following quotations from the Good Book, which seem to indicate that the seed of the Fourteenth Amendment was early sown.

"One law shall be to him that is homeborn, and unto the stranger that sojourneth among you." Ex. 12:49.

"Ye shall have one manner of law, as well for the stranger, as for one of your own country." Lev. 24:22.

"And if a stranger shall sojourn among you, and will keep the pass-over unto the Lord, according to the ordinance of the passover, and according to the manner thereof, so shall he do; ye shall have one ordinance, both for the stranger, and for him that was born in the land." Num. 9:14.

"One ordinance shall be both for you and the congregation, and also for the stranger that sojourneth with you, an ordinance for ever in your generations; as ye are, so shall the stranger be before the Lord." Num. 15:15.

"One law and one manner shall be for you, and for the stranger that sojourneth with you." Num. 15:16.

"Ye shall have one law for him that sinneth through ignorance, both for him that is born among the children of Israel, and for the stranger that sojourneth among them." Num. 15:29.

Senator Sumner in proposing the Fourteenth Amendment said:

"Here is the great charter of every human being drawing vital breath upon this soil, whatever may be his condition and whatever may be his parents. He may be poor, weak, humble or black; he may be Caucasian, Jewish, Indian or Ethiopian race; he may be of French, German, English or Irish extraction; but before the Constitution all these distinctions disappear. He is not poor, weak, humble or black; nor is he Caucasian, Jew, Indian or Ethiopian; nor is he French, German, English or Irish. He is man, the equal of all his fellow men. He is one of the children of the state, which like an impartial parent, regards all its offspring with an equal care. To some it may justly allot higher duties according to higher

capacities; but it welcomes all to its equal, hospitable board. The state, imitating the divine justice, is no respecter of persons."

Yick Wo vs. Hopkins, 118 U. S. 356.

"It stands in the Constitution as a personal shield against all unequal partial legislation by states, and injustice which follows from it, whether directed against the most humble or the most powerful; against the despised laborer from China, or the envied master of millions."

Justice Field, in the opinion in *Barbier vs. Connolly*, 113 U. S. 27, said that the phrase equal protection of the laws in substance

"meant, not only that there should be no arbitrary spoliation of property, but that equal protection and security should be given to all alike under like circumstances in the enjoyment of their personal and civil rights, that all persons should be equally entitled to pursue their happiness and acquire and enjoy property * * * they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment. * * * The right to the equal protection of the laws is not denied by a state court when it is apparent that the same law or course of proceedings would be applied to any other person in the state under similar circumstances and conditions. * * * The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person, or class of persons, from being singled out as a special subject for discriminating and hostile legislation."

Brannan—The Fourteenth Amendment, p. 324:

"The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality, indiscriminate operation, and equality of operation does not mean on persons merely as such, but on persons according to their relations."

Mr. Justice Bradley, in *Bells Gap Railroad vs. Penn.*, 134 U. S. 232-237, says:

"Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibitions."

Mr. Justice Brewer, in *Gulf etc. Railway vs. Ellis*, 165 U. S. 150, says:

"The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear, not merely that a classification has been made, but also that it is based on some reasonable ground—some thing which bears a just and proper relation to the attempted classification, and not a mere arbitrary selection."

Mr. Justice Angellotti in the *Matter of Guillermo D. Kotta* (Crim. No. 2394, decided September 12, 1921) says:

"What is said in *Barbier vs. Connolly*, *supra*, and the Federal statute just quoted sufficiently shows the subject-matter as to which the alien inhabitant is given by the constitution 'a pledge of the protection of equal laws', laws free from discrimination based solely on his alien character. Stated very generally, the requirement is 'for equal protection and security for all, citizens and aliens alike, under like circumstances, in the enjoyment of their personal and civil rights, and in the imposition of burdens, such as penalties, taxes, etc.' * * * The sole distinction between the

male inhabitants of California so burdened with the poll tax and those not so burdened, in so far as all matter material to imposition of the tax is concerned, is that the former are aliens and the latter citizens. This is the sole basis of the attempted classification. * * * In the case at bar the only difference is such that in view of the language of section one of the Fourteenth Amendment relative to equal protection of the laws, it cannot in the nature of things constitute a proper basis for classification, for the plain effect of the section is to forbid any distinction in such a matter as this based on that fact alone."

So much for definition. Two hundred and seventy-three cases have been brought to the Supreme Court of the United States from the adoption of the Fourteenth Amendment to the close of the fall term of 1910. Sixty-eight of these cases arose in the period between 1868 and 1895 and two hundred and five from 1896 to 1910. In eleven of these cases the equal protection clause was the only question involved, while in fourteen others this clause was considered along with the due process clause. A rather rough classification of these cases is as follows:

The Negro Jury Cases.—It took six cases before the Supreme Court to demonstrate the fact that negroes cannot be excluded from jury service solely because of race or color.

The Chinese Cases.—One case in the Supreme Court and four others in Federal courts demonstrated that there could not be discrimination against Chinese solely on account of race which would prevent them engaging in either the laundry or fishing business.

Kansas Stock Yard Case.—Discrimination justified under the police powers of a state.

Illinois Anti-Trust Law.—Discrimination justified police powers.

Illinois Assessment Case.—Discrimination justified.

Alabama Classification Corporation.—Discrimination not justified.

In *Southern Railway Company vs. Green*, 216 U. S. 419, the court said:

"While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, having a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

SUMMARY OF THE ARGUMENT ON THIS BRANCH OF THE CASE.

Once we concede that the rights of Japanese aliens to the guardianship of the persons and properties of their children are "rights which certainly are as sacred as any rights of property" (*Ex parte Miller*, 109 Cal. 657), there would seem to be no escape from the conclusion that a state law, which denies to them protection in respect of such rights not equal to that given to other aliens similarly situated, is unconstitutional under the equal protection clause of the Constitution.

"That no guardian can be appointed of the person of an infant having father or mother living not declared unsuitable by a court of competent jurisdiction, nor a guardian or curator to an infant whose father or mother is entitled, under the law, to take charge of its estate as natural guardian, has already been pointed out as the law in most states."

Sec. 31, The American Law of Guardianship—Woerner.

In *re Campbell*, 130 Cal. 380.

"The father's right, at least so far as the services of the child are

concerned, is strictly a property right, for the loss of which—as in the case of servants generally—an action could at common law be maintained; and in other respects the right, though not commonly spoken of as such, is of essentially the same nature as the right of property. For though the subject of the right is not salable, it is valuable, and of all species of property the most valuable to the parent. Hence it is a mistake to suppose that the right of the father is merely fiduciary. It is that; but it is also—like the right of the child in the father—a right vested in him for his own benefit, and of which it would be a personal injury to deprive him. The right must therefore be regarded as coming within the reason, if not within the strict letter, of the constitutional provisions for the protection of property. (Beatty, C. J., in *Ex parte Miller*, 109 Cal. 662.)”

Can persons within the jurisdiction of the state be put into a class by themselves because, for any reason whatever they cannot become citizens and then subjected to special legislation imposing burdens not imposed upon other persons? If we answer this question in the affirmative the way would be open for making classification based upon the possession or lack of possession of other political privileges than citizenship. As one writer expresses it (Charles Wallace Collins):

“From the standpoint of political science there is much to be said as to the philosophical background of the Fourteenth Amendment and as to the political philosophy which has grown up around it in the courts.”

We have no space within the compass of this brief to analyze the twenty-five cases in which state action has been annulled, but we conclude that when we understand that it is not a question of classification between aliens and citizens, but rather of an arbitrary distinction between aliens eligible and aliens not eligible to citizenship, the denial of equal protection to a Japanese alien father under the act in question is clear.

B.

The denial to a Japanese alien father of the right to be appointed guardian of the person and estate of his minor child (citizen or alien) is contrary to the provisions of the treaty between the United States and Japan.

The third paragraph of article I of the treaty between Japan and the United States proclaimed April 5th, 1911, reads as follows:

“The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.”

Any judgment of any court of the land and any statute of any state of the United States in conflict with the quoted provisions of the treaty would be void because the treaty is specifically made the supreme law of the land and binding upon the judges in every state under section 2 of article 6 of the Constitution of the United States.

“From the first decision of the Supreme Court of the United States upon this subject rendered in 1796 (*Ware vs. Hylton*, 3 Dall. 198), to the present day, it is uniformly declared, as the express language of the Federal Constitution unequivocally requires, that as to all matters within the treaty making power conferred by the Federal Constitution, a treaty entered into on the part of the United States by the President with the concurrence of two-thirds of the United States Senate, is a part of the

supreme law of the land, binding on all states and to which all state enactments in conflict therewith must yield."

In re Heikich Terui, Crim. No. 2390. Decided Sept. 12th, 1921.

It is quite clear that "protection" and "security" for the "persons and property" of aliens are "matters within the treaty making power conferred by the Federal Constitution."

Moore's International Law Digest, vol. 4, secs. 534-535.

The following questions must be answered:

1. Is a Japanese alien parent given "the most constant protection" for his property under California law when he is deprived by the Alien Land Act and the judgment in the instant case of the guardianship of the person and property of his child?

2. Does a Japanese alien parent enjoy the same rights and privileges as parent citizens of California when he is denied the right under the Alien Land Act and the judgment in the instant case, of guardianship of the person and property of his minor child?

3. Incidentally (though the child in the instant case is a citizen) another question would be: Is a Japanese alien minor given the most constant protection and security for his person and property or is he given the same rights and privileges as minor California citizens under the Alien Land Act?

While it has been held that the "privileges or immunities" clause of section 1 of the Fourteenth Amendment to the Constitution of the United States "are privileges and immunities arising out of the nature of the federal government, and granted or secured by the Constitution" (*Duncan vs. Missouri*, 152 U. S. 382), it cannot be said that the words used in the treaty have any such special or restricted meaning.

As a matter of construction:

"A treaty is to be construed on principles similar to those applied to other contracts and statutes. Anything necessarily implied is as though inserted. In the construction of treaties, words are to be taken as understood in the public law of nations, and not in any artificial or special sense impressed by local law, unless the restricted sense is clearly intended. Where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." 26 Ruling Case Law, pp. 926, 927.

A few definitions may assist us in interpreting the words of the treaty if any assistance is necessary:

"The word 'right' denotes, among other things, 'property,' 'interest,' 'power,' 'prerogative,' 'immunity,' and 'privilege'; and in law is most frequently applied to property in its restricted sense. As an enforceable legal right it means that which one has a legal right to do. (*Shaw vs. Proffitt*, 109 Pac. 584, 57 Or. 192, Ann. Cas. 1913A, 63 [citing 7 Words and Phrases, p. 6220].)"

Words and Phrases, vol. 4, p. 386.

"The distinction between 'power,' and 'right,' whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right." (*State vs. Koch*, 85 Pac. 272, 274, 33 Mont. 490, 8 Ann. Cas. 804 [citing *Kane vs. Commonwealth*, 89 Pa. 522, 33 Am. Rep. 787].)

"The grant of a 'right' is by reasonable construction a grant of power to do all the acts reasonably necessary to its enjoyment." (*Memphis State Line R. Co. vs. Forest Hill Cemetery Co.*, 94 S. W. 69, 72, 116

Tenn. 400, quoting and adopting the definition in *Inhabitants of Springfield vs. Connecticut River R. Co.* [Mass.], 4 Cush. 72.)”

Words and Phrases, vol. 4, p. 387.

“As a noun, and taken in a concrete sense, a right signifies a power, privilege, faculty, or demand, inherent in one person and incident upon another. ‘Rights’ are defined generally as ‘powers of free action.’ * * * But leaving the abstract moral sphere, and giving to the term a juristic content a ‘right’ is well defined as ‘a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others.’ (Holl. Jur. 69.)

“The noun substantive ‘a right’ signifies that which jurists denominate a ‘faculty’; that which resides in a determinate person, by virtue of a given law, and which avails against a person (or answers to a duty lying on a person) other than the person in whom it resides. And the noun substantive ‘rights’ is the plural of the noun substantive ‘a right.’ But the expression ‘right,’ when it is used as an adjective is equivalent to the adjective ‘just,’ as the adverb ‘rightly’ is equivalent to the adverb ‘justly.’ And when used as the abstract name corresponding to the adjective ‘right,’ the noun substantive ‘right’ is synonymous with the noun substantive ‘justice.’ (Aust. Jur., sec. 264, note.)”

Black’s Law Dictionary, page 1044.

“The words ‘privilege and immunity,’ as used in the Illinois constitution, providing that the general assembly shall not pass any special law granting any special or exclusive privilege, immunity, or franchise whatever, include all the rights which the state government was created to establish and every right which can be conferred or granted by any law of the state, and by the provision of the constitution a guaranty is given that all valid enactments of the legislature shall operate uniformly on persons and property and all citizens are assured the equal protection of the laws of the state. (*Jones vs. Chicago, R. I. & P. R. Co.*, 83 N. E. 215, 216, 231 Ill. 302, 121 Am. St. Rep. 313.)”

CONCLUSION ON THIS BRANCH OF THE ARGUMENT.

In concluding this branch of the argument, we submit that surely somewhere within the scope of the broad definition of the words used in the treaty, “constant protection,” “security,” “rights,” “privileges,” there is found a guaranty, contractual, constitutional and fundamental, that an alien Japanese father may not be deprived of the guardianship of the person and property of his own child.

THE RIGHTS OF THE JAPANESE MINOR CITIZEN.

C.

The denial to a Japanese minor citizen of the United States and of the State of California of her right to have her own father, otherwise competent, appointed guardian of her person and estate, is a denial to her of “privileges or immunities” upon the same terms as they are granted to all other citizens of California.

Section 21 of article 1 of the constitution of the State of California reads as follows:

“Sec. 21. No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.”

We shall now give a few definitions of the expression “privileges or immunities” as viewed in respect of citizens.

"The 'privileges and immunities' referred to in Const. Ind., art 1, sec. 23, prohibiting any law granting privileges or immunities to one class of persons which upon the same terms are not open to all citizens, and Const. U. S. Amend. 14, sec. 1, prohibiting the abridgement of the privileges and immunities of citizens of the United States, are general abstract personal rights, in their nature fundamental and pertain to all citizens in free governments, and which they are entitled to enjoy throughout the several states as well as in the state of residence, such as freedom of travel, pursuit of any lawful vocation or of pleasure, enjoyment of life and liberty, acquisition of property, the right to control it in security and peace, and the right to resort to the courts for its protection without restriction other than those usually affecting all persons. (*Strange vs. Board of Com'rs of Grant County*, 91 N. E. 242, 173 Ind. 640; *Id.*, 91 N. E. 506)."

A distinction must be carefully drawn between a *citizen father* relying on the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States in his application for guardianship *in any state*, and the fundamental right of a citizen child based upon the laws of a state to have his own father appointed guardian of his person and estate. The citizen child in the instant case bases her right upon the constitution of the State of California of which she is a citizen. The alien father in the instant case bases his right to guardianship of his minor citizen child, *both upon the Fourteenth Amendment and upon the treaty*. Were the father, *as a citizen of the United States*, exclusively relying upon the Fourteenth Amendment as the basis of his right to guardianship of his minor citizen child, he would be met by the doctrine of the case of *Wadleigh vs. Newhall*, 136 Fed. 941. In other words, the father's basic right is derived from the treaty and from the equal protection clause of the Fourteenth Amendment. As the father is not a citizen obviously he can base no right upon the privileges and immunities clause of the Fourteenth Amendment. If he were a citizen of the United States and not a citizen of California he could not base his right to letters of guardianship under the privileges and immunities clause of the Fourteenth Amendment because, as we have shown, the right to guardianship of a child is not one derived from the Constitution of the United States but is rather derived from the municipal law of the State of California. *The right of the child*, however, who is *both a citizen of the United States and of the State of California*, to have his own father act as his guardian is guaranteed to him under the *constitution of the State of California*.

We cite as being closely in point the case of *Sacramento O. & C. Home vs. John S. Chambers*, 25 Cal. App. 536 (September 26th, 1914).

The question involved in this case was the constitutionality of section 2289 of the Political Code as amended 1913, subdivision four of which reads as follows:

"4. That no child whose parent or parents have not resided in this state for at least three years prior to the application for aid, or whose parent or parents have not become citizens of this state shall be deemed a minor orphan, half-orphan or abandoned child within the intent and meaning of this chapter."

The facts show that a child seven years old and a citizen of California and of the United States had parents who were aliens and who had never become citizens of the United States or of the State of California and both of whom were dead. The petitioner in the case applied for an allowance for said child from the state board of control. Denial of the

claim was based upon the section above cited and petitioner contended that the said section was unconstitutional. After citing section 1, article 21, of the state constitution, the court, speaking through Mr. Justice Burnett, says:

"The child for whose support aid is herein sought is a citizen of this state. He was born in this state while his parents were residents thereof. It is undoubtedly true, as stated by respondent, that 'Every child born here is a citizen of the state if its parents are residents of the state. Thus, a child born here, whether its parents are citizens or aliens immediately becomes a citizen of the United States, but its second citizenship follows the residence of its parents.' The child is and was an orphan under the age of fourteen years and was cared for by such an institution as is contemplated by said statute providing for state aid. What is the basis, then, for discrimination between him and other citizens who are orphans under the age of fourteen years and under the care of the same or of similar institutions? Is it any quality or condition affecting him personally, that would make such classification reasonable and just? Is there any 'natural intrinsic or constitutional distinction' differentiating him from the other minor orphan citizens who are receiving and who are entitled to receive state aid? The answer, of course, must be in the negative. *The distinguishing quality or condition relates not to him but to his parents. It would be a strange construction of the constitutional provision that would permit privileges to be conferred upon one citizen of the state and withheld from another for the reason that there was a difference in the political status of the parents.* Mentally, morally, and physically, no doubt the sins and infirmities of the parents are often visited upon their descendants, but in the realm of civil and political rights and privileges no such principle can be recognized or tolerated. *To affirm the proposition contended for by respondent, that one citizen is, and another is not entitled to this privilege in consequence of the difference in the citizenship and residence of their parents is to deny all efficacy to the constitutional mandate that privileges and immunities must be granted to all citizens upon the same terms.*

"The purpose of the legislature is unquestionably a commendable one, but it must be accomplished in a legal and constitutional manner. Restrictions affecting all citizens alike might be imposed which would prevent abuse of the privilege and which would be open to no valid objection.

"If the condition of residence or of citizenship related to the minor orphan himself it probably could be said that the classification was just and reasonable and within the purview of the constitution. No doubt the legislature might require the beneficiary to be a citizen of the state and a resident therein for a certain period. If he were not a citizen, said constitutional provision could not, of course, be invoked, and three years might not be an unreasonable requirement as to residence. There would thus be presented in the condition and status of the minor a just basis for valid discrimination. But this is entirely different from the requirement here as to the citizenship and residence of the parents. The injustice of the rule contended for could not be more impressively illustrated than in the present instance. If said provision as thus understood is to be enforced no aid can ever be granted to said minor for the reason that death has rendered it impossible for either of his parents to become a citizen or resident for the requisite time. *No such arbitrary and ex-*

traneous discrimination is sanctioned by our fundamental law." (Italics ours.)

The court in the above case then proceeds on page 542 of the opinion to discuss the definition of the words "privileges or immunities" and concludes that the right to orphan's aid is a constitutional right included within the scope of the definition of privileges and immunities. If we concede that the right of a citizen child to have his own parent act as his guardian is of the same dignity and importance as his right to orphan's aid, then the above case is a decision on all fours with the instant case. The parallelism between a child citizen, whose parents are dead and who can therefore never become citizens, and a child citizen whose parents are permanently disqualified from becoming citizens is so close as to be startling, and in view of this situation we quote again the one sentence in the learned court's opinion which is the best recent statement of the fundamental basis of democracy which we have found:

"No such arbitrary and extraneous discrimination is sanctioned by our fundamental law."

IS THE RIGHT OF A CHILD CITIZEN TO HAVE HIS PARENTS, OTHERWISE COMPETENT, ACT AS HIS GUARDIAN AS AGAINST STRANGERS, FUNDAMENTAL IN CHARACTER?

We think that we have in the decision of this state a direct slant on that situation.

Guardianship vs. Kirkham, 168 Cal. 688 (Nov. 25, 1914):

"Section 1750 of the Code of Civil Procedure provides that 'when a guardian has been appointed by the court for a minor under the age of fourteen years, the minor, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court.' We are of the opinion that when this section is read in connection with sections 1748 and 1749 of the Code of Civil Procedure, it is clear that it means that a minor over fourteen years of age *has the absolute right to replace the guardian appointed by the court* when he was under fourteen years of age, with one of his own selection, provided always that the person selected by him is, in the estimation of the court, a suitable or proper person. The latter sections prescribe the rules for an original application for letters of guardianship. If the minor is under the age of fourteen years, the court may nominate and appoint his guardian. 'If he is fourteen years of age, he may nominate his own guardian, who, if approved by the court, must be appointed accordingly.' If the nominee of the minor over fourteen years of age 'is not approved by the court, * * * or if, after being duly cited by the court, he (the minor) neglects for ten days to nominate a suitable person, the court or judge may nominate and appoint the guardian in the same manner as if the minor were under the age of fourteen years.' Then follows section 1750 of the Code of Civil Procedure. *The whole scheme contemplates the absolute right of the minor to have a guardian of his own selection after he is fourteen years of age, provided always he selects a person who is, in the judgment of the court, a suitable person to act as guardian.* The discretion of the court can be exercised only in the determination of the question whether the nominee is a 'suitable person.' It does not follow from this conclusion, as suggested by learned counsel for respondent, that a minor over fourteen years of age once having exercised this right and procured the appointment of his nominee, may exercise it a second time." (Italics ours.)

Collins vs. Superior Court, 35 C. A. D. 138 (May 9, 1921):

"In the instant case the petition filed in the superior court shows that

the minor is an inhabitant of Monterey County. He is fourteen years of age, and has the *absolute right* to select and nominate his guardian, who, if approved by the court, must be appointed. (Code of Civ. Proc., sec. 1748; *Guardianship of Kirkham*, 168 Cal. 688, 144 Pac. 745; *Guardianship of Meikeljohn*, 171 Cal. 247, 152 Pac. 734; *Guardianship of McSwain*, 176 Cal. 287.) These cases are also authority for holding that a minor, upon arriving at the age of fourteen years, may nominate and displace a guardian already appointed, and that, even though the displaced guardian may be one of his parents. 'The whole scheme,' says the court, in discussing the provisions of the Code of Civil Procedure relating to the appointment of guardians, * * * (*Guardian of Kirkham, supra.*)

"To uphold the contention of the respondent would be to deny the minor the exercise of this *absolute right*." (Italics ours.)

CONCLUSION OF THIS BRANCH OF THE ARGUMENT.

We think we have demonstrated that (a) the right of a father (alien or citizen) to be appointed guardian of the person and estate of his minor child (alien or citizen), is a real right assuming the proportions of a property right; and that (b) the right of a minor child (alien or citizen) over fourteen years of age to select his own guardian is an "absolute right." Surely the right of a minor citizen child under the age of fourteen years to have its own father, if otherwise competent, act as guardian of his person and property, ought certainly to be a privilege or immunity under the constitution of California. Whether we call the right of a citizen child, citizen of California and of the United States, to have its own parents act as guardian of its person and estate, a "right," a "privilege," or an "immunity," certainly somewhere within the scope of these comprehensive words there will be found protection for a Japanese citizen child who is denied the right to have her own parent act as guardian of her person and estate, on the sole ground that said parent is an ineligible alien (Japanese). In the whole field of arbitrary, artificial and unjust discriminations we are able to find no discrimination so arbitrary, extraneous, unjust and undemocratic, as the principle proposed in the instant case and the Alien Land Act, that a child citizen shall be denied rights because he happens to have parents of a particular race. If this is not a pure race discrimination surcharged with race prejudice and visited upon a citizen of California and the United States, we are unable to find one in the statutes or decisions.

A peculiar corollary resulting from the argument is that an alien Japanese child, under the treaty with Japan might be protected on the basis of our argument heretofore made, while a minor Japanese citizen, if the decision of the instant case is good law, would fail of such protection.

D.

The denial to a Japanese citizen child of the right to have her own father, otherwise competent, act as guardian of her person and estate, when the sole basis of such denial is racial, is a denial to the child citizen of both her "privileges or immunities" and also "the equal protection" of the law under section 1 of article 14 of the Constitution of the United States.

Are we justified in arguing to this court that the Alien Land Act is only one of a series of acts passed by the legislature and the people of the State of California evidencing "hostile and discriminating legislation by a state against persons of any class, sect, creed or nation?" (*Ah Kow vs. Nunan*, 5 Sawy. 562).

The external evidence that "these acts are *in pari materia*; and, being so indicate and illustrate the motive or purpose of the passage of any one of them," is not before this court, although it is abundant in character and could be easily presented. The internal evidence in the acts themselves is very clear. Let us enumerate some of these acts and see the race prejudice shining through the smoke-screen of the disingenuous expression "ineligible to citizenship."

1. The Alien Land Act, approved May 19, 1913, in effect August 10, 1913, Statutes of 1913, p. 206.

2. The Alien Land Act of 1920, Statutes of 1921.

3. The Alien Poll Tax Law of 1921.

4. Act approved May 9, 1921, in effect July 29, 1921, Statutes 1921, page 76, being a new section added to the Penal Code, numbered 931.

5. An act approved May 23, 1921, in effect July 29, 1921, Statutes 1921, page 546.

It is idle to deny that most, if not all, of the above acts show a legislative purpose to discriminate against Japanese and Chinese aliens. We can find no essential difference between the present situation and the anti-Chinese class legislation with which California is familiar and practically all of which was held to be unconstitutional and void.

THE ANTI-CHINESE LEGISLATION IN CALIFORNIA.

Article 19 of the state constitution of 1879 is devoted to the Chinese race, *eo nomine* and consists of four sections in three of which at least no attempt is made to conceal the race prejudice which forms the basis of the legislation.

At least four separate acts were passed in which more or less clumsy attempts were made to conceal the fact that the Chinese race was aimed at, in the hope that the provisions of the United States Constitution could be evaded, but all of these acts were held unconstitutional. *In re Tiburcio Parrott*, 1 Fed. 481; *In re Ah Chong*, 2 Fed. 733; *Yick Wo vs. Hopkins*, 118 U. S. 356; *Ah Kow vs. Nunan*, 5 Sawy. 562; *Lin Sing vs. Washburn*, 20 Cal. 534; *Quong Woo*, 13 Fed. 229; *Lee Sing*, 43 Fed. 359; *Gondolfo vs. Hartmann*, 49 Fed. 181.

We must remember that Chinese as such were not mentioned in most of the above legislation, but arbitrary and discriminatory bases of classification were set up in the hope that the provisions of the United States Constitution could be circumvented. For example in the *Ah Chong* case the act under consideration was aimed at "aliens not eligible to become electors of the State of California." The fatal parallelism between this combination of words and the device used in the Alien Land Act, to-wit, "Aliens ineligible to citizenship," is evidence of the fact that race prejudice legislation has not changed the style of its raiment much between 1879 and 1921.

Section 4 of article 19 of the constitution also uses the expression "foreigners ineligible to become citizens of the United States."

We are not surprised therefore in this cursory examination of the anti-Chinese prejudice as it is found in the early legislation of California, to note what Mr. Justice Field said in summing up the situation (*Ah Kow vs. Nunan*, 5 Saw. 562).

"But in our country, hostile and discriminatory legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the Fourteenth Amendment to the Constitution. * * * And the equality of protection thus assured to everyone

while within the United States, from whatever country he may have come, or whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others; and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment."

Or to note what Mr. Justice Sawyer said (*In re Ah Chong, supra*):

"The Fourteenth Amendment of the National Constitution provides that 'no state shall * * * deny to any person within its jurisdiction the equal protection of the laws.' To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected, and it is to deny to them the equal protection of the laws, contrary to those provisions of the Constitution. (Parrott's Case, 21 Alb. L. J. 387 [1 Fed. Rep. 481]; *Strauder vs. West Virginia*, 10 Cent. L. J. 227.) It is obvious, also, from a consideration of these various provisions of the new state constitution, and the several statutes *in pari materia* referred to, considered in connection with the public history of the times, that the act relating to fishing in question was not passed in pursuance of any public policy relating to the fisheries of the state as an end to be attained, but simply as a means of carrying out its policy of excluding the Chinese from the state, contrary to the provisions of the treaty. The end to be accomplished being unlawful, as we held in Parrott's case, it is unlawful to use any means to accomplish the unlawful object, however proper the means might be if used in a proper case and for a legitimate purpose."

(It is interesting to know that the Ah Chong case has been cited and referred to with approval 16 times, and is considered a well-established authority.)

Or what Judge Deady said in the very early case *Chapman vs. Toy Long et al.*, circuit judge, District of Oregon, 1876 (4 Sawyer 28):

"Nominally, these acts discriminate against the alien generally, but in fact against the dreaded Chinaman only; because all aliens, including the Congo negro, except the Mongolian, are permitted to become naturalized, and therefore qualified to locate and occupy mining lands under them.

"Article VI of the treaty with China, of July 28, 1868 (U. S. Pub. Treat. 148), provides that citizens and subjects of the two nations shall respectively enjoy the same privileges, immunities or exemptions, in respect to travel or residence 'within the country of the other', as may there be enjoyed by the citizens or subjects of the most favored nation.

"The right to reside in the country with the same privileges as the subjects of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these powers. Therefore the provisions in the mining regulations of Poorman Creek, which, in effect, forbid Chinamen from working in a mining claim for themselves or others, as well as the clause of the state constitution, *supra*, to the same effect, seem to be in direct conflict with this article of the treaty; and if so, are therefore void. Practically the latter has always been a dead letter. Both it and the similar prohibition in relation to free negroes (art. 1, sec. 35, Or. Con.) were generally regarded, at the time of the formation of the state constitution, as a mere piece of *brutum fulmen*, intended to quiet the fears

and placate the prejudices of a certain class of voters who were supposed to stand in dread of being overslaughed by an influx of these black and yellow people."

On the basis of the history of the anti-Chinese legislation in this state, may the Supreme Court not find in the anti-Japanese legislation that "history repeats itself" and that legislation declared void when aimed at Chinese is likewise void when aimed at Japanese even though in the latter case the legislation is more deftly and ingeniously constructed.

In answer to this argument can it be shown that there is any reason for discriminating against a Japanese parent as distinguished from parents of other races? If the legislation made the speaking of the English language a necessary qualification for a guardian, we do not think any complaint could be made at least so far as guardianship of the property of the child is concerned. There might be other qualifications added by statute to those already existing as necessary for a guardian, *provided the qualifications apply to all parents regardless of race*. The point of the argument is that a Japanese parent is discriminated against, not on the basis of any lack of qualification incapacitating him to be guardian, but entirely on the basis of an arbitrary qualification, to-wit: eligibility to citizenship, which does not bear any relation to the question of guardianship so far as it affects his fitness or unfitness. Pressing the argument one point further, the citizen child complains because his father is discriminated against in the matter of guardianship, while other alien fathers no better qualified than his Japanese father, are permitted to act as guardian of their children (either citizen or alien).

CONCLUSION OF THIS BRANCH OF THE ARGUMENT.

We trust that we have shown clearly that in denying to a Japanese citizen child the right to have his own parents act as his guardian we are discriminating against him and denying him the equal protection of the law under the Fourteenth Amendment and his privileges and immunities under the California constitution because the discrimination is an arbitrary one of race. The child, as a citizen of California and of the United States is certainly denied the equal protection of the law as well as "privileges or immunities" when he is compelled to accept a public administrator as his guardian as against his parents, otherwise qualified. We shall not take up the time of the court arguing the obvious advantage to a child of having his own parent administer his property. We cannot conceive how it could be successfully claimed that a public administrator would handle the property of a child as inexpensively, as sympathetically and to such advantage as the child's parent and whether the child be under or over fourteen years of age, his right to have his property managed by his father in the absence of the unfitness of the father is a property right. His constitutional right to equal treatment with all other children citizens of California is so clear that we deem it almost an axiom of American judicature.

PERORATION.

Small qualifications of the great fundamental principle of equality of all persons before the law, may be permitted to creep into the structure of our Government. The Fourteenth Amendment and the great body of law which has flowed therefrom, may be sacrificed to the demands of an assumed expediency in the settlement of race problems. The rights of a humble Japanese father or a Japanese minor child may amount to nothing in American jurisprudence. All of this may be true and yet the day of reckoning may come when later substantial right under the forms of law shall be taken from all

or any of us, because we have permitted the great principles of democracy to be cut down. Once we leave the safe anchorage of the Constitution,

"'Twill be recorded for a precedent and many an error, by the same example will rush into the state; it cannot be."

Dated, San Francisco, November 12, 1921.

Respectfully submitted,

ALBERT H. ELLIOT,

GUY C. CALDEN,

Amici Curiae.

5. BRIEF OF U. S. WEBB, AS ATTORNEY-GENERAL OF THE STATE OF CALIFORNIA, ON ORDER OF THE COURT FOR RESUBMISSION OF CASE.

[This was filed in reply to Elliot's brief and argument presented to the Supreme Court of the State of California.]

No objection need be made to the general statements made upon the oral argument by counsel as *amicus curiae* and by counsel for appellant respecting certain general rules in reference to the right of a parent to be appointed guardian of the person and estate of his minor child. If it were not for the Alien Land Acts of 1913 and 1920 it might be conceded that the Fourteenth Amendment to the Constitution of the United States, and perhaps the treaty between the United States and Japan, would be applicable. But the ruling appealed from was made for the reason that it was the judgment of the court that it had been sought to acquire title to the land involved in violation and in evasion of the Alien Land Act of this state adopted in 1913, and that the guardian had acquired no title to such land.

Little attention was given to the Fourteenth Amendment or to the treaty in the original briefs in this case, because of the well-established rule that it is the rule of a state to control the devolution and transfer and ownership of land within such state.

Since the decision of the trial court, the law of California has been amended by the initiative act of 1920. (Stats. 1921, p. 83.) The trial court refused the petition to appoint an ineligible alien as guardian of the land of his minor child, which land was paid for by the said father. The ground for the decision was that the application was made for the sole purpose of evading the 1913 statute, which prohibits ownership or enjoyment of lands by such aliens ineligible to citizenship, and that the alien had acquired no title to the land through the transaction shown in the record.

The initiative act of 1920 was adopted as a means of stopping the very evasions referred to by the trial court. Section 4 of the later act expressly prohibits the appointment of such an alien as guardian of any portion of the estate of a minor which consists of property which such alien himself is inhibited from acquiring, possessing, enjoying or transferring by reason of the act.

The 1920 act supersedes, with reference to ownership of land, section 1751, Code of Civil Procedure, and all the other provisions of the California statutes on guardianship to which counsel have referred. It is the latest expression in the law of this state on this subject matter.

Again the 1920 act, in section 9a thereof, states the circumstances under which it will be presumed that a conveyance is made to prevent, evade or avoid escheat as provided for in said act.

One of such *prima facie* presumptions is described as arising upon proof that land is taken in the name of such a person as the minor child in

the case at bar, and the consideration paid by an ineligible alien. Such a condition was proved in the instant case.

The 1913 act has been superseded by the 1920 act. And so, today, appellant is expressly prohibited from being appointed guardian in this case, unless the section in question violates either the Fourteenth Amendment or the treaty.

It is a fundamental rule and so determined by the United States Supreme Court that in the absence of treaty provisions on the subject every state in the Union has the exclusive right to determine for itself who shall and who shall not own or acquire any interest in the land in the state. We shall not at this time go extensively into this matter, inasmuch as we have already done so in a brief just filed by this office with the United States district court, Southern District Division, in the case of *W. L. Porterfield et al. vs. U. S. Webb, etc., et al.*, which case has been submitted for decision to Circuit Judge Hunt and District Judges Dooling and Bledsoe. We, therefore, ask permission to file copies of said brief with this court. A reading thereof, we submit, will show that so far as acquiring interests in agricultural land is concerned, the Fourteenth Amendment to the United States Constitution was never intended to control. Also that the treaty of 1911 between the United States and Japan by express exclusion eliminated any right of the citizens of either country, living in the other, to acquire any interest in agricultural lands. This will be seen from a reading of the briefs to which we have referred and the language of the courts and law writers therein quoted, together with the complete history of the adoption of the treaty which we have given. The reason that underlies this entire subject is the safety of the state. From the time of the year books of the common law the rule has been again and again stated that self-preservation is the first law of all commonwealths; and under the law the right is inherent in all societies and governments to prevent a condition where interest in lands might be acquired by those who owe an allegiance to a foreign sovereign. The soil of the state, and particularly the soil suitable for agriculture, is the life-giving substance which assures the perpetuity of government. The doctrine of nationality is emphasized especially with respect to agricultural holdings. It is universally conceded that rural and farming communities constitute the bulwark of any state.

There is then just one question for this court to answer as we understand the issue presented by the record in the case at bar. Assuming, as we must, the validity of the general prohibition against ownership of land by aliens in both the 1913 and the 1920 California statutes, is that other provision of the 1920 act prohibiting the appointment of an alien parent as a guardian to his child, which act now must control this appellant, so related to the constitutional purposes of the statutes as to be sustained and supported by these purposes? The trial court in this action found that the reason for the ineligible alien father applying for letters of guardianship was to defeat the 1913 California statute. If in fact an evasion of the statute would be the probable result of granting such petitions then of course the section incorporated in the 1920 act to prevent such evasion is a valid one. For if we assume the main features of the two acts to be valid, which question is now before the United States district court, then certainly any provision that will prevent the defeating of these main purposes is a valid provision.

And certainly the trial court was authorized in finding that an attempt was made to evade the 1913 act.

We submit it is obvious, as was so clearly understood by the trial court, that if we permit throughout the agricultural districts of California ineligible aliens to have for all practical purposes possession and enjoyment of and dominion over such lands through the device of being appointed guardians of their native born children, the Alien Land Act will fail of its purpose. Every possible effort is being made by subterfuge to defeat the provisions of this act. We confidently assert that so far as the main purpose of the act is concerned, in recognizing a class of ineligible aliens created by act of Congress, and barring them from the right of acquiring interests in agricultural lands in this state, it will be sustained by the Federal court where the question is now pending. A similar case was sustained by the United States district court in the State of Washington, which decision is described in full in our brief in the Porterfield case. The California statute is more liberal than was the Washington statute. It permits some aliens to own land. The Washington statute permits none unless they declare their intention to become citizens. California encourages eligible aliens to take an interest in our government, to found homes here, and to raise their families here, by assuring them that they may acquire land in this state. This is an encouragement to become real defenders of this country in time of trouble. But an ineligible alien can not become such a defender in time of trouble, if he desires to assert his treaty rights. The classification is as natural and as logical and reasonable as any classification can possibly be. We have no fear of the final decisions of the courts on the broad question involved. Indeed, generally, the constitutionality of the act is admitted, but its defeat is sought by subterfuge, by device and by fraud. One of these devices upon which the Federal court is to pass in a companion case which was argued and submitted at the same time that the Porterfield case was argued, is the so-called "Crop Contract" made by an ineligible alien and a citizen landholder. A Japanese, for instance, ineligible to citizenship, enters upon a farm and calls himself an "employee," agrees to cultivate the land for a period of four years and receive as his "compensation" one-half of the crops produced. We have urged in the Federal court that this is an obvious attempt to evade the statute and that the Japanese has a real interest in such agricultural lands, the acquiring of which is prohibited by the statute. Another device which was feared by those who drafted the 1920 law, on account of the state's experience with the earlier act, was the wholesale appointment of ineligible aliens as guardians of their minor children for the purpose of getting control of the agricultural lands of this state.

The courts will undoubtedly sustain any provisions in a statute which are reasonably necessary to carry out the purposes of the statute. The sole question then in this case is whether the prohibition against the appointment of an ineligible alien as the guardian of the estate of his child is such a reasonable exercise of legislative power, having in view the purposes of the statute.

Counsel as *amicus curiae* in his oral argument made this observation: "We are not contending that the State of California may not classify and make a distinction. It would be ridiculous to make that contention. The State of California may classify indefinitely, *ad infinitum*, but the basis of the classification, where the state acts within its police powers, and those powers justify the classification, *the basis of classification must have some relation to the ultimate object to be sought.*"

The basis of classification in the California statute is a determination that those only who may by act of Congress become citizens and owe allegi-

ance to this country shall acquire interests in the agricultural lands of this state. The "relation to the ultimate object to be sought" of this prohibition against alien parents becoming guardians of the lands of their minor children, seems to us to be obvious. If this fundamental consideration be granted then all that has been said about the guaranty of the Fourteenth Amendment and the treaty with Japan has no bearing on this case.

The right of the government to exist in perpetuity is of infinitely greater consequence than the right of any individual to own real property or to be appointed a guardian of his minor child, or the enjoyment of any other right which we usually contemplate in considering the guarantees of the United States Constitution and of treaties.

Referring to the Ah Chong case, counsel in his argument said:

"The end was the protection of the fisheries of the state. What did it matter whether a poor Chinaman was eligible as an elector or not to become an elector of the state?"

Counsel then follows with this question:

"And so here, what does it matter so far as eligibility to citizenship is concerned whether a man can be a guardian or can not be a guardian?"

The answer is that it does not matter at all so far as eligibility to citizenship is concerned. But it does matter so far as preventing alien domination in the agricultural districts of this state by those ineligible to citizenship whether such persons will be permitted by subterfuge to control these lands by simply petitioning to be guardians of their native born children. There is as much difference between the right to fish and the right to own land so far as the necessity for the legislation is concerned as there is between the requirements of securing a permit for erecting a building, and the obligation to serve the country in time of war.

With reference to *the necessity* in alien land legislation, for the classification made, and also for the different means taken to make the legislation effective, the courts will have regard for the judgment of the legislature or people who adopt the same.

In discussing a distinction made between resident and nonresident aliens, the United States Supreme Court, in *Patsone vs. Pennsylvania*, 232 U. S. 138, at p. 144, said:

"The question therefore narrows itself to whether this court can say that the legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent * * *. Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts."

The statute in question prohibited the possession of shotguns and rifles by unnaturalized foreign born residents, as a means of making effective the purpose of the act which was to forbid such persons killing wild game.

The court at page 143 says:

"Under the Fourteenth Amendment the objection is two-fold; unjustifiably depriving the alien of property and discrimination against such aliens as a class. But the former really depends upon the latter, since it hardly can be disputed that if the lawful object, the protection of wild life * * * warrants the discrimination, the means adopted for making it effective also might be adopted."

In *Perley vs. North Carolina*, 249 U. S. 510, a statute making it a penal offense for failing to clear lands from which timber had been removed,

was involved. The Fourteenth Amendment was urged against its validity. At page 514 Mr. Justice McKenna says:

"We concede the aphorism upon which counsel relies that, 'The equal protection of the laws is a pledge of the protection of equal laws.' We, on March 24th last, by an almost prescience of the contention now based on it, defined its extent and declared that the Fourteenth Amendment, which is the foundation of the aphorism, does not regard the impracticable and that distinction may be made by the legislation between objects or persons, and that the power of the state 'may be determined by the degrees of evil already exercised where detriment is especially experienced.' * * * Moreover, we pointed out that 'the deference due to the judgment of the legislature in the matter' had 'been emphasized again and again.' (*Hebe Co. vs. Shaw*, 248 U. S. 297, 307; *Dominion Hotel vs. Arizona*, 249 U. S. 265.)"

The fatal weakness of the position of counsel as *amicus curiae* as well as of counsel for appellant is that they do not realize that the admittedly lawful limitation against aliens acquiring interests in our lands is a subject matter so vital to the existence of the state as to brush aside all of their illustrations of constitutional and treaty guarantees. In no single case cited did these guarantees have to be weighed in the scales and balanced against the first principle of sovereignty and patriotism. Counsel in their "peroration" at the close of their brief urge with some vehemence that we must not leave the safe anchorage of the Constitution. There will be no safe anchorage nor will there be any Constitution left to which counsel may go for protection if the day shall ever come that the courts of this land overturn the long established rule of control against alien land ownership, which we have fully set forth in our printed brief in the Porterfield case filed in the United States district court.

Respectfully submitted.

U. S. WEBB,

Attorney-General of the State of California.

FRANK ENGLISH,

Deputy Attorney-General.

6. CLOSING BRIEF OF APPELLANT, BY ALGERNON CROFTON.

Nine points in opposition to appellant are raised in respondent's brief. As an aid to clarity, in reply we have summarized these points, arranged them in their order as presented, and for distinction print them in italics.

(1) *That even if a father is a competent guardian of the person of his minor child, it does not follow that he is a competent guardian of that child's estate.* (Respondent's brief, p. 3.)

That is true, but the same presumption of competency attaches. The same necessity of a proof and a finding of incompetency exists. Neither the code nor the decisions draw any distinction between a parent's right of guardianship of the person and of the estate.

Indeed, there are cases where, as in the instant case, the petition was for both person and estate, which lay the rule flatly that a parent must be appointed guardian of both unless by act enumerated in C. C. 246 he has forfeited that right. (*Re Mathews*, 174 Cal. 679; *Campbell vs. Wright*, 130 Cal. 380; *Re Mathews*, 169 Cal. 26.)

It would be a cruel law and one fraught with danger, which, without compelling reason, would take from any parent the right to care for the estate as well as the person of his child, and no authority is cited by re-

spondent which would indicate that the law of California need in this case depart from the law of nature.

(2) *That the court did not deny to the petitioning father any right which under like facts would not be denied to a citizen.* (Respondent's brief, p. 3.)

This argument seems sufficiently contradicted by the transcript, pages 7, 8, and 9. It there appears that the father paid for the property as a gift to his child and that he was refused guardianship upon grounds directly connected with his status of an alien.

That status may or may not affect the title to the land in other proceedings, but the case at bar is one of guardianship only, and appellant contends that under the record facts, guardianship would not have been and could not be denied to a citizen. The treaty guarantees Yano the same right.

(3) *That the record does not show that the minor child had any estate.* (Respondent's brief, p. 4.)

The transcript, page 28 *et seq.*, shows a deed to the minor. Title to the property rests somewhere certainly. Even debarred aliens in California may hold real estate until divested thereof by the government in an escheat proceeding. (*Racouillat vs. Sansevain*, 32 Cal. 376, 386.) The minor has not been yet divested of the title.

(4) *That under section 853 of the Civil Code, it must be held that the minor child holds in trust for the father.* (Respondent's brief, p. 5.)

One answer is that no implication of a resulting trust arises when a parent purchases property in the name of a child. (*Russ vs. Mebius*, 16 Cal. 350; *Spitler vs. Kaeding*, 133 Cal. 500.)

Another answer is that a minor child can not be saddled with a trust, especially with one to which no consent of the trustee is given, and especially also when the child is under eighteen. (C. C., 33.) The children involved in the cases cited by the respondent were all of age, capable of contracting and actually did contract and later attempted to repudiate their agreement to hold in trust for the parent.

A third answer is that the only conclusion to be drawn from the record is that the father gave the property to his child. (Tr., p. 7, f. 21.) His language is unequivocal and we submit that nothing in the record contradicts it. Under cross-examination by the court he did testify that the reason of the gift was that his child was an American citizen (Tr., p. 9, f. 26). But the giving of a reason for the gift does not invalidate it, even if that reason be obviously incomplete and its expression hampered by an evident unfamiliarity with the English language.

Section 853 was not, we think, intended to apply to gifts. To so hold would create a trust whenever any parent gave any gift to a child, or when any husband gave a gift to his wife. The presumption of a trust arises only in transactions between strangers. (*Hamilton vs. Hubbard*, 134 Cal. 603.)

In each one of the cases cited by the respondent, the child was of age, capable of contracting and did contract to hold for the parent, in whole or in part. No such situation is here presented. We can not imagine any pleading or proof which would enable the father, Yano, to recover the property in question from the child. The passage of title is absolute.

(5) *That the transfer can not be a gift because there is no showing of a delivery to or acceptance by the minor.* (Respondent's brief, p. 6.)

In opposition to this idea we cite the rule that infants may take and hold real estate as adults (*Lackman vs. Wood*, 25 Cal. 147, 151) and

that the assent of an infant to a gratuitous deed to him is presumed. (*Devillain vs. Evans*, 39 Cal. 120; *Jennings vs. Jennings*, 104 Cal. 150, 154.)

"In the case of a gift to an infant, no formal acceptance is necessary, but if the gift is for his advantage the law accepts it for him and will hold the donor bound, while if the gift is not for the infant's advantage, the law will repudiate it at his instance." (22 Cyc. 530.)

Further, the transcript shows (p. 15, f. 43) that the deed to the child was duly recorded. The recording of a voluntary deed to a grantee of tender years amounts to a formal delivery to and acceptance by him. (*Masterson vs. Check*, 23 Ill. 72; *Wedel vs. Herman*, 59 Cal. 515.)

(6) *That the guardianship by the father would result in the child being raised as a Japanese.* (Respondent's brief, p. 8.)

This seems speculative and irrelevant. Children of alien races domiciled in this country will doubtless always be brought up according to the lights of their fathers unless the state assumes the parental duties, but we think that is not a consideration pertinent here.

(7) *That the father is not competent to exercise a dominion over land as guardian which he can not do as an individual.* (Respondent's brief, p. 9.)

This is an attractive sophism, but we think it is an erroneous statement of the law. A man may, if empowered thereto, do many things for another which he might not do for himself. Generally speaking, any adult, not imbecile, may act as agent for another although incapable of acting for himself. (2 C. J. 430.) Slaves who were certainly not *sui juris*, could always act as agents for their masters or for anybody. Yano, for instance, might by power of attorney lease or sell even real estate for an American citizen. As guardian he would be only representative for an American citizen and a representative strictly bound and accountable.

(8) *That in guardianship proceedings the controlling consideration for the court is the welfare of the minor.* (Respondent's brief, p. 9.)

We do not see that the welfare of the minor in this case would be advanced by placing the guardianship of her estate in the hands of a strange guardian whose fees would have to be paid. But, conceding the point for argument's sake only, we believe that in California the welfare of the minor is subordinate to the parent's right of guardianship. Section 1751 of the Civil Code controls section 246 on the authority of *Re Mathews*, 174 Cal. 679; *Re Forester*, 162 Cal. 493; *Re Salter*, 142 Cal. 412; *Re Gallagher*, 2 Cal. App. 364; and there is no authority applicable to this case which we have found to the contrary.

(9) *That the provisions of the initiative law of 1920 are applicable to this section.* (Respondent's brief, p. 11.)

Respondent's argument, as we understand it, is that because the law of 1913 does not make Japanese ineligible as guardians, the provisions of the 1920 law which provide that it shall not affect proceedings pending at the time of its passage, are not applicable to guardianship proceedings.

In other words, it is urged that only proceedings "instituted under the 1913 act" could be continued to final judgment.

If that was the intent of section 12, subd. a, of the 1920 law, we submit that it certainly does not say so, nor even indicate it.

However, a conclusive argument against respondent's contention is found in the next subdivision, b, of the same section of the same law. This reads:

"No cause of action arising under any law of this state shall be affected by reason of the adoption of this act whether an action or proceeding has been instituted thereon at the time of the taking effect of this act or

not and actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as if this act had not been adopted."

We say again that whatever the alien laws may be, and whatever may be their validity, the present proceeding on the record concerns only the right of an American citizen, a minor, to have her father appointed as guardian of her person and estate, and we believe that this right is in complete accord with the laws of California and of nature.

Respectfully submitted,

ALGERNON CROFTON,
CHARLES A. WETMORE, JR.,
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GILLOGLEY, CROFTON & PAYNE,
Of Counsel.

7. ORAL ARGUMENT.

Mr. Crofton: May it please the court, in this case, before opening the argument, I would like to move that Mr. Albert H. Elliot be permitted to appear as *amicus curiae* and file a brief. Mr. Elliot took that matter up with Chief Justice Angellotti and obtained permission at that time, some couple of weeks ago, to file his brief.

The Chief Justice: There is no objection to that. How long a time did he have?

Mr. Crofton: I think it was to be filed today. He will file the brief today, and I would ask permission for him to address the court if he so desires.

The Chief Justice: That will be another matter. Of course he can file his brief.

Mr. Crofton: The facts in this case are like the annals of the poor, very short and simple. Four American citizens residing in Sutter County transferred a piece of property to Tetsubumi Yano, a native-born American citizen of Japanese parentage. The transfer was made directly to her, and her father, as appears from the transcript, paid for the land. It consists of fifteen acres of orchard land. The father made application to be granted guardian of the minor Tetsubumi Yano, and that petition was denied, and from the order of denial we appeal. The theory of the appellant is based on this: That in California, and probably in all other jurisdictions, so far as we have been able to determine, the right of a father to be appointed guardian of the person and estate of his child is dependent on one fact only, and that is his competency. In the absence of an express finding that the father is incompetent to act as guardian, it is mandatory upon the court to make that appointment. I will support that with California authorities in a few moments. In this case it appears from the transcript that no such finding was made, nor could it have been made. Nothing appears in the transcript to the contrary, and on the trial it was affirmatively shown that the father was of good character, industrious, sober and a responsible person. Nevertheless the petition was denied. We submit that that violates the right of the father, the petitioner, in three different particulars. The first is that he was entitled to the guardianship under the laws of California. The second is that he was entitled to the guardianship in view of the treaty between Japan and this country made in 1911; and the third is that he is entitled to the guardianship under the provisions of the Fourteenth Amendment of the Constitution of the United States.

The rights of the child, I take it, are also before this court, and as to her we claim that relationship of guardian and ward being reciprocal and mutual, that she has a right to have her father appointed guardian, that she was entitled to it under the laws of California, and that she also fell within the shadow of the Fourteenth Amendment to the Constitution of the United States.

In order to establish the appellant's case it was necessary, of course, to establish our major premise first, and that is that his child, in the absence of any finding that he is incompetent; that the court has no discretion in the matter.

The Chief Justice: I suppose you have seen the order of the court directing the attention of counsel to the point upon which the court wants argument?

Mr. Crofton: Yes. *I understand the court wanted argument on the relation of the treaty to this case and also on the Fourteenth Amendment, and if the court will allow me I will just sketch this for a background for the argument, and will only read one authority so as to get the picture exactly before the court.* Out of a great multitude of cases in California bearing on the point, without any contradiction, I take the case of *Estate of Mathews* 169 Cal. and read from that. The court says:

"It is well settled that, under the provisions of section 1751 of the Code of Civil Procedure, the father or mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed guardian in preference to any other person, and that the court must appoint a parent seeking to be appointed, unless it finds such parent incompetent, notwithstanding the judge is of the opinion that the child's health and welfare may be promoted by giving it to another."

Now that case standing by itself might give rise to argument, but it is supported by—

The Chief Justice: That has been decided a number of times.

Mr. Crofton: Then the major premise having been established, that is, if these people had been two American citizens, that this father would be entitled to the guardianship of his child, I take up the question whether his rights under the treaty have been violated by that denial, and of course the decision of this court in the case of Terui and the case of Kotta, decided last September, seem to me to make any extended discussion of the treaty, except upon one or two points, academic. In view of those decisions it now becomes unnecessary to argue, I take it, to your honors the definition of the word "person". It is held in those cases flatly that the word "person" includes this alien. It becomes unnecessary to discuss the legal rank of a treaty. It becomes unnecessary to discuss the meaning of the phrase "equal protection of the laws" which was taken up on the Kotta case.

The Chief Justice: I think the decision of the case of Terui and other alien cases referred to the word "person" in connection with its use in the Fourteenth Amendment.

Mr. Crofton: It is not raised in the treaty. Yes. We call your attention to the reciprocal nature of this treaty. Leaving out the phrases in which it expresses the desire of the high contracting parties to lay equal obligations upon each of them, there are twenty-eight paragraphs in that treaty, and seventeen of them have to do and bear upon the fact that the citizens of either party shall have equal treatment with those born in

the land, and the protection which directly concerns the appellant here is a little different from the one construed in the Terui case. The next clause:

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security of their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

Two phrases in that clause are significant here: the first is that they shall receive the most constant protection and security of their persons and property, and the second is that they shall enjoy in this respect the same rights and privileges. So it seems to me, whether this right of guardianship be construed by this court to be a property right or privilege, that it is covered by the shadow of the treaty. However, I think there can be little question that the right of guardianship is a property right. It has been so held expressly by this court in *Re Campbell*, 130 Cal., and before reading from that case I want to admit that the treaty-making power has its limitations. It is not within the province of the Federal Government, for instance, to conclude a treaty with Japan giving the Japanese subjects the right to vote in this state. That is a power that was not delegated to the Federal Government by the Constitution. Unless it is held that the treaty-making is broader than the legislative power, the right of suffrage would fall outside of the power of the Federal Government in making a treaty. There are other exceptions to the treaty-making power. It would be idle to itemize them here because they are not germane to the point. The court in the Campbell case said (p. 382, 130 Cal.):

"Under the general law and independently of the provisions of the codes, the father has a natural right to the care and custody of his child, and this right is recognized by the provisions of our codes, which are to be regarded as but a re-expression of the principles of the common law governing the subject. The father's right, at least so far as the services of the child are concerned, is strictly a property right, for the loss of which, as in the case of servants generally, an action could at common law be maintained, and in other respects the right, though not commonly spoken of as such, is of essentially the nature as the right of property. For though the subject of the right is not salable, it is valuable, and of all species of property the most valuable to the parent. Hence it is a mistake to suppose that the right of the father is merely fiduciary. It is that, but it is also, like the right of the child in the father," and I call the court's attention to that when I speak of the rights of the father and child being mutual. "It is also, like the right of the child in the father, a right vested in him for his own benefit, and of which it would be a personal injury to deprive him. The right must therefore be regarded as coming within the reason, if not within the strict letter, of the constitutional provisions for the protection of property," and there we couple this up with the treaty provisions so far as property is concerned.

Chief Justice Beatty in the case of *Ex parte Miller*, 109 Cal., in his dissenting opinion closes on page 662 with these words:

"The natural right of a parent to the custody and society of his child is certainly equal in dignity and importance to any right of property."

Now, then, if we establish our first premise, that an American citizen would have peremptory and primary right to the guardianship of his child, in the absence of a finding of incompetency, that was not made in this case, and if we establish that the right to guardianship is a property right,

and if we take the treaty again and read that the citizens of each of the high contracting parties shall receive the most constant protection and security of their person and property, what escape is there from the conclusion that this appellant has been denied that right of guardianship and that he has not received the most constant protection and security for his property, or any protection or security at all.

The Chief Justice: In the Campbell case in 130 Cal., the part you read from decides the parent's right to the child's services, how did that question arise in that case?

Mr. Crofton: It was a guardianship. The father applied to the lower court to be appointed guardian of the person and estate of the minor.

The Chief Justice: It came up in connection with guardianship?

Mr. Crofton: Yes.

Mr. Justice Wilbur: It was held that it was for the best interests of the minor that the grandmother should be appointed.

Mr. Crofton: It was appealed and the court held that the welfare of the child is the primary object of guardianship, which must be subordinate to the right of the parent. Now I have passed this point, that even if there were no treaty and no Fourteenth Amendment, that the father in this case would be entitled to guardianship under the laws of California irrespective of either one of those two instruments, because the Fourteenth Amendment is merely a guaranty of rights that previously existed, and without going into that matter *in extenso* I would like to lay before the court this rule from *United States vs. Cruikshank*, 92 U. S. 554, in which the court says:

"The Fourteenth Amendment prohibits a state from depriving any person of life, liberty or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society."

And from *Mobile & Ohio R. R. vs. Tennessee*, 153 U. S. 506, in which the court says:

"That amendment conferred no new and additional rights, but only extended the protection of the Federal Constitution over the rights of life, liberty and property that previously existed under all state constitutions."

And Judge John Bassett Moore, who is now, I think, judge of the International Court, and who wrote a very extensive work on international law, lays this rule down:

"Aliens coming within our territory are entitled to the same protection in their personal rights as our own citizens and no more. The principle of placing the foreigner in regard to all objects of navigation and commerce upon a footing of equal favor with the native citizen, is altogether congenial to the spirit of our institutions and the main obstacle to its adoption consists in this, that the fairness of its operation depends upon its being admitted universally." If it has not been admitted universally there is no reason for disregarding a treaty which starts the good work. "The right of the citizens of the United States to resort to and transact affairs of business or commerce in another country, without molestation or disfavor of any kind, is set forth in the general treaties of amity and commerce which the United States have concluded with foreign nations, thus declaring what this government holds to be a necessary feature of the mutual intercourse of civilized nations and confirming the principles of equality, equity, and comity which underlie their relations to one another. This right is not created by treaties; it is recognized by them as a necessity of national existence, and we apply the precept to other countries, whether it be con-

ventionally declared or not, as fully as we expect its extension to us." That last clause that I read is a quotation from a letter written by Mr. Hay, secretary of state, to the minister of Roumania in 1902, and cited as authority by Mr. Moore.

I also read from Mr. Willoughby. I have to apologize to the court for bringing his abridged edition, but it is a verbatim quotation from his larger work, in which he lays the same rule:

"Aliens are by the general doctrines of public law, entitled to the same protection of person and property as that enjoyed by the citizens of the state in which they are resident. In all cases, when injured, the same means of redress as are open to citizens should be given them."

It would be possible to continue an analysis and application of the treaty at almost interminable length, but those are our premises. I presume I will have an opportunity to reply to the distinguished attorney-general if he controverts our statements in that regard.

Passing to the Fourteenth Amendment. As I say, those two decisions of this court have removed the necessity of counsel construing the Fourteenth Amendment in an application to this case. All we have to do is to apply it, and in order to make the contact between the Kotta decision, in which there was no treaty—that was a case of a Mexican subject and no treaty covered the case. In order to apply the Kotta decision we merely have to change this question. The question there was, did the imposition of a tax violate the Fourteenth Amendment, the tax on an alien, and in this case the question is, does the denial of a property right violate the Fourteenth Amendment? I cannot see that there is any difference or any possible theoretical distinction to be drawn between one of those wrongs and the other. This court has already decided that the imposition of an additional tax on the ground of alienship was a burden that threw it outside of the Fourteenth Amendment, and is not the violation of a property right the same as this? I think so. The Fourteenth Amendment covers the case of both the child and the father. Almost every sentence of the Fourteenth Amendment, of this section of it, is applicable to the child. The first sentence says, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." The minor here is a citizen of the United States and of California. The second sentence forbids any state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. The next clause forbids any state to deprive her of her property without due process of law, and the fourth clause forbids any state to deny her the equal protection of its laws. We claim she is not getting them; that were she the child of an American father he would have had the right of guardianship, and we hold that she cannot be denied that right because her father is an alien. So far as the appellant here is concerned, I am concerned only with the last clause of that amendment, in which the states are forbidden to deny to any person the equal protection of the laws. The court says that it is upon this portion of the section that we have italicized that the claim of the petitioner is based. So it is in our case, and I want to continue to draw the parallel through this opinion. The court quotes in a noted case from the Fourteenth Amendment. We pass the definition of the word opinion. The court merely holds that it is applicable to Mongolians and every person, and quotes the Supreme Court of the United States, through Mr. Justice Hughes, as follows:

"Upon the allegations of the bill it must be assumed that the complainant, a native of Austria, has been admitted to the United States under

the Federal law. He was thus admitted with the privilege of entering and abiding in the United States and hence of entering and abiding in any state in the Union. Being lawfully an inhabitant of Arizona the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws."

We can paraphrase that and say the appellant here is an inhabitant of California and is entitled to the equal protection of its laws. "The description, any person within its jurisdiction, as it has frequently been held, includes aliens." The court quoted with approval a portion of the opinion in *Yick Wo*: "These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws." That we claim he did not get. The opinion quotes what I imagine is the leading case in the federal reports on that matter, *Barbier vs. Connolly*, which has been quoted approvingly, I think, by every text writer on the subject and by many of the courts, and in almost every sentence of that we can see a violation of the protection which the court said must be granted to an alien.

Thus I read from *Barbier vs. Connolly* another quotation:

"It was undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights."

And if the court will allow me I will just take that sentence by sentence. That they should have the equal protection and enjoyment of their civil rights. If our premise is correct, that that is a primary right of the father, then this petitioner did not get that. "That all persons should be equally entitled to pursue their happiness and acquire and enjoy property." I cannot imagine any happiness that the courts are more prone to uphold than the happiness of a father to provide for his child, and if this alien father here wants to make a gift to his child, who was born in the land, he should certainly have a right to do it. He has the right to pursue his happiness and to enjoy his property. His property is the right of guardianship. "That they should have like access to the courts of the country for the protection of their persons and property." We seek that access here. "The prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition." If a citizen of California is entitled to that right of guardianship, then this petitioner is entitled to it.

There is this to be said, however, about the Fourteenth Amendment, and that is that the words and the expressions there "privileges and immunities of the citizens of the United States" to which they are entitled, has frequently been distinguished in the United States Supreme Court from the rights and privileges of the citizen of a state, and we admit for the sake of the argument that the rights and privileges of citizens of the United States are not identical with the rights and privileges of citizens of a state. But I do not think that point is raisable here. If it is I would like to reply to it later. But I will not take up the time of the court right at the present moment in arguing points that might be purely academic and an exhibition of pedantry to do it. There is no point raised in the attorney-general's brief that has anything to do with the treaty or the Fourteenth Amendment. But, with the court's permission, I would like to reply briefly to it for this reason,

that the ground upon which this petition was denied was not sharply raised in the transcript. An examination of the transcript would lead, I think, any person to the conclusion that it was denied because the father was a Japanese alien. The opinion of the lower court has this to say, on page 10 of the transcript.

Mr. Justice Sloane: It disposed of it apparently upon the ground that it was not property.

Mr. Crofton: That was the ground alleged. The language of the court is: "The guardianship is denied. It appears that the child has no property. The child has no property. The property or deed was taken in the child's name solely to evade the laws of the State of California." The allegation that the child had no property can only be based upon the alienship of the father, and therefore we arrive at the same conclusion. But if it should be held otherwise, and if it should be argued that the petition was denied solely because the child had no property, then I will call the court's attention to the fact that the record shows that the child held the record title to the property without contradiction; that this is a case of guardianship and not a case of ownership of land; that the title to the property could not pass collaterally in a petition for guardianship, and for the purposes of the case it must be assumed that the child did have title to the property. Whether that title was good or bad does not concern the guardianship proceedings, because the child can be divested of it only in one way and that is by escheat proceedings taken under certain limitations. Even in escheats title to property is property. It cannot be denied that the child had no property because the record shows she had, and she can only be divested of it by the State of California. I lay this principle before the court, which I will support by authority, that even if the alien father had taken title to that property in his own name, which he did not do, but if he had taken title in his own name, he could pass a perfectly good title to anybody else, unless the State of California intervened and took the property away from him. There is authority for that.

Mr. Justice Sloane: I do not believe that branch of the case presented any difficulty.

Mr. Crofton: I will not argue any further on those points then.

8. DECISION OF THE COURT.

HISTORY.

In October, 1920, Hayao Yano, a Japanese subject, by his attorneys, Algernon Crofton and C. A. Wetmore, Jr., petitioned the superior court of Sutter County to be appointed guardian of the person and estate of his minor daughter, Tetsubumi, aged about five.

Tetsubumi's estate consisted of a small ranch, the deed to which stood in her name, but which had been paid for by her father, Hayao Yano.

At the hearing of the petition, it was shown that the father had paid for the land and had made a gift of it to his child. It was, however, the opinion of the court that Yano sought to retain control and management of the ranch which he, himself, being a Japanese, could not hold title to, by the device of buying it in the name of his child. The court accordingly denied the petition, adding its opinion that the child, Tetsubumi, had no estate, and no need for a guardian, as she merely held the land in trust for her father, who was, the court indicated, the true owner. This fact, if proved, would, of course, have laid the land open to escheat.

An appeal was taken at once to the supreme court. It was based upon three distinct points of law:

(1) That, irrespective of treaty or constitutional provisions, the right of a father to guardianship of the personal estate of his minor child cannot be denied except upon the ground that he is an unfit person. The corollary point that a minor child is entitled to the guardianship of its father was also briefed.

(2) That under the Japanese-American Treaty of 1911 the right of a Japanese father to be guardian of his child cannot be denied.

(3) That under the Fourteenth Amendment to the Constitution of the United States, no distinction in guardianship matters can be made between aliens of different nationalities, nor between native-born children of different parentage as to race.

On January 24, 1921, the attorney-general of California moved to dismiss the appeal. The motion was denied on February 7, 1921.

On May 10, 1921, the case was submitted upon briefs to the supreme court. It was held under advisement until the following October, when the order of submission was vacated by the court, and the case set for further argument in Sacramento November 14, 1921.

On this date, the matter was again argued at length by Algernon Crofton and Charles A. Wetmore, Jr., attorneys for Yano, the appellant; Albert H. Elliot and Guy C. Calden, *amici curiae*, and U. S. Webb, attorney-general of California.

On May 1, 1922, the supreme court reversed the order of the lower court denying guardianship to Yano, and sustained all the points of appellant, in one of the most scholarly and exhaustive opinions yet written in any state upon alien land law problems.

Sac. No. 3191. In Bank. May 1, 1922.

In the Matter of the Estate and Guardianship of TETSUBUMI YANO, a Minor. HAYAO YANO, Petitioner and Appellant.

[1] GUARDIANSHIP OF MINOR—PREFERENTIAL RIGHT OF FATHER.—The father of a minor under the age of 14 years is entitled as a matter of right under the provisions of the codes to the guardianship of such minor, unless shown to be incompetent. Competency is presumed and should be so found by the court in the absence of evidence to the contrary.

[2] ID.—GUARDIANSHIP OF PERSON AND OF ESTATE—LACK OF DISTINCTION.—The code makes no distinction as to the preferential right of a father of a minor under the age of 14 years to letters of guardianship between guardianship of the person and guardianship of the estate.

[3] ID.—GUARDIANSHIP OF PERSON AND ESTATE OF NATIVE-BORN JAPANESE—APPLICATION OF FATHER—NON-OWNERSHIP OF PROPERTY—ERRONEOUS GROUND FOR REFUSAL OF APPLICATION.—An order denying a petition by a Japanese and not a citizen of the United States or of the State of California for letters of guardianship of the person and estate of his minor daughter, on the sole ground that the minor had no property, cannot be sustained, where the minor was a native-born American citizen and the deed to the property was made directly to her.

[4] DEED—INFANCY OF GRANTEE—PASSING OF TITLE.—Infancy does not incapacitate one from becoming seized of the title to real estate and delivery to and acceptance by an infant will be presumed, and the recording of the deed is sufficient delivery.

[5] ID.—DEED TO DISQUALIFIED ALIEN—PASSING OF TITLE.—Conveyance to an alien disqualified under the law to hold real property conveys title to such alien, until the same is divested by the state or by inquisition had upon its denouncement, and the Alien Land Act of 1913 recognizes the same rule.

[6] GUARDIANSHIP OF MINOR—DETERMINATION OF OWNERSHIP OF PROPERTY—LACK OF JURISDICTION.—The nature and extent of a minor's property rights under a deed, the minor being qualified to own real estate, cannot be determined in a guardianship proceeding.

[7] ALIENS—FURNISHING OF CONSIDERATION—ABSENCE OF IMPLIED TRUST.—Where aliens are prohibited from holding lands, an implied trust by operation of law will not arise in their favor from payment of the consideration.

[8] ID.—CONVEYANCE OF LAND TO NATIVE-BORN JAPANESE—ACT OF FATHER NOT ILLEGAL.—The act of a Japanese not a citizen of the United States in securing conveyances of land to his daughter because the laws of the state did not permit him to buy it himself, was in no sense unlawful where the daughter was a citizen.

[9] ID.—RIGHT OF ALIEN TO GUARDIANSHIP.—An alien was not disqualified from serving as a guardian merely by reason of being an alien prior to the Initiative Alien Property Act of 1920.

[10] INITIATIVE ALIEN PROPERTY ACT—DISQUALIFICATION OF ALIENS AS GUARDIANS—TREATY BETWEEN JAPAN AND UNITED STATES NOT VIOLATED.—The Initiative Alien Property Act of 1920 providing that no alien disqualified to acquire and hold real estate may be appointed guardian of that portion of the estate of a minor which consists of property which such alien is inhibited from acquiring by reason of the provisions of the act is not violative of the treaty between the United States and Japan, since the rights and privileges which the treaty declared the Japanese citizen shall enjoy are such rights and privileges only as may be necessary for the protection and security of his person or property, and eligibility of appointment as guardian is neither property or a right of property, but pertains exclusively to the person.

[11] ID.—DISCRIMINATION AGAINST CITIZEN OF JAPAN—CONSTITUTIONAL LAW—VIOLATION OF FOURTEENTH AMENDMENT.—The Initiative Alien Property Act of 1920 forbidding the appointment of any alien not eligible to citizenship as guardian of a minor with respect to property of the minor of a character which such alien cannot acquire himself, that is to say, with respect to agricultural land, belonging to such minor, clearly discriminates against citizens of Japan residing in this state and is violative of the Fourteenth Amendment of the Constitution of the United States, for its effect is that a citizen of Japan who is the parent of a native-born child cannot be appointed guardian of the property of the child, where that property consists entirely of agricultural land, which restriction is not put upon a citizen of any country whose citizens are eligible to citizenship, nor upon any other class of residents of this state who are not citizens thereof.

[12] ID.—VIOLATION OF RIGHTS OF MINOR.—The Initiative Alien Property Act of 1920 denies to a native-born minor child the privileges guaranteed by the Fourteenth Amendment of the Constitution of the United States, and of section 21 of article I of the Constitution of the State of California.

Appeal from an order of the superior court of Sutter County, K. S. Mahon, judge, denying petition for letters of guardianship. *Reversed*. Lawlor, J., *dissents*.

For Appellant—Algernon Crofton, Chas. A. Wetmore, Jr.; Gillogley, Crofton & Payne, of Counsel; Albert H. Elliot, Guy C. Calden, *amici curiae*.

For Respondent—U. S. Webb, attorney-general; Leon French, deputy attorney-general, attorneys for superior court of Sutter County and Hon. K. S. Mahon, judge thereof.

BY THE COURT.

This is an appeal by Hayao Yano, an alien Japanese, from an order of the superior court of Sutter County denying him letters of guardianship of the person and estate of his minor daughter, Tetsubumi.

The petition for guardianship was filed October 23, 1920, and alleged that petitioner was the father of said minor daughter; that she was of the age of two years; that she had estate in Butte County, consisting of fourteen acres of land, more or less, and that she was in the care and custody of petitioner and his wife, the mother of said minor, who were her only relatives in said County of Sutter.

It was made to appear on the hearing by undisputed evidence that the petitioner was a Japanese and not a citizen of the United States or the State of California; that he was and had been for several years a resident of California; that he was of good character, a good father, sober and industrious.

That the minor was his daughter, aged between two and three years, and a native-born citizen of the United States and the State of California. That she had no guardian, and held title to fourteen acres of improved land in Butte County of the value of three thousand dollars or thereabouts, which required care and cultivation.

Under this state of facts the petitioner was entitled to letters of guardianship unless the fact of his being a Japanese alien defeated his right.

[1] It is settled law in this state that the father of a minor under the age of 14 years is entitled as a matter of right under the provisions of the codes to the guardianship of such minor, unless shown to be incompetent. Competency is presumed and should be so found by the court in the absence of evidence to the contrary. (Code Civ. Proc., sec. 1751; *Matter of Forester*, 162 Cal. 493; *Guardianship of Mathews*, 169 Cal. 26, 174 Cal. 679; *Guardianship of Gullcher*, 2 Cal. App. 364; *Estate of Moore*, 179 Cal. 302; *Guardianship of Person and Estate of Akers*, 60 Cal. Dec. 685.)

[2] The code makes no distinction as to this preferential right to letters of guardianship between guardianship of the person and guardianship of the estate. The last above cited expression of the rule of the statute involved guardianship of both person and estate. Indeed, the parents' right to letters of guardianship of the person of a minor child scarcely needs the protection of section 1751, Code of Civil Procedure, as such parent is by law the natural guardian and entitled to the custody of the person of a minor child. (Civ. Code, sec. 197; *In re Hunt*, 103 Cal. 355.) The mere fact, if such were shown, that the minor would receive better care, training and support, and be under better influences under other guardianship, cannot defeat the right of the parent to letters, except under the circumstances set out in subdivision 4 of section 246 of the Civil Code. (*In re Mathews, supra.*) No such showing was made here.

There was no finding of incompetency and no evidence which would have justified such finding.

The sole ground for denying the petition, as appears from the record, is contained in the statement of the court refusing letters to the petitioner as follows: "The guardianship is denied. It appears that the child had no property. The property or deed was taken in the child's name solely to evade the laws of the State of California."

It appears from the transcript that subsequent to the Alien Land Act of 1913 denying the right to acquire real estate to aliens disqualified to become citizens, and about a year prior to the initiative act of 1920, which adds the further disqualification of such alien to act as guardian of a minor for property which the alien himself is incompetent to acquire under the act, the petitioner bargained for and caused to be conveyed to his daughter, the minor named in this proceeding, the tract of land referred to in the petition. The deed was introduced in evidence showing the conveyance by the grantors directly to the minor. The petitioner testified that he had the land deeded to his infant daughter because he was Japanese and could not take title himself; that his baby was a citizen of the United States and that he had the land conveyed to her for that reason alone.

[3] The ruling of the court in this matter cannot be sustained on the ground stated in the order, that the minor took no title to the property.

She was a native-born American citizen and as such entitled to acquire and hold property, real and personal. Her infancy did not incapacitate her from becoming seized of the title to real estate. (22 Cyc., 527, 529; *Masterson vs. Cheek*, 23 Ill. 72; *Scanton vs. Wright*, 13 Pick. [Mass.] 523.)

[4] Delivery to and acceptance by an infant will be presumed. When a deed clearly beneficial to an infant is given to him his acceptance will be presumed, and the recording of the deed is a sufficient delivery. (22 Cyc. 529; *Masterson vs. Cheek*, *supra*; *Hadden vs. Neighbarger*, 9 Kan. App. 529, 58 Pac. 568; *Spencer vs. Carr*, 45 N. Y. 406; *DeLevillain vs. Evans*, 39 Cal 120; *Turner vs. Turner*, 173 Cal. 782.)

[5] Even a conveyance to an alien disqualified under the law to hold real estate has been generally held to convey title to such alien, until the same is divested by the state or by inquisition had upon its denouncement. This was so even under the common law which excluded aliens from acquiring and holding real property. (*Merle vs. Mathews*, 26 Cal. 455; *Phillips vs. Moore*, 100 U. S. 208; *Norris vs. Hoyt*, 18 Cal. 217; *Santa Paula Water Co. vs. Peralta*, 113 Cal. 44.) It is apparent that the present Alien Land Law recognizes the same rule, as it provides that action shall be brought by the state for the escheat of any lands conveyed to aliens in contravention of the act.

[6] In any event, the nature and extent of the minor's property rights under the deed in question, she being qualified to own real estate, could not be determined in this guardianship proceeding. She would require a guardian to represent her in the settlement of just such a controversy.

[7] The fact that the father paid the consideration for the transfer of this land to the minor does not establish a trust in the father's favor under section 853 of the Civil Code. Where aliens are prohibited from holding lands, an implied trust by operation of law will not arise in their favor. (2 Corp. Juris, 1057, sec. 5; *Phillips vs. Crommond*, 19 Fed. Cas. No. 11092; *Hubbard vs. Goodwin*, 3 Leigh [30 Va.] 492; *Leggett vs. Dubois*, 5 Paige Ch. 114, 28 Am. Dec. 413.) Besides, the attempt of the alien to obtain title through such a trust would be in violation of the Alien Land Law, and could not be enforced.

[8] The act of petitioner in securing conveyances of land to his daughter, while confessedly carried out because the laws of California did not permit him to buy it for himself, was in no sense unlawful since the daughter is a citizen of the United States and entitled to acquire and own real estate. There is nothing in the evidence to indicate that it was not the purpose of this conveyance to vest absolute title to the land in the minor. If any legal ground appears in the record for denying letters of guardianship it must be found elsewhere than in the reason stated in the order of the court.

[9] There is no claim that an alien Japanese was disqualified merely by reason of his being an alien from qualifying as a guardian at the time this petition was filed and acted upon.

The very fact that the act of 1920, in terms, creates such disqualification, is a recognition of the right of such aliens to qualify and serve as guardians in the absence of such inhibition.

All the proceedings in the superior court, including the final order denying the petition, were had in this matter before the Initiative Alien Property Act of 1920 went into effect, though the final order was not made until after the adoption of the law by popular vote at the election of November 2, 1920. (Stats. 1921, lxxxiii.)

That act provided that thereafter no alien disqualified to acquire and hold real estate "may be appointed guardian of that portion of the estate of a minor which consists of property which such alien * * * is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of this act". It further provides that the "public administrator of

the proper county or any other competent person or corporation may be appointed guardian of the estate of a minor citizen whose parents are ineligible to appointment under the provisions of this section". (Sec. 4.)

Section 12 of the act declares that it "shall not affect pending actions or proceedings, but the same may be prosecuted and defended with the same effect as if this act had not been adopted".

The act did not take effect until December 9, 1920, five days after the official declaration of the vote thereon by the secretary of state. The order appealed from, having been made on November 6, 1920, was, of course, unaffected by the act. What we have already said sufficiently shows that the order was erroneous and that it must be reversed. The appellant, however, has presented and elaborately argued certain additional points upon which he claims the right to a reversal, to the effect that the initiative act of 1920, in the respect here involved, is invalid upon constitutional grounds. Section 4 of the act also authorizes the superior court to remove a guardian whenever it appears "that facts exist which would make the guardian ineligible to appointment in the first instance". If the court below, upon a retrial, should believe that the provisions of the act declaring the petitioner ineligible are valid, it may be that it would refuse to issue letters to him, or, having done so, it might immediately revoke them on the ground that as the facts showing ineligibility appeared in the proceedings it was its duty to do so. Under these circumstances we deem it advisable to consider and determine the additional points presented.

These points are: (1) That the law in question violates the treaty between the United States and Japan; (2) that it denies to the Japanese parent the equal protection of the laws, contrary to section 1, article XIV, of the Constitution of the United States; (3) that it denies to the child, who is a native-born citizen of the United States, the privileges guaranteed to her by section 21, article I, of the constitution of California, and the privileges and equal protection of the laws secured to her by the Fourteenth Amendment aforesaid.

1. The preamble of the treaty states that it is made to fix clearly and positively "the rules which are hereafter to govern the commercial intercourse" between the respective countries. The opening clause of article I declares that the citizens of each country shall have liberty to enter and reside in the territory of the other, carry on trade therein and, among other things, to lease land for residential and commercial purposes. It contains no guarantee of the right to lease land for agricultural purposes. The principal clause relied on is a part of article I, as follows:

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

[10] This, it will be seen, guarantees to subjects of Japan residing here protection and security for their persons and property and provides that in this respect, that is, in respect to such protection and security, they shall enjoy the same rights and privileges as citizens of this country. It is suggested, though the appellant does not lay stress upon this point, that one of the privileges of a native citizen of this country is the right to be appointed guardian of his own child, and that as the act forbids the appointment of a Japanese alien residing here as guardian of his own child, it is, therefore, a direct denial of a privilege secured by the treaty. The language of the

treaty, however, does not include such privilege. The rights and privileges which it declares the Japanese citizen shall enjoy here are such rights and privileges only as may be necessary for the protection and security of his own person or property. It cannot be said that it is necessary for the security or protection of either the person or the property of a parent that he should become the guardian of his own child. Eligibility to appointment as guardian is not property, nor is it a right of property. It pertains exclusively to the person. It may be given or withheld by the law of the state in which the parent and child reside. The withholding thereof from all parents would be within the power of the state. Undoubtedly, when given, it is a privilege pertaining to the individual parent, but it is not a privilege which enhances his own personal security or which assists him in protecting his property. A deprivation of the privilege would in no manner endanger the person of the parent, or jeopardize his property. The child, being a native citizen of the United States, cannot as such, invoke the protection of the treaty to secure to the father, a citizen of Japan, equal privileges with other residents who are not citizens of Japan. The question whether the child is deprived of the privilege of having its own father serve as its guardian does not arise under the treaty. It must look to the provisions of the laws of this country for the protection of its privileges as a citizen thereof. The law does not violate the treaty with Japan.

[11] 2. Our law provides that the father or mother of a minor child less than fourteen years of age, if competent, is entitled to be appointed guardian of such child in preference to any other person. (Code Civ. Proc., sec. 1751.) This law is general in terms. It is not confined to citizens in its application, but purports to confer the right upon all residents regardless of citizenship. The Initiatory Act of 1920 (Stats. 1921, lxxxiii, sec. 4), by its terms, forbids the appointment of any alien not eligible to citizenship as guardian of a minor with respect to property of the minor of a character which such alien cannot acquire for himself, that is to say, with respect to agricultural land belonging to such minor. Its effect is that a citizen of Japan who is the parent of a native-born child cannot be appointed guardian of the property of the child where that property consists entirely of agricultural land. This restriction is not put upon a citizen of any country whose citizens are eligible to citizenship here, nor upon any other class of residents of this state who are not citizens thereof. It is clearly a discrimination against citizens of Japan residing in this state.

Section 1 of article XIV of the Constitution of the United States declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws". We had occasion to consider this language in *Ex parte Kotta*, decided on September 12, 1921 (200 Pac. 957). We there said that "the word 'person' as used in this amendment includes aliens", and quoting from *Yick Wo vs. Hopkins*, 118 U. S. 396, that it applies "without regard to any difference of race, of color, or of nationality", and that the guarantee of "the equal protection of the laws is a pledge of the protection of equal laws". These statements are also quoted and approved by the Supreme Court of the United States in *Truax vs. Raich*, 239 U. S. 33. In *Barbier vs. Connolly*, 113 U. S. 31, the court declared that this guarantee means that "equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights". It needs no argument to demonstrate the proposition that a law which gives to one person the right or privilege of becoming the guardian of his child and withholds it from another, both being alike competent in all respects, is not equal as between the two persons. The person from whom it is withheld

is not in such a case accorded the protection of equal laws. In this respect the initiative act of 1920 is clearly a violation by this state of the guarantee contained in the Fourteenth Amendment, that no state shall deny to any person the equal protection of its laws.

It cannot be successfully contended that the law may be declared valid in this respect on the ground that persons who are ineligible to citizenship under the laws of the United States form, by reason of that fact alone, a class by themselves, for which the state may enact peculiar legislation depriving them of rights or privileges which are accorded to others not of that class. The rule in regard to classification, peculiarly applicable to such an attempt, is that the classification "must be founded upon differences which are either defined by the Constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification, that legislation really local or *special* may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation." (Italics ours.) (*Darcy vs. Mayor etc.*, 104 Cal. 645.) A law "makes an improper discrimination if it confers particular privileges or imposes peculiar restrictions or disabilities upon a class of persons arbitrarily selected from a number of persons, all of whom stand in the same relation to the privileges granted or burdens imposed, and between whom and the persons not so favored or burdened no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privileges or burdens. The difference on which the classification is based must be such as, in some reasonable degree, will account for or justify the peculiar legislation". (*Ex parte Miller*, 162 Cal. 698.) "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, having a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification." (*Southern R. Co. vs. Greene*, 216 U. S. 417.) The right or privilege of a father to be the guardian of his own minor child does not in any respect depend upon or arise out of his nationality or his eligibility to citizenship in this country. It has no relation thereto. Such privilege is no doubt as much prized by a Japanese resident of good character who is not a citizen of this country and cannot become such, as by any other father of like character who is a citizen or is eligible to become one. A law denying the privilege to one class and giving it to the other cannot be said to be a law justified by a classification based on a distinction which calls for such peculiar legislation. Such attempted classification does not relieve the act from the charge that it violates the Fourteenth Amendment.

[12] 3. The foregoing observations apply with equal force to the proposition that the act of 1920, taken in connection with section 1751 of the Code of Civil Procedure, denies to the child, Tetsubumi Yano, the privileges guaranteed to her by the Fourteenth Amendment to the Constitution of the United States and by section 21, article I, of the constitution of this state. Section 21 declares that no *citizen* or class of *citizens* shall "be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens". The child is a native citizen of the United States and of the State of California. Nothing can be denied to her because of her race or color that is not denied to all citizens regardless of race or color. Any privilege that is given generally to citizens of other races must also be

given to her upon the same terms, and her race cannot be considered as a factor in the problem, or as a cause for denial thereof to her. The effect of the two laws would be that all native minor children possessed of agricultural land in this state, whose parents are aliens residing in this state and eligible to citizenship, would have the privilege of having their father or mother appointed guardian of that part of their estate, while, on the other hand, all native-born minors who are possessed of agricultural land in this state, whose parents are aliens and reside here, but are ineligible to citizenship, if a guardianship of such land is necessary or convenient, would be compelled to have strangers as such guardians. Furthermore, while a native California child of alien Japanese parents, if over fourteen years of age, could nominate its own father as the guardian of its personal property or of its real property leased for purposes of trade or residence solely (Code Civ. Proc., sec 1748), it must nominate some stranger as guardian of any farming land it may own. No such burdensome disability is imposed upon any native-born child whose parents are citizens or eligible to citizenship. All such discriminations are forbidden by the constitutional provisions above mentioned.

It is argued on behalf of respondent that the object of the law is to prevent evasions of the law forbidding aliens ineligible to citizenship to acquire, possess, or enjoy agricultural land, that the only class doing so is composed exclusively of aliens who cause land to be vested in their own minor children, with a view of being appointed guardian of the estate of such children, and that it is permissible for the state to regard the persons who are producing the evil which it desires to prevent, as a class by themselves and to enact such measures operating only upon that class as may be necessary to accomplish the desired object, as has been pointed out in *Patson vs. Pennsylvania*, 232 U. S. 138, and *Ex parte Spencer*, 149 Cal. 401. But even in such case, as has been shown, the differences on which the classification is based must suggest a reason for the peculiar legislation and the legislation must be such as will have some tendency to remove the evil intended to be prevented. The appointment as guardian would not enable such parents to acquire, possess or enjoy agricultural land, and therefore their ineligibility to such appointment could not prevent their so doing. A guardian neither acquires, possesses, or enjoys the property belonging to the ward, in any accurate or legal meaning of those terms. At most, he merely has, for some purposes, the control of the property, but the control is not in his own right and does not inure to his benefit. He controls it as trustee only, and is held to strict accountability to the child for all the benefits accruing from the use of it. He must render such accounts annually, or oftener, if required by the court. (Code Civ. Proc., secs. 1773, 1774.) He must hold all the receipts from the farming operations as the property of the native-born child, and must use so much of it for the support and education of the child as may be necessary, and no more, and must safely invest the remainder as the property of the child and for its sole use and benefit. In all of his acts as guardian he is under the supervision and control of the superior court of the county. His compensation is limited to the reasonable value of his services and is to be fixed by that court. The use is in the child, not in the guardian. When the child becomes of age the control of the guardian immediately ceases. If the child should die the control would pass forthwith to its heirs, and the alien parent, in that event, would not even inherit the property or any part thereof. It seems plain that since the alien parent could not by this means evade the operation of the law, nor acquire, possess or enjoy agricultural land, the law cannot

be upheld on the ground that such persons constitute a class, and the only class, who attempted to evade the law forbidding alien ownership. They could not by the use of such guardianship enjoy the rights of ownership. The classification is, therefore, clearly arbitrary and does not "suggest a reason which might rationally be held to justify" the peculiar legislation addressed to the class, as it is said in *Darcy vs. Major, supra*.

The object sought to be attained by these statutory provisions, that is, to discourage the coming of Japanese into this state, may be a proper one, and may be even desirable for the promotion of the welfare and progress of the state. The court can only consider its validity under the limitations of the Constitution. A similar object prompted the adoption of the anti-Chinese provisions of the Constitution of 1879, which, so far as they were effectual, were declared invalid by the federal courts. This entire question is international in character and is a matter properly to be disposed of by the Federal Government. Appeal for its adjustment should be made to Congress, rather than to attempt to accomplish it by discriminatory legislative measures of the state.

Our conclusion is that the provisions of the initiative act of 1920 forbidding the appointment of an alien resident, ineligible to citizenship, as guardian of the farming land of his native-born child, and authorizing the removal of such parent, if previously appointed as such guardian, are invalid.

The order appealed from is reversed.

(Shaw, C. J., Sloane, J., Waste, J., Shurtleff, J., Wilbur, J. and Lennon, J., concur.)

In the Matter of the Estate and Guardianship of TETSUBUMI YANO, a Minor. HAYAO YANO. Petitioner and Appellant. Sac. No. 3191.

RE. OPINION OF THE SUPREME COURT.

By ALBERT H. ELLIOT.

Two points seem to be clearly settled by the opinion of the court in the above-entitled matter:

First: An alien Japanese father, otherwise competent, is entitled to letters of guardianship over the person and estate of his child, regardless of whether that child was born in the United States or not; and so far as the Alien Land Act of 1920 interferes with that right, it is contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States.

Second: A Japanese child, born in the United States, is a citizen thereof, and is entitled, as of right, to have his father, otherwise competent, appointed as guardian of his person and estate; and the Alien Land Act of 1920, so far as it interferes with said right, is contrary, both to section 1 of article 14 of the Constitution of the United States and also to section 21 of article I of the constitution of California.

These seem to be the fundamental questions decided definitely by the opinion in the above case. Incidental questions are also disposed of as follows:

(a) The father of a minor child, otherwise competent, regardless of whether he is an alien or a citizen, is entitled as a matter of right, under the provisions of the Codes of California, to the guardianship of the person and estate of his minor child.

(b) A deed of real property executed in favor of a minor child is pre-

sumed to be delivered and accepted by the child and the recording of the deed itself constitutes a sufficient delivery.

(c) Where the father, alien or citizen, pays the consideration for the transfer of land to his minor child, a trust is not established in the father's favor.

(d) The restriction of the Alien Land Act of 1920 to the effect that an alien ineligible to citizenship cannot be appointed guardian of the person and estate of his child, is clearly a discrimination against citizens of Japan residing in California.

(e) The withholding from aliens ineligible to citizenship who are residents of California of the right to be guardians of their own children coupled with the granting of said right to all other aliens, is not granting to such aliens the equal protection of the law under the Fourteenth Amendment.

(f) The classification of aliens into those eligible and those ineligible to citizenship is an arbitrary one and, so far as such classification results in denying a privilege to one class and giving it to another, it cannot relieve the act of 1920 from the charge that in the particular matter of guardianship said act violates the Fourteenth Amendment.

(g) Even conceding that the preventing of the immigration of Japanese into California is a proper object to be attained, the entire question is international in character and an appeal should be made to Congress for the determination of the question rather than that states should attempt to accomplish such object by discriminatory legislation.

The practical result of the above decision is that a Japanese alien father may purchase agricultural land as a gift to his native-born child and he may be appointed guardian of the person and estate of his child unless he is shown to be otherwise incompetent. His right to make a *bona fide* gift to his child seems to be clear, but of course the gift must be in every sense in good faith. A reading of the decision seems also to indicate that the classification which is the basis of both the act of 1913 and the act of 1920 is arbitrary and contrary to the Fourteenth Amendment to the Constitution of the United States.

It would appear, therefore, that when the other provisions of both these acts, which are based upon the same classification, are called to the attention of the court, they will declare those provisions unconstitutional. We confess that after a careful reading of the opinion we can come to no other conclusion.

CHAPTER VII.—COCKRILL AND IKADA CASE.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent.
vs. W. A. COCKRILL and S. IKADA, Defendants and Appellants.

IN THE CALIFORNIA DISTRICT COURT OF APPEAL.

CRIM. 655. APPEAL FROM THE SUPERIOR COURT, SONOMA COUNTY.

1. APPELLANTS' OPENING BRIEF, BY ALGERNON CROFTON.

STATEMENT OF FACTS.

On August 26, 1921, Bartholomeu C. Souza and Mae C. Souza, his wife, made a contract with W. A. Cockrill, a practicing attorney of Santa Rosa, by which they agreed to sell to him five acres of agricultural land situated in Sonoma County. The first payment, \$150, was paid by the defendant Ikada, a Japanese subject, the father of several American-born minor children, and Cockrill's client.

The Souzas testified that both Cockrill and Ikada told the Souzas at the time of making the contract that the property was being purchased by Cockrill for the American-born children of Ikada.

The abstract showed numerous defects in the title and on September 24, 1921, Cockrill, as attorney for the Souzas, filed suit to quiet title.

Subsequently Cockrill was subpoenaed as a witness before the grand jury. He testified that Ikada was purchasing the property for his native-born children; that the contract of sale was taken in Cockrill's name as trustee for the children; that it was necessary to perfect Souza's title and then to complete the transaction by taking a deed in the name of the children and have a guardian appointed for the children.

At about the same time Cockrill established the American nativity of two of Ikada's children in the superior court in Sonoma County. The record of the birth of the other two native-born children had been properly made by the attending physician and it was therefore not necessary to establish their nativity by a court proceeding.

Soon after the contract was entered into, defendant Ikada, with his family, moved on the premises and there proceeded to construct some chicken houses and a dwelling house. He purchased lumber for this purpose.

At that time the Yano case had not been decided by the supreme court of this state, and while Cockrill believed that Ikada's native-born children could take title to agricultural lands in this state, and that the father could legally furnish the money for such purpose, he was of the opinion that the alien Japanese father could not act as guardian of his children's estate, and arrangements were made to have an American citizen appointed as such guardian, as soon as the title should be found good and the actual transfer made.

It is the contention of the prosecution that Cockrill took the contract of sale from the Souzas for the alien Japanese father and with the intention eventually to take the deed to the property in the same way and hold it in trust for Ikada.

It is the contention of the defendants that Cockrill took the contract of sale from the Souzas in his own name for Ikada's native-born children, with the intention that when the title was cleared a deed would be made to said children and a guardian appointed for them.

In other words, the state contends that Cockrill was a trustee for the father, while the defense contends that Cockrill was a trustee for the children.

HISTORY OF THE CASE.

On November 14, 1921, the grand jury of Sonoma County returned an indictment against Cockrill and Ikada charging them with conspiracy to violate the Alien Land Law. (Tr., pp. 3-4-5.)

Defendants moved to set aside this indictment (Tr., pp. 6-7) and also demurred. (Tr., pp. 8-9.)

On January 16, 1922, permission to file an amended indictment was granted by the court (Tr., p. 27), and thereupon the district attorney filed the amended indictment. (Tr., p. 10.)

On January 23, 1922, upon arraignment of the defendants under the amended indictment, defendants filed a motion to set it aside, and also demurred. The district attorney again admitted error, and asked leave to amend the indictment, which was granted by the court. (Tr., p. 28.)

On January 30, 1922, the district attorney asked leave to file a so-called second amended indictment, which motion was granted and the so-called second amended indictment filed. (Tr., p. 28; 2nd am. ind., Tr., p. 13.)

On February 3, 1922, it was ordered by the court that defendants' motion to strike out the first amended indictment and the demurrer thereto be considered as filed against the second amended indictment. The motion to set aside the second amended indictment and the demurrer were denied and overruled, respectively, and the defendants were arraigned upon the so-called second amended indictment and pleaded not guilty. (Tr., p. 29.)

The trial came on June 26, 1922. A jury was impanelled and at the close of the prosecution's evidence a motion for an advisory verdict was made by defendants and denied by the court. (Tr., p. 195.)

The jury returned a verdict of guilty and the defendants, upon arraignment for judgment, made a motion for an order in arrest of judgment, which was denied. (Tr., p. 300.)

A motion for a new trial was then made, which was also denied. (Tr., p. 316.) Sentence was pronounced June 30, 1922. (Clerk's transcript, p. 35.) From the judgment of conviction and order denying a new trial both defendants appealed. (Tr., pp. 59 and 324.)

INDICTMENT.

Indictment for conspiracy to effect a transfer of real property in violation of the Alien Land Law of the State of California.

W. A. Cockrill and Y. Akado are accused by the grand jury of the County of Sonoma, State of California, by this indictment, found this 15th day of November one thousand nine hundred and twenty-one of the crime of conspiracy to effect a transfer of real property in violation of the Alien Land Law of the State of California, committed as follows:

The said W. A. Cockrill and Y. Akado on or about the 19th day of September, nineteen hundred and twenty-one, at and in said County of Sonoma, State of California, that the said defendants W. A. Cockrill and Y. Akado did then and there wilfully, unlawfully and feloniously conspire together to effect a transfer of real property in the County of Sonoma, State

of California, and an interest therein, and did so wilfully, unlawfully and feloniously take and enter into an agreement to purchase certain real property from Bartholomeu C. Souza and Mary C. Souza in the name of said defendant W. A. Cockrill and paid thereon the purchase price thereof the sum of one hundred and fifty dollars, lawful money of the United States, which said money so paid on said purchase price was paid by said defendant Y. Akado, said Y. Akado being an alien and a subject of the Empire of Japan and not being then and there an alien eligible to citizenship under the laws of the United States, and there not being then and there any treaty existing between the Government of the United States and the Government of the Empire of Japan providing for the acquiring, possessing, enjoying and transferring real property or any interest therein, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of California.

G. W. HOYLE,

District Attorney of said County.

Dated November 15th, 1921.

Names of witnesses examined before the grand jury on finding the foregoing indictment:

John A. Anderson, W. Grindle, M. Acorne, J. H. Gallagher, Ivar Peder sen, Earl Doss, Robert Magetti, Dr. L. H. Snow, W. A. Cockrill, Bartholomeu Souza, Mrs. Mae Souza, Doctor H. S. Rogers.

Let the defendants be admitted to bail in the sum of \$2500.00 each.

Emmet Seawell, judge of the superior court.

Dated Nov. 15th, 1921.

[Endorsed]: (Title of court and cause.)

Indictment for conspiracy to effect a transfer of real property in violation of the Alien Land Law of the State of California.

A true bill. Harry L. Hall, foreman of the grand jury. Filed Nov. 15, 1921. W. W. Felt, Jr., county clerk.

By Chas. T. Byington, deputy clerk.

AMENDED INDICTMENT.

Amended indictment for conspiracy to effect a transfer of real property in violation of the Alien Land Law of the State of California.

W. A. Cockrill and Y. Akado, also known as S. Ikada, are accused by this amended indictment filed in the above entitled court this 16th day of January, 1922, by the district attorney of Sonoma County, of the crime of conspiracy to effect a transfer of real property in violation of the Alien Land Law of the State of California; the original indictment in which said defendants are accused by the grand jury of Sonoma County, State of California, being found on the 15th day of November, 1921, accusing said defendants with the crime of conspiracy to effect a transfer of real property in violation of the Alien Land Law of the State of California. That said crime of conspiracy to effect a transfer of real property in violation of the Alien Land Law of the State of California was committed as follows: That the said defendants, W. A. Cockrill and Y. Akado, also known as S. Ikada, did then and there wilfully, unlawfully and feloniously, conspire together to effect a transfer of agricultural and farming real estate, land and property, in the County of Sonoma, State of California, and an interest therein, and did so wilfully, unlawfully and feloniously take and enter into an agreement to purchase certain agricultural and farming real estate, land and property, from Bartholomeu C. Souza and Mary C. Souza in the name of said defendant W. A. Cockrill, for the use, benefit, enjoyment, possession,

occupation and control of said Y. Akado, also known as S. Ikada, and paid thereon, on the purchase price thereof, the sum of one hundred and fifty dollars, lawful money of the United States, which said money so paid on said purchase price was paid by said defendant, Y. Akado, also known as S. Ikada; said Y. Akado, also known as S. Ikada, being then and there an alien, and a subject of the Empire of Japan, and not being then and there an alien eligible to citizenship under the laws of the United States, and there not being then and there any treaty existing between the Government of the United States and the Government of the Empire of Japan, providing for the acquiring, possessing, enjoying, owning and transferring agricultural and farming real estate, land and property, or any interest therein.

Contrary to the form, force and effect of the statutes in such case made and provided, and against the peace and dignity of the people of the State of California.

G. W. HOYLE,
District Attorney of said County.
By ROSS CAMPBELL,
Assistant District Attorney.

Dated January 16, 1922.

The names of the witnesses examined before the grand jury: John A. Anderson, W. Grindle, M. Acorne, J. H. Gallagher, Ivar Pedersen, Earl Doss, Robert Magetti, Dr. L. H. Snow, W. A. Cockrill, Bartholomeu Souza, Mrs. Mae Souza, Doctor H. S. Rodgers.

[Endorsed]: (Title of court and cause).

Amended indictment for conspiracy to effect a transfer of real property in violation of the Alien Land Law of the State of California.

Filed Jan. 16, 1922. W. W. Felt, Jr., county clerk, by Chas. T. Byington, dep. clerk.

SECOND AMENDED INDICTMENT.

Second amended indictment for conspiracy to effect a transfer of real property in violation of the Alien Land Law of the State of California.

W. A. Cockrill and Y. Akado, also known as S. Ikada, are accused by this second amended indictment filed in the above-entitled court this 30th day of January, 1922, by the district attorney of Sonoma County, of the crime of conspiracy to effect a transfer of real property in violation of the Alien Land Law of the State of California; the original indictment in which said defendants are accused by the grand jury of Sonoma County, State of California, being found on the 15th day of November, 1921, accusing said defendants with the crime of conspiracy to effect a transfer of real property in violation of the Alien Land Law of the State of California. That said crime of conspiracy to effect a transfer of real property in violation of the Alien Land Law of the State of California was committed as follows:

That the said defendant W. A. Cockrill and Y. Akado, also known as S. Ikada, on or about the 19th day of September, 1921, at and in said County of Sonoma, State of California, did then and there wilfully, unlawfully and feloniously conspire together to effect a transfer of agricultural and farming real estate, land and property, in the County of Sonoma, State of California, and in interest therein, and did so wilfully, unlawfully and feloniously take and enter into an agreement to purchase certain agricultural and farming real estate, land and property from Bartholomeu C. Souza and Mary C. Souza in the name of said defendant W. A. Cockrill, for the use, benefit, enjoyment, possession, occupation and control of said Y. Akado, also known as S. Ikada, and paid thereon, on the purchase price thereof, the sum of one

hundred and fifty dollars, lawful money of the United States, which said money so paid on said purchase price was paid by said defendant Y. Akado, also known as S. Ikada; said Y. Akado, also known as S. Ikada, being then and there an alien and a subject of the Empire of Japan, and not being then and there an alien eligible to citizenship under the laws of the United States, and there not being then and there any treaty existing between the Government of the United States and the Government of the Empire of Japan, providing for the acquiring, possessing, enjoying, owning and transferring agricultural and farming real estate, and property, or any interest therein. That said agricultural and farming real estate, land and property, which said defendants W. A. Cockrill and Y. Akado, also known as S. Ikada, conspired to effect a transfer of, and an interest therein, as aforesaid, was, and is not acquired in the enforcement nor in the satisfaction of any lien existing upon said agricultural and farming land and property nor interest in such property. That said agreement to purchase said land and property hereinbefore set forth was taken in the name of defendant, W. A. Cockrill, for the use, benefit, ownership, enjoyment, possession, occupation, and control of said Y. Akado also known as S. Ikada, with the intent and for the purpose of preventing, evading and avoiding the escheating of said land and property to the state. Said W. A. Cockrill not having then and there any interest in said land and property in fee or otherwise.

Contrary to the form, force and effect of the statutes in such case made and provided, and against the peace and dignity of the people of the State of California.

G. W. HOYLE,
District Attorney of said County.
By ROSS CAMPBELL,
Assistant District Attorney.

Dated January 30, 1922.

The names of the witnesses examined before the grand jury: John A. Anderson, W. Grindle, M. Acorne, J. H. Gallagher, Ivar Pedersen, Earl Doss, Robert Magetti, Dr. L. H. Snow, W. A. Cockrill, Bartholomeu Souza, Mrs. Mae Souza, Doctor H. S. Rogers.

[Endorsed]: (Title of court and cause).

Second amended indictment for conspiracy to effect a transfer of real property in violation of the Alien Land Law of the State of California.

Filed Jan. 30, 1922. W. W. Felt, Jr., county clerk, by Chas. T. Byington, dep. clerk.

ASSIGNMENTS OF ERROR, NOS. 1, 2, 3 AND 4, AND ARGUMENT.

(1) The court erred in reading to the jury as an instruction section 9 of the Alien Land Law. (Tr., p. 281, line 27 *et seq.*)

(2) The court erred in instructing the jury that any burden of proof was upon defendants as appears in reporter's transcript, page 284, lines 4 to 8, to-wit:

"The burden of proving that such conveyance or agreement to convey such agricultural real estate or an interest therein was not made with intent to prevent, evade or avoid an escheat of said land to the state, is upon those persons claiming that it was not made with such intent."

(3) The court erred in permitting the deputy district attorney to read and discuss to the jury section 9 of the Alien Land Law. (Tr., p. 255, line 24, to p. 258, line 27.)

(4) The court erred in rereading to the jury, at the jury's request, while deliberating upon their verdict, section 9 of the Alien Land Law. (Tr., pp. 293-4.)

The full instruction complained of gave to the jury four sections of the Alien Land Law alleged to be applicable to the case at bar, as follows:

"Section 1 of the Alien Land Law of this state provides that all aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property or any interest therein in this state in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Section 2 of the Alien Land Law of this state provides that all aliens other than those mentioned in section one of the Alien Land Law, which has just been read to you, may acquire, possess, enjoy and transfer real property, or any interest therein, in this state in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

"Section 9 of the Alien Land Law of this state provides that every transfer of real property, or of any interest therein, though colorable in form, shall be void as to the state, and the interest thereby conveyed or sought to be conveyed shall escheat to the state, if the property interest involved is of such a character that an alien mentioned in section two thereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat.

"A *prima facie* presumption that the conveyance is made with intent to prevent, evade or avoid escheat shall arise, if the property is taken in the name of a person other than the persons mentioned in section two of said Alien Land Law, if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two of said Alien Land Law.

"Section 10 of said Alien Land Law provides that if two or more persons conspire to effect a transfer of real property or of an interest therein in violation of said Alien Land Law, they are punishable by a fine or by imprisonment, or by both."

To the giving of section 9 of the Alien Land Law, as an instruction, to the repetition of its substance during the trial and to its use in argument to the jury, as designated in the assignments of error, we have three separate and serious objections:

First, that the section is unconstitutional;

Second, that it is violative of the treaty of 1911 existing between the United States and Japan;

Third, that it creates a rule of evidence to be applied only in certain escheat proceedings and not intended for or applicable to criminal trials.

I.

The portion of section 9 of the Alien Land Law which attempts to create a prima facie presumption is unconstitutional.

The constitutional provision violated, is the right of the Japanese father to the equal protection of the laws, guaranteed by section 1, article XIV of the Constitution of the United States. That section declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

It has been emphatically established in California that a Japanese father may obtain the conveyance of land to his native-born child, even though

his reason was confessedly that the law did not allow him to buy it for himself.

"The act of petitioner in securing conveyances of land to his daughter, while confessedly carried out because the laws of California did not permit him to buy it for himself, was in no sense unlawful since the daughter is a citizen of the United States and entitled to acquire and own real estate. There is nothing in the evidence to indicate that it was not the purpose of this conveyance to vest absolute title to the land in the minor. (*In re Estate of Yano*, 63 C. D. 515, 518.)"

It follows, of course, that a Japanese father may obtain the conveyance of land to a trustee for his native-born child. The validity of each transaction rests upon exactly the same legal basis.

No question of the right of the Japanese father to hold land himself is involved in either case.

If a father of, say, Swedish or any other nationality desires to make a gift of land to his American-born child and to place the property for any reason in the hands of a trustee for that child he may do so without hindrance.

On the other hand a Japanese father doing exactly the same thing has a legal presumption raised against the transaction which casts a burden of proof upon him because of his nationality, with the penalty of the escheat of the property to the state if the presumption is not controverted to the satisfaction of a jury.

It is obvious that a law which subjects aliens of one nationality to certain rules of evidence not applicable to citizens or aliens generally is not according to all the equal protection of the laws, and is thus unconstitutional.

That a Japanese alien is a "person" entitled to the full benefit of the Fourteenth Amendment is held without reservation in the Yano case (63 C. D. 515, 520) where another portion of the Alien Land Law was under consideration.

Said the court by Chief Justice Shaw:

"Section 1 of article XIV of the Constitution of the United States declares that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' We had occasion to consider this language in *Ex parte Kotta*, decided on September 12, 1921 (200 Pac. 957). We said there that 'the word "person" as used in this amendment includes aliens', and quoting from *Yick Wo vs. Hopkins*, 118 U. S. 396, that it applies 'without regard to any differences of race, of color or nationality', and that the guarantee of 'the equal protection of the laws is a pledge of the protection of equal laws.' These statements are also quoted and approved by the Supreme Court of the United States in *Truax vs. Raich*, 239 U. S. 33. In *Barbier vs. Connolly*, 113 U. S. 31, the court declared that this guarantee means that 'equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights.' It needs no argument to demonstrate the proposition that a law which gives to one person the right or privilege of becoming the guardian of his child and withholds it from another, both being alike competent in all respects, is not equal as between the two persons. The person from whom it is withheld is not in such a case accorded the protection of equal laws. In this respect the initiative act of 1920 is clearly a violation by this state of the guarantee contained in the Fourteenth Amendment, that no state shall deny to any person the equal protection of its laws."

Nor should it be contended in the present case that any theory of classification of aliens according to their eligibility to citizenship will cure the palpable defect in section 9, because in the Yano case, *supra*, the court continues:

"It cannot be successfully contended that the law may be declared valid in this respect on the ground that persons who are ineligible to citizenship under the laws of the United States form, by reason of that fact alone, a class by themselves, for which the state may enact peculiar legislation depriving them of rights or privileges which are accorded to others not of that class."

The right of a father to make a gift to his child, whether direct or in trust, does not depend on his eligibility to citizenship, any more than does his right to guardianship which was upheld in the Yano case, on which point the court said at page 521:

"It (the right of guardianship) has no relation thereto. Such privilege is no doubt as much prized by a Japanese resident of good character who is not a citizen of this country and cannot become such, as may any other father of like character who is a citizen or is eligible to become one. A law denying the privilege to one class and giving it to the other cannot be said to be a law justified by a classification based on a distinction which calls for such peculiar legislation. Such attempted classification does not relieve the act from the charge that it violates the Fourteenth Amendment."

Therefore, because a material instruction of the lower court was a statement of a law which contravenes the Fourteenth Amendment to the Constitution of the United States, the defendants are entitled to a new trial.

II.

The portion of section 9 of the Alien Land Law which attempts to create a prima facie presumption is violative of the Japanese-American treaty of 1911.

The treaty provision violated is the right of the Japanese father to enjoy the same rights and privileges as native citizens in respect to his person and property, guaranteed by article I of the Japanese-American treaty of 1911.

Article I of the treaty reads, in part, as follows:

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

We think it unnecessary to submit to the court any authority for the statement that a treaty is the supreme law of the land and equal to the Constitution itself in its binding effect upon the several states, further than *Ex parte Terui*, 187 Cal. 20.

It has never been and probably will not be suggested that the subjection of aliens to special rules of evidence is a matter beyond the treaty-making power of Congress. We will, therefore, not erect a man of straw for the pleasure of demolishing him, but will reserve the presentation of authority and argument, should any such contention be advanced in the brief of the learned attorney-general.

The argument that section 9 contravenes the treaty differs from the argument that it infringes the Constitution, in the main only so far as the phrase "the same rights and privileges" differs from the phrase "equal protection of the laws."

It would seem that the power to make a gift to one's child is both a right and a privilege, as it should be. Certainly counsel despairs of finding authority to support such an axiomatic truth.

If this be true, and if also the power is a right and privilege possessed by native-born Americans, then section 9 prevents a Japanese making a gift to his children through a trustee, free of burden, although all others may do so, and so violates his treaty right.

For while other citizens and other aliens may trustee property for their children, it is impossible for a Japanese to do it without raising the ogre of escheat and undertaking to disprove a *prima facie* presumption to a jury where unfortunately prejudice and passion are sometimes factors.

It is clear that a law which subjects a Japanese to certain rules of evidence not applicable to citizens generally does not accord to him the same rights and privileges as are enjoyed by native citizens.

We repeat here, as in the constitutional argument, that in the instant case no question is involved of the right of the state to forbid the acquisition of agricultural land by Japanese. The treaty gives such aliens no such privilege. But the right of a Japanese to make a gift to his child, an American citizen, who as such is entitled to take and hold it, has been strongly upheld by the Supreme Court.

What we urge here is that a Japanese has the right to convey to a trustee for his native-born child without raising thereby any presumption in favor of escheat. If it be contended that the defendant Japanese caused the land to be conveyed to his co-defendant as trustee for himself, and not for his child, we answer that there is not one iota of evidence to that effect, except the presumption whose constitutionality and validity we attack. Moreover, even that presumption is not of an intent to violate the law, but merely one of an intent to prevent and avoid—evade if you will—escheat. If one prevents escheat he prevents it only because no interest was transferred and the law was not violated.

If section 9 be constitutional and if, further, it were held to be a rule of evidence applicable to criminal proceedings, the state could now arrest Yano and his child for conspiracy, as in this case, prove that Yano paid the purchase price, prove that the title was taken in the child's name, claim that the child held as trustee for Yano, raise the presumption and convict them both for a transaction which the supreme court has said was perfectly legal.

The facts in the Yano case are quite as indicative of an intent to escape escheat as those at bar. Without reference to the record there, it is apparent from the language of the opinion that Yano caused the land to be conveyed to his child because he could not buy it himself.

This act, says the court, "while confessedly carried out because the laws of California did not permit him to buy it for himself was in no sense unlawful since the daughter is a citizen of the United States and entitled to acquire and own real estate." (*In re Yano*, 63 C. D. at p. 518.)

Continuing, Chief Justice Shaw says, "There is nothing in the evidence to indicate that it was not the purpose of this conveyance to vest absolute title to the land in the minor."

Similarly and almost identically runs the record of the defendant Ikada's intents and acts, while as to the defendant Cockrill, the record is perfectly bare of any evidence except that he advised his client that a conveyance of the land to a trustee for the American child would be good. And that we submit was and is the law.

Thus, the law of section 9, given by the court as an instruction, is, in addition to other objections, invalid because it subjects Japanese to a rule of law and a detrimental presumption not laid on native citizens and is thus violative of the treaty.

III.

Section 9 of the Alien Land Law creates a rule of evidence to be applied only in certain escheat proceedings and not intended for or applicable to criminal trials.

Two separate proceedings are provided for by the Alien Land Law in sections 9 and 10. Section 9 provides for a civil proceeding of escheat, while section 10 provides for a criminal prosecution for conspiracy to violate the law.

The actions have no relation to each other. The first is a civil action, cause for which arises only after an interest in land has been transferred to an ineligible alien. The second is a criminal action maintainable against not less than two persons, and apparently not requiring as a base that any transfer of land or violation of the law be made at all. The first is a proceeding *in rem*, the second *in personam*. The penalties are entirely different and the only connection between the two actions is that they both are created by the same statute.

Section 9 has to do with the civil action—the escheat. It provides that any transfer to an ineligible alien, although it may be colorable in form, is void as to the state and is subject to escheat, providing that it were made with intent “to prevent, evade and avoid escheat.” (Apparently if such a transfer were made without an intent to avoid escheat the alien’s title would be unassailable.)

As an aid to the state in proving the existence of an intent to prevent escheat, section 9 next creates a new rule of evidence for use in this particular escheat proceeding, and says that an intent to prevent escheat shall be presumed from the fact that the alien paid the money and title was taken in the name of another. This casts on the alien or perhaps on the grantee, it is not clear which, the burden of disproving such an intent.

But that presumption is raised only in an escheat proceeding. It can have nothing to do with a criminal action.

Its very wording makes it plain that it is impossible to apply it to the crime set out in section 10. The presumption is of an intent to prevent escheat. Such an intent is not a crime nor part of a crime. Neither section 10 nor any other part of the law attempts to make it such.

A man may intend to avoid escheat and be possessed at the same time of a firm intention to keep the law. In fact his intent to prevent escheat would, in order to prevail, necessarily involve observance of the law because any transfer of an interest would invite escheat.

Be that as it may, the law does not make an intent to prevent escheat either criminal or evidence of a crime.

Such an intent becomes wholly immaterial if applied to section 10. It tends neither to prove nor disprove any violation of the law. *It has a function to perform in section 9 but none in section 10.* Under section 9 proof of an intent to prevent escheat must be made before escheatment, but in section 10 the intent to be proved is an intent to violate the law, an entirely different intent and one which cannot exist contemporaneously in the same mind with the other.

Yet the lower court instructed the jury (Trans., p. 284, line 4) that “the burden of proving that such conveyance * * * was not made with

intent to prevent, evade or avoid an escheat of said land to the state" was upon the defendants.

Clearly this was an error. Such an intent had naught to do with their guilt or innocence.

The only way in which the Alien Land Law can be violated is to transfer an interest in agricultural land to an ineligible alien.

Therefore the only possible conspiracy to violate the law must consist of an intent to transfer an interest in such land to such an alien.

But an intent to transfer an interest in agricultural land is an entirely different thing to an intent to prevent escheat. The two intents are not sharply distinct, they are not even related.

An intent to transfer land may or may not be a violation of section 10, *but it is plain that an intent to avoid escheat is not.* The law does not attempt to say so. A man may possess such an intent with no intent to transfer an interest illegally, and there is no reason, either legal or logical, why a jury should be instructed, as they were in this case, that a man accused of conspiracy to violate the law, must successfully assume the burden of disproving a presumption that he intended to avoid escheat, or be found guilty.

His guilt depends solely upon whether he did or did not conspire to transfer an interest in agricultural land to an ineligible alien. It does not depend at all upon whether he desired to prevent and avoid a forfeiture to the state, and the law does not make any such provision. The penal section, 10, is not concerned with the escheat.

Let us assume for a moment that the Alien Land Law had been divided into two different statutes, one a civil statute providing for the escheat of land conveyed to ineligible aliens and raising the presumption, and the other a criminal statute making it a crime to conspire to transfer land to such persons.

It would be a bold lawyer who would contend that the presumption of intent to avoid escheat, raised in the civil statute in behalf of the state, could be imported into the criminal proceeding as evidence to prove an intent to transfer illegally.

Especially is this true when it is noted that an intent to avoid escheat is certainly not an intent to transfer land to an ineligible alien.

If the legislature had intended that any presumption should be applied to criminal trials under section 10, it would have said so. But in order to effect this result, section 10 would have to be given a clause substantially as follows: "A conspiracy to violate the law shall be presumed from the fact that an ineligible alien paid the purchase price and title was taken in the name of another."

More than that, it would be necessary to state against which of the three parties necessary to any such transaction, the presumption would arise, whether against grantor, grantee or alien. Conspiracy would have to be proved against two or there would be no conspiracy. In the complete absence of any such language or provision, it is clear that in the criminal proceeding the rules of evidence have not been changed.

Crimes cannot be built up by implication or inference or strained construction (*Ex parte McNulty*, 77 Cal. 164, 168), and while appellants believe that the most liberal construction of the statute would fail to support the giving of the instructions complained of, they submit the following rule:

"Where the statute not only effects a change in the common law, but is also in derogation of common rights, it must be construed with especial strictness." (36 Cyc. 1179.)

An example of such a statute is one which grants power to deprive persons of their property (*Trumpler vs. Bemery*, 39 Cal. 490), and a statute which aids the state to escheat a person's property and which divests him of a defense or of the presumption of innocence is clearly covered by the rule.

Therefore, we submit that because the court instructed the jury that the defendants must disprove a presumption that they had an intent to prevent and avoid escheat, the judgment must be reversed.

IV.

The instructions as to section 9 were material and did affect the substantial rights of the defendants.

No refuge may be taken by the prosecution under any theory that the instructions as to section 9 were immaterial or that they did not affect the substantial rights of the defendants.

If argument be deemed necessary on this, we point to the fact that the jury after retiring, returned to the courtroom and asked that one of the instructions containing section 9 be reread to them, which was done. (Reporter's transcript, p. 292, line 25 *et seq.*)

Obviously the jury was confused on one and possibly two important points: First as to where the burden of proof as to intent lay, and, second, as to whether an "intent to prevent, evade or avoid escheat" was an "intent to transfer land to an ineligible alien."

The giving of section 9 as an instruction directly misinformed the jury as to the first point, and by inference as to the second.

Even if it be contended that the reading of section 9 was merely the correct statement of an unrelated proposition of law and not prejudicial, our reply is that there are "cases in which an instruction involving an abstract statement of a proposition of law would be and is harmful to the accused." (*People vs. Rowland*, 12 Cal. App. 6, 24; *People vs. Roe*, 64 Cal. sec. 264, 269, 270, 271.)

Moreover, while the first instruction as to the burden of proof (Trans., p. 282, line 9 *et seq.*) might be said to be merely an abstract statement, no such claim can be made for the second instruction (Trans., p. 284, line 4 *et seq.*), where the court expressly laid the burden of proof on the defendants.

V.

The presumption of section 9 cannot be indulged in opposition to the presumption of innocence.

If now the appellate court should decide that section 9 is not unconstitutional, that it is not violative of the treaty and that it applies to criminal prosecutions, we have yet one important point to raise in opposition to its influence on the verdict. That point is contained in the question: Is the presumption of section 9 strong enough to overcome the presumption of innocence?

To this we contend a negative answer must be given. The rule is given in 16 Corp. Juris 542:

"Some courts state the rule is broadly to be that, as between conflicting presumptions, that which is in favor of the innocence of accused prevails, at any rate, where two equal presumptions, one in favor of innocence, and the other in favor of guilt, are presented, the one in favor of innocence is to be preferred and applied. Certain presumptions which might be invoked in civil actions, such as the presumption of delivery of an instrument arising

from the fact of possession by the party to whom delivery must be made, or the presumption of ownership arising from possession, cannot be indulged in a criminal proceeding in opposition to the presumption of innocence."

More succinct is the opinion of this court in *People vs. Scott*, 22 C. A. 54, 60, where it is said: "This (conflicting presumption) cannot be indulged in opposition to the presumption of innocence where a material element of a serious criminal charge is involved."

Thus in a criminal case the presumption of section 9 could not be allowed to overcome the presumption of innocence, even if the section could by any twist of reasoning be considered as appreciative to section 10. So because the jury were practically instructed that section 9 overcame the presumption of innocence the judgment must be reversed.

ASSIGNMENTS OF ERROR, NOS. 5 AND 6, AND ARGUMENT.

(5) The court erred in denying defendants' motion to set aside the second amended indictment. (Tr., pp. 20 to 23.)

(6) The court erred in instructing the jury that the defendants were charged by an indictment "found against them by the grand jury." (Tr., p. 287, line 5.)

The so-called second amended indictment, under which the defendants were convicted (Tr., pp. 13-15), was not an indictment at all, neither was it an information.

Section 940, Penal Code, provides that an indictment cannot be found without the concurrence of at least twelve grand jurors, and that when so found it must be endorsed "a true bill", and signed by the foreman.

Section 944, Penal Code, provides that an indictment, when found by the grand jurors, must be presented by their foreman, in their presence, to the court.

The original accusation against these defendants was, so far as the records show, properly found, endorsed, signed, presented and filed. (Tr., pp. 3-5). This indictment was admittedly insufficient to charge an offense because the grand jury did not find several facts essential to charge an offense under the Alien Land Law, to wit:

"First, the indictment did not charge that the land involved was agricultural land or that it was not land which an alien Japanese might acquire for residence or commercial purposes in accordance with the treaty between the United States and Japan;

"Second, the grand jury did not find or charge that the transaction was for the use or benefit in any way of the defendant Akado;

"Third, the grand jury did not find or charge that the land was not to be acquired for the use and benefit of defendant Cockrill, in whose name the contract was taken;

"Fourth, the grand jury did not find or charge that the contract was not taken, or that the land was not to be finally transferred, in satisfaction of any lien thereof."

Each of these allegations of fact were necessary to a valid indictment, and without them, an indictment for conspiracy to violate the Alien Land Law is insufficient.

Upon arraignment, defendants moved to set aside this original indictment, and also demurred. (Tr., pp. 6-9.) Upon argument of the motion and demurrer, the district attorney asked leave to file an amended indictment, which was granted by the court and a so-called amended indictment

was thereupon filed (Min. of Court, Tr., p. 27; Amended Ind., pp. 10-12). No order of court was made resubmitting the indictment to the grand jury, and no action was taken by the grand jury on the amended indictment. It was wholly the act of the district attorney so far as finding and presenting are concerned.

The amended indictment attempted to cure the defects in matters of substance existing in the original indictment found by the grand jury by adding to it:

(a) The finding of the material fact that the land involved was agricultural and farming real estate, etc. (Tr., p. 10, lines 26-27; p. 11, lines 1-4);

(b) The finding of the material fact that the contract was taken in the name of defendant Cockrill for the use, benefit, enjoyment, possession, occupation and control of defendant Akado (Tr., p. 11, lines 5-6).

(c) Third, the finding of the material fact that there was no treaty between the United States and Japan relating to the acquiring, etc., of agricultural lands.

The amended indictment did not, moreover, charge *either the time or place* of the alleged conspiracy.

These were matters of substance, and absolutely necessary to a valid indictment.

Upon arraignment under this so-called amended indictment, the defendants moved to set it aside, and also demurred.

Before the court passed upon this motion and demurrer, the district attorney confessed error and asked leave to file a second amended indictment, which was by the court granted, and the so-called second amended indictment was filed. (Min. of Court, Tr., p. 28; Second Amended Ind., Tr., pp. 13-15.)

No order was made re-submitting the matter to the grand jury and no action was taken by the grand jury on the so-called second amended indictment, the finding and filing of which was wholly the act of the district attorney.

The second amended indictment differed from the amended indictment only in this:

(a) It alleged the material allegation of time and place of the alleged conspiracy (Tr., p. 13, line 26), which was not alleged in the amended indictment.

(b) It added the material allegation that the land involved "was, and is not acquired in the enforcement or satisfaction of any lien." etc. (Tr., p. 14, lines 25-27.)

(c) It alleged that the contract was taken in the name of defendant Cockrill for the use and benefit, etc., of defendant Akado "with the intent and for the purpose of preventing, evading and avoiding the escheating of said land and property to the state" (Tr., p. 15, lines 1-7);

(d) It added an allegation that defendant Cockrill had no interest in said land in fee or otherwise. (Tr., p. 15, lines 7-8.)

With the exception of the allegation of time and place none of the added and vital allegations of fact found in the first and second amended indictments were in the original indictment. Each one of these allegations is material and as a matter of substance necessary to a sufficient indictment under the Alien Land Law, and requires proof in order to convict.

Upon arraignment under the so-called second amended indictment, the court ordered that the motion to set aside the first indictment, and the

demurrer to it, be considered as filed to the second amended indictment, and thereupon denied the motion, and overruled the demurrer.

A motion to set aside an indictment comes first in the order of procedure as laid down in the Penal Code, and provides that an indictment must be set aside upon motion of the defendant, "Where it is not found, endorsed and presented as prescribed in this code."

This was one of the grounds of the defendants' motion to set aside. (Tr., p. 16.)

We think it cannot be denied that the second amended indictment was not so found, endorsed or presented.

Section 997 Penal Code provides that if the motion to set aside be denied, the defendant must immediately answer the indictment, either by demurring or pleading thereto. If the motion is granted, the defendant must be discharged, unless the court directs that the case be re-submitted to the same or another grand jury; and section 998 provides that in such case the defendant must be held either in custody or on bail to "answer a new indictment," not an amended indictment.

We respectfully ask the court at this juncture to bear in mind that we are now urging the point that a motion to set aside an indictment precedes, and must be disposed of prior to, the consideration by the court of a demurrer to the indictment. The reason for this is that a motion to set aside an indictment is directed solely to procedure in the finding, endorsing, and presenting of the indictment. If it be not found, endorsed, and presented as code prescribes, it must be set aside, and the matter ordered re-submitted to the grand jury for a new indictment, or the defendants must be discharged. A demurrer attacks only to the sufficiency of an indictment as a pleading after it is determined to have been properly found, endorsed and presented.

The original indictment was perhaps properly found, endorsed and presented, and the motion to set it aside on that ground properly denied; but upon demurrer to it as a sufficient pleading it was found and conceded by the district attorney to be lacking in several vital and substantial averments. The court permitted the district attorney to file an amended indictment without directing it to be re-submitted to the grand jury and without it having been either re-submitted or approved.

If the original indictment was to have been amended in matters of form only, no valid objection could be raised to this being done without a re-submission to the grand jury, as provided in section 1008 Penal Code. But it is manifest that it could not be so amended, and that it had to be amended by the addition thereto of the material allegations of fact alleged in the first amended indictment, and in the second amended indictment. This being the case, it was reversible error for the court to permit the district attorney to file a new indictment or an indictment amended in matters of substance, under the guise of an amended indictment without it being found, endorsed, and presented by the grand jury as the code provides.

The motion, therefore, to set aside the first amended indictment should have been granted, and for like reasons, of course, the second amended indictment should have been set aside. The defendants were tried and convicted upon a pretended indictment which was not an indictment at all, neither was it a valid information, although it is, in fact, an accusation by the district attorney, but not found and filed by him as the code provides for the filing of informations. (Sec. 809, Pen. C.).

The conviction of the defendants was had without due process of law.

in violation of U. S. Const., Fifth Amendt.; sec. 13, art. I, Cal. Const.; sec. 8, art. I, Cal. Const

It may be claimed by the attorney-general that section 1008 of the Penal Code authorizes a district attorney to file, or the trial court to permit to be filed, an amended indictment such as the first and second amended indictments in this case. But this section does not authorize the filing of a new document by the district attorney, where the amendments are of matters of substance.

In the case of *People vs. Tinnen* (Cal. App.), 192 Pac. 557, the court said, in announcing the familiar rule respecting the allegations of an indictment:

"Sufficient facts must be directly alleged in a criminal pleading from which it can be determined that the acts complained of are wrongful and unlawful and in construing an indictment or information nothing must be left to implication, intendment, or conclusion, and none but ultimate facts are to be pleaded, but when ultimate facts are alleged from which but one conclusion can follow, and which conclusion irresistibly follows from the facts so alleged, the pleading is not in violation of the rule if the conclusion is not expressly or directly alleged."

The original indictment returned by the grand jury in this case does not at all measure up to the rule above. So far as the facts alleged show, the transaction was an entirely innocent one. The land sought to be transferred might have been land for residential or commercial purposes, and not agricultural land. The transaction as alleged could lead but to one conclusion, and that was that the land was to be transferred to the defendant Cockrill. The allegation that the money paid thereon was paid by defendant Akado, an alien Japanese not entitled to acquire land in the United States, is, either standing by itself or in connection with all or any of the other allegations of fact in the indictment, an allegation of a valid and innocent act.

To make the fact of the payment of the money on the purchase price by defendant Akado appear criminal it is necessary to allege that he paid the money, and that defendant Cockrill took the contract in his own name for the use and benefit of defendant Akado and with the intent to violate the provisions of the Alien Land Law. In addition it would be necessary to allege that said land was agricultural land and that the transfer was not taken in satisfaction of any lien thereon, in accordance with the exception in the Alien Land Law, section 7.

Under section 1008, Penal Code, no amendment can be made by the court or district attorney to an indictment in matters of substance. This is distinctly held in the case of *People vs. Anthony*, 20 Cal. App. 586, 589, where the court said, upon objection raised to an amendment of an indictment by the district attorney:

"The code section (1008 Pen. C.) must be read and construed in its entirety; and when so read and construed it is manifest that the district attorney is not empowered thereby to amend an indictment or an information in matters of substance. If the code section under discussion purported to permit an amendment to anything but the mere formal allegations of an indictment we would have no hesitation in holding such a procedure unconstitutional. The constitution contemplates that an indictment shall be found and presented by a grand jury (Const., art. 1, sec. 8); and to permit the district attorney to amend an indictment in matters of substance would in effect render the indictment no longer the finding of the grand jury. It is evident, however, that the code section in question contemplates and

permits an amendment to an indictment or information by a district attorney only in so far as such amendment relates merely to matters affecting the formal parts of an indictment or information. That this is so is manifest from the language of the section itself, which plainly provides that an indictment cannot be amended by the district attorney, "so as to change the offense charged."

In the case of *People vs. Webber* (44 Cal. App. 120), 186 Pac. 406, the court held that the granting of permission to amend an indictment so as to state an offense would have been error under Penal Code, section 1008, if the indictment before amended did not charge an indictable offense.

We think the authorities above cited are quite sufficient, but there are many authorities to the same effect in other jurisdictions, where statutory provisions exist similar to section 1008 of our Penal Code. In an extensive note on the subject of amendments to indictments are cited many authorities sustaining the general proposition contended for here, to-wit, that an indictment may not be amended by the court or district attorney in matters of substance. This note is found in 7 A. L. R., page 1548, under the heading "Averment of essential fact", where the writer says:

"An indictment which has omitted an allegation, proof of which is necessary to a conviction, is fatally defective, and the court cannot authorize an amendment curing the defect."

Then follow citations supporting the text from numerous states in this country and also England and Canada. We quote from a few only:

In *Kline vs. State*, 44 Miss. 317, the indictment was for prosecuting secular business on Sunday in violation of statute. It failed to negative an exception in favor of "druggists and apothecaries." The court held that the allowance of an amendment remedying the defect was a material change not authorized by the following provision of the statute (Rev. Code, p. 615, Art. 257):

"An indictment may, with consent of the grand jury or of the court, be amended at any time during the term of court at which it was found, or afterwards by the consent of the defendant, with permission of the court," and that the authority therein granted extended only to amendments in matters of form.

In the instant case, the negative provisions of the Alien Land Law, to-wit, that the land was not agricultural land, and that the transfer was not taken to satisfy or enforce a lien, are exceptions requiring negation, as did the exception relating to "druggists and apothecaries", in *State vs. Kline*, *supra*.

In *State vs. Cannon*, 118 Miss. 230, 79 So. 85, it was held, on the prosecution of an indictment for a violation of the statute against liquors shipped into the state under a fictitious name, that the omission to charge that the liquor ordered was to be shipped to the defendant was a vital defect, and as such the court could not remedy the omission by amending the indictment.

This holding was in view of the same statute referred to in *Kline vs. State*, *supra*.

The statute in New Jersey provided that amendments might be authorized on the trial of any indictment where there appeared to be a variance in the name of any place, person owning property, or person, property, or thing named therein, or in the manner of describing the offense, or in case any error in form appeared in the indictment, and that on objection to the indictment, before the jury was sworn, for any defect of form or substance apparent on its face, the court might authorize an amendment curing such defects.

In *State vs. Startup*, 39 N. J. L. 423, it appeared that an indictment charging the defendants as members of the board of public works of Jersey City with having unlawfully entered into a contract for work and materials without advertising for proposals, failed to allege a criminal intent in the failure to advertise. This was an essential element of the crime, and it was held that the omission could not be supplied by amendment under the statute above referred to, since, while the expression "defect of substance" contained in the statute might well cover the special points named, "it is plain that the legislature cannot constitutionally authorize an amendment in substance, which will change an indictment found by a grand jury so as to substitute one crime for another charged therein; *nor, if the indictment failed to set out any crime, can the court so amend it as to charge the crime which it is supposed they intended.*" (Italics ours.)

In the case at bar the original indictment charged no offense, and the material averments added by the district attorney were necessary to charge an offense, and were therefore not permissible under the statute.

To the same effect is the case of *State vs. Ham*, 72 N. J. L. 4, 60 Atl. 41, where it was held that allowing an amendment changing an averment as to the place of sale of intoxicating liquors was material and therefore not permissible. The court there held that the sale of liquor is not of itself criminal (this being before prohibition was in effect), and that it only became so when it was made without a license.

In the case at bar, the purchase of land as alleged in the original indictment is not criminal and could only be so when shown to be made in violation of the Alien Land Law, which the original indictment did not show.

Also in *State vs. Twining*, 71 N. J. L. 388, 58 Atl. 1098, in an indictment which charged the conversion by the defendants of property belonging to a corporation, for the use of the defendants and the corporation, an amendment was allowed so as to charge that the defendants converted the property to their own use. It was held that the amendment was not authorized by the statute providing that defects of form or of substance apparent on the face of the indictment might be amended by the court after demurrer or motion to quash. The court said:

"To convert the corporation's property to the corporation's own use, clearly, is not a criminal offense. * * * the indictment failed, therefore, to charge a crime. The amendment by which it was made to charge a crime was in violation of the constitutional right of the defendant not to be held to answer to a criminal offense, unless on the indictment of a grand jury."

In the first amended indictment, so called, filed by the district attorney in the instant case (Tr., pp. 10-12), there was no averment of time or place of the alleged offense. The demurrer to the original indictment having been in effect sustained, the original indictment could no longer be considered. So far as the so-called amended indictment could be considered at all, it was insufficient to charge an offense because it did not allege any time or place, and the second amended indictment, so called, which supplied the averment of time and place (Tr., p. 13, lines 26 and 27), added a vitally material amendment of substance and decidedly not of form, and was therefore invalid. It was material to know the place of the alleged offense in order that it might be shown that the court had jurisdiction of it. It was also material to know the time of the alleged offense in this case because the Alien Land Law had at the time of the filing of the indictment been in effect only about one year. The defect here is not similar to one where *some* time is alleged within the period of the statute of limitations, and where the allowance of an amendment to show the true date within such

period, where there was alleged an erroneous date within the period stated, might be proper.

In the case of *State vs. Amidon*, 58 Vt. 524, the court said:

"In indictments, matters of form may be amended; matters of substance may not be. It may be difficult to express in exact language that will be applicable to every case, what constitutes the substance of an indictment, and what is merely formal. In general, I think it may be laid down that the statement of every fact necessary to be proven to make the act complained of a crime is matter of substance in an indictment, and that all beyond the order of arrangement, the precise words, unless particular words alone will convey the proper meaning, is formal."

An information or indictment must show affirmatively that the offense was committed within the jurisdiction of the court. (*People vs. Webber*, 133 Cal. 623.)

In *re State vs. Chamberlain*, 6 Nev. 257, an indictment charging the defendant with murder contained no allegation as to the locus of the crime. The trial court, on motion, allowed an amendment to the indictment supplying the omission, after which the trial proceeded to a verdict of guilty. On appeal the defendant claimed that the trial court had erred in allowing the amendment, and the court said:

"This point we think well taken. An allegation of the county wherein a crime is committed is manifestly material, as much so as any fact constituting the body of the offense itself. * * * Such allegation being a material and essential part of the indictment, it is clear the court could not amend it by the addition of such allegation, for the obvious reason that the constitution of this state (art. 1, sec. 8) prohibits the trial of any person for a capital or other infamous crime * * * except on presentment or indictment of a grand jury. There can be no difference of opinion as to what is meant by the expression 'Indictment of a grand jury.' It manifestly means a written accusation made and presented by the inquisition known as a grand jury. * * * But if, after being presented to the court, an indictment so found be in any particular materially modified or altered, if anything of substance be added to or taken therefrom by the court, it cannot with any degree of propriety be denominated an indictment of a grand jury."

That an indictment may not be amended in matters of substance seems to be supported by simple logic and by a plenitude of authorities.

That the first and second amended indictments in the case at bar were amended in several different matters of substance without resubmission to a grand jury is incontrovertible.

There seems to be but one possible conclusion: That the motion to set aside should have been granted.

ASSIGNMENT OF ERROR, NO. 7, AND ARGUMENT.

(7) The court erred in overruling defendants' demurrer to the second amended indictment. (Tr., pp. 20 to 23.)

For the same reason assigned for error under assignments Nos. 5 and 6 it was error for the court to overrule defendants' demurrer to the so-called second amended indictment.

In addition the so-called indictment is, in our opinion, fatally defective in this: It charges that the contract to purchase the land was taken in the name of defendant Cockrill "for the use, benefit, enjoyment, possession, occupation and control of said Y. Akado, etc." (Tr., p. 14, lines 5 to 9, inc.)

This language is repeated in the indictment in lines 2 to 5, inclusive, page 15 of Transcript.

The language of the Alien Land Law prohibits aliens ineligible to citizenship from "acquiring, possessing, enjoying, transmitting (conveying)" agricultural real property.

The added words "use, benefit, occupation, control," used in the indictment, are in this case not merely superfluous and therefore harmless, nor merely words meaning the same as the words used in the statute. The harmfulness in this case of such additional words is readily seen when we come to examine the evidence and the instructions.

The defendant Ikada was the father of citizens of the United States, for whom the land was to be purchased. As their father he would be entitled to act as the legal, as well as the natural, guardian of his children, and would have the absolute right as such legal guardian to the "use, benefit, occupation, and control" of the land, accounting for the same, of course, to the children. (*In re Yano*, 63 Cal. Dec. 515.)

In the Yano case the court said, at page 522:

"A guardian neither acquires, possesses, or enjoys the property belonging to the ward, in any accurate or legal meaning of these terms. At most, he merely has, for some purposes, the control of the property, but *the control is not in his own right, and does not inure to his benefit*. He controls it as trustee only, and is held to strict accountability to the child, for all the benefits accruing from the use of it. (Italics ours.)"

By the foregoing language the words "acquire", "possess", and "enjoy", used in the Alien Land Law, are distinguished from the words "control", "benefit", and "use", which are used in the indictment, as, presumably, synonymous with the words "acquiring", "possessing", "enjoying", used in the statute.

Now, no harm might be done the defendants by the use of such additional words in the indictment in a case where the ineligible alien had no minor children citizens of the United States. But the use of such words in this case were particularly harmful, because the court permitted the prosecution to introduce evidence over the objection of the defendants that defendant, Ikada, after the contract of purchase was entered into between Cockrill and the Souzas, moved onto the land with his family and proceeded to make improvements; and the court thereafter instructed the jury (Tr., p. 42) that if they found that the transfer of the land, or any interest therein, "was taken in the name of the defendant W. A. Cockrill, to the end that the defendant S. Ikada, might acquire, control, possess and enjoy the issues and profits arising out of the same", the verdict should be guilty as charged, if as the defendants claim, the land was held for the children, then as their natural guardian, Ikada certainly had the right and even the duty to control the land and his control should not have been used as evidence against him.

The so-called indictment is not therefore direct and certain as regards the offense charged, nor the particular circumstances of the offense charged, and the demurrer should have been sustained.

ASSIGNMENT OF ERROR, NO. 8, AND ARGUMENT.

(8) The court erred in overruling defendants' objection to the reading of portions of the transcript of defendant Cockrill's examination before the grand jury and in denying motions to strike out portions thereof. (Tr., pp. 165, 171, 172, 173, 174, 175, 176, 177, 182, 183.)

A transcript of defendant Cockrill's examination before the grand jury was introduced in evidence by the prosecution. The court permitted the

prosecuting attorney to read to the jury, over the objections of the defense, portions of this transcript consisting of legal opinions by the district attorney and expressions of various jurors as to the meaning, intent, and policy of the Alien Land Law, and also expressions of opinion by grand jurors as to defendant Ikada's guilty intent. To aid the court's survey of this matter we print the objectionable matter in italics. We quote, beginning at line 19 page 164 of transcript, Mr. Campbell reading:

"Mr. Cockrill: A. There was one case came to me some months ago, and I think that case, I don't remember the names, it is hard to remember the name, but I think in that case, they were going to have some American born of age buy it, and have it in their name, some one beyond the age of 21. I explained on each one of those occasions that it was against the policy of the law to have Japanese buy it, but I could not swear under the law that an American born could not get it, after proper process, if they insisted on doing it. And Mr. Comstock agreed with me on that same line and the other attorneys I talked with, too.

"Q. That would be true, would it, Mr. Cockrill, if the child, a native born citizen, who was purchasing, and in whose name the land was taken actually put up the money himself or herself with which to buy?"

"A. Yes, that would.

"Q. But if the money was put up by somebody else, that is, for instance, by the father for a young minor child, it would really bear the earmarks of being an attempt to evade the law, don't you think, Mr. Cockrill?"

"A. Oh, in a way, yes, sir, but if you look at it from the other hand, Mr. Hoyle, suppose you wanted to deed property to your own child under age; you could do it or you could give him the money and have a trustee appointed and have him use that money under a court order.

"Mr. Crofton: If you are reading just Mr. Cockrill's statement that would be different, but you are reading questions by Mr. Hoyle, too.

"The Court: I do not see it would make any difference whether it is or is not read, as far as the point you are urging is concerned.

"Mr. Crofton: The point I make is this, your Honor, if I may make it again: this being placed before the jury in the form of an examination of one of the defendants by the district attorney, he was asked a question here which, I think, in the light of the decisions that have come down since, is a misstatement of the law and I think it is improper to read that question to the jury without an explanation that it is not the law.

"The Court: Well, it is just the opinion of the attorneys as to what the law is, is it not? It is a discussion of a question of law that does not bind anybody. Either read it, or skip it, it does not matter. It is not material. Go ahead with the next, that is, go right on to the next question. It is just a discussion between the district attorney and Mr. Cockrill as to what the law is. You might omit it. It is not connected with anything else, is it? Is it connected with what follows?

"Mr. Campbell: Well, there is quite a lot of it here. I do not know where to stop.

"Mr. Crofton: If the court please, I would like to read it. I have no objection to its going before the jury with the proper explanation.

"The Court: You can do that in your argument when it comes to the argument.

"Mr. Crofton: May I illustrate? As Mr. Campbell says, there is quite a lot of it. There is another answer here: 'I think that was the endeavor of the last Legislature to put that bill through, and they failed.' I don't think those questions ought to be asked.

"The Court: It is utterly immaterial, but it is a part of the conversation.

"Mr. Crofton: This is supposed to be a statement by the defendant Cockrill.

"The Court: I know, I know, but it does not stop the answers the questions elicit. Go ahead and read it all. There is a lot of it you are right about. It is immaterial, just a discussion. Probably quicker and easier to get through with it. I do not think it is prejudicial to anybody from what I see of it here. (Tr., pp. 164 to 167.)

"Mr. Campbell resumes reading:

"Juror: *What difference would it make about the trustee, if the father is putting up the money. It seems to me that would show that he was buying for himself.*

"A. Well, I suppose, directly it would be that way, if the question came up. But the children, of course, would be heirs of the parents, anyhow. If anything happened to the father and he died tomorrow, the money would be theirs immediately.

"Juror: *Does it look as though they were trying to evade the law by buying that way?*"

"Mr. Crofton: We renew our objection to this portion of the testimony, a statement by members of the grand jury, that is improper. It is a statement by the grand jury to this jury, not a statement by Mr. Cockrill about anything.

"The Court: It is only eliciting his answers. Of course, he answers the question. Overruled.

"Mr. Campbell (resumes reading): 'Juror: *Doesn't it look as though they were trying to evade the law by buying that way?*'

"A. Well, the way the last matter came up in the legislature I thought that was settled, that they were allowed to, as long as they were born here. That was my understanding of it.

"Juror: *What is your opinion of that, Mr. Hoyle?*

"Mr. Hoyle: The section that seems to me to cover the situation is section nine of the Initiative Act which was passed by a vote of the people.'

"Mr. Crofton: I move the testimony of Mr. Hoyle be stricken out.

"The Court: It is only a statement of his in the course of the conversation. Objection overruled. Motion denied.

"Mr. Campbell (resumes reading): 'Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section 2 hereof is inhibited from acquiring possession, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.'

"A *prima facie* presumption that the conveyance is made with such intent shall arise upon proof of any of the following group of facts:

"(a) The taking of the property in the name of a person other than the persons mentioned in section 2 hereof, if the consideration is paid, or agreed or understood to be paid by an alien mentioned in section 2 thereof.

"So under that, it would seem to me, Mr. Cockrill, if the purchase price was to be paid by a person who came within the provisions of section 2 of the act, which includes all persons who are not eligible to become citizens of the United States, even though the property was taken in the name of a minor, and yet the purchase price paid by such alien, according

to the terms of that section, it would be prima facie evidence—prima facie presumption that the conveyance is made with such intent, that is, with the intent to avoid and evade the law of escheat under that act.

"Mr. Crofton: We renew our objection.

"The Court: That is argument, that is largely argumentative.

"Mr. Campbell: Yes.

"The Court: Well, omit that if you can.

"Mr. Crofton: Our objection is that, if your Honor please, is that that portion of the statute refers to the escheat of property, and has nothing to do with the section under which this indictment is laid.

"The Court: This is a legal argument between them, it seems, and it goes to no fact as to how the transaction was consummated or expected to be consummated.

"Mr. Campbell: I think that is all of that. (Reading): 'A. Well, that may be right. I was going on the Alien Land Act, and my interpretation of it, under our general laws. Of course, if they were going outside of their family and getting somebody to take it, that would be more plainly contrary to the law. I considered that the children would be entitled to that just the same as if anything happened to the parents.'

"Q. *Of course, it practically sums itself up, doesn't it, Mr. Cockrill, into this, as to whether or not this Japanese, that is, the father of this boy, is in reality buying the land for his own benefit, for his own use, and expecting to reap the profits from it, and attempting to evade the law by simply getting it in the name of the boy that was born in this country?*

"A. Well, that is a pretty broad question.

"Mr. Crofton: I move that be stricken out as being argumentative.

"The Court: A great deal of it is argumentative, the effect of the statute rather than a statement of a question of fact, I suppose when a couple of lawyers get to talking, why, you expect all argument and little fact. There is no statement of facts there. Pass over to about the transaction, that is what we want to know, not about the construction of law, to save time, unless there is a great deal of it and it will take you some time to go through. A great deal of it is immaterial. Some of it is a statement of fact, of course. The difficulty of it is you get so much of it in the minds of the jurors it is hard to separate the facts from the argument, rather confusing more than helpful.

"Mr. Campbell: I will skip then.

"Mr. Crofton: Page 16, about the middle of the page is the next question to the witness.

"Mr. Campbell: Page 16, line 4:

"Mr. Hoyle: *As I understand this section where property is acquired in violation of this Act, it is subject to escheat to the State the entire property.*

"Mr. Crofton: Well, we object to that your Honor. Clearly that is a question that has to do with the escheat of property to the state. That is not concerned in this case at all.

"Mr. Campbell: Well, I would like to read that.

"The Court: If it gives the attitude of the person charged it is material. If it is just simply a discussion of law, of course it would be just a waste of time. Well, read it, go ahead, it is quicker to read it.

"Mr. Campbell (Reading): 'A. The state takes it over.

"Mr. Hoyle: The state simply takes over the title to the land.

"A. That is the main reason why I did not go any further with it when I heard this was coming up, because I did not want to put them in

that position where the state could take it away from them, and it could be stopped just where it is.

"Juror: What were you waiting for before you took further action? The decision from the grand jury, or the district attorney, or the judge, or what?

"A. I was waiting to see what the grand jury would do about it, then I would take it up with the district attorney and discuss it with him. Of course, I did not want to try to override that law, and I don't think the other parties do, either. I think it was my interpretation of the law that they went by. I don't think it was the intention of them to evade it. I would not want to have anything like that to occur.

"Juror: *Mr. Cockrill, if that child is in possession of that land, then, under the law, the land would revert back to the state, wouldn't it?*

"A. Since the question came up Mr. Vonsen, that is when I found it was coming up here, that is why I held it up, because it would depend upon some other matters that have come up in court and discussed with some other very important attorneys before I would go any further with it. Because if that is going to be knocked out, or going to a higher court, I wouldn't want it to go any further. That is, I wouldn't want it to go any further right now, because it would not only hurt me professionally, but it would be an injury to my client financially.

"Juror: *How do you feel about the case now?*

"Mr. Crofton: We object to that, your Honor, as incompetent, irrelevant and immaterial.

"The Court: I do not know what his answer is. Go ahead.

"Mr. Campbell: (Resumes reading): 'A. There is a lot of doubt in my mind about it since it has taken the steps it has.

"Juror: *If this case had not come before the Grand Jury, Mr. Cockrill, then you would have got your foot in it in good shape, wouldn't you?*

"A. That would depend upon the decision of the court on that.

"Juror: *You say now you have your doubts about it, but when you started it, you didn't have any doubts?*

"A. No, as I say, after talking to some other attorneys about it, before I said anything about it I thought I was right in my interpretation of the law. I thought I was taking the right steps. I never thought the question would be raised against an American-born Japanese.

"Juror: Are they still improving the land with buildings?

"I have not been down there at all, Mr. Petray. I did not know what questions was coming up in regard to it. I knew there was something about it, but I didn't know where I was. I didn't feel at liberty to ask any of them anything about it.

"Juror: *It seems to me it is a pretty big undertaking for such a flimsy contract or agreement. If this thing would go through, other Japanese would buy land all over the country.'*

"Mr. Crofton: I move that be stricken from the record as incompetent, irrelevant, immaterial and prejudicial.

"The Court: Well, it is only the effect of it, it is only the effect of it. It does not help anything, does not go to this particular transaction. Does the answer involve anything that is material, or bring in anything that is material? (The court refers to transcript.) Well, it is on the question as to policy, most all of that is merely a discussion of the policy and does not hurt nor help anything, does it?

"Mr. Campbell: No, I do not think so, yet I cannot offer a portion of the statement, it seems to me.

"The Court: That is, if it is objected to. Here there is no complaint made to your not reading it. The rule is where you offer a statement all of it is entitled to be received, and this should go in if that would help in the slightest. It is a general discussion on the advisability of the Japanese people being permitted to own, directly or indirectly, land, is it not?

"Mr. Campbell: Down on page 19, line 10, I think it gets back to this: (Resuming reading): 'Juror: *Didn't you think, according to that law, that the transaction was illegal?*'

"A. Well, I would not want to express an opinion on that.

"Juror: *The law is quite plain the way he read it there, if the father puts up the money.*

"A. It would certainly forbid one Japanese from going outside of his family and getting somebody else to handle the money for him. But whether the law would consider that he could not place it in his own offspring, I would not want to say that.

"Mr. Hoyle: *Mr. Cockrill, do you think there would be any particular difference? Do you really think that would make any difference at all? Now, as far as a gift of the money is concerned, I would have a perfect right, if I wanted to, to give a bunch of money \$100 or \$500 or \$5,000 to somebody else's child as well as my own child. It is my own property and I could do as I pleased with it.*

"A. Yes, but take this case on the other hand; supposing these contracts were to go through, and he deed it to me, and I lease it to this man for twenty years, or deed it to him in escrow for any one of those children, so when they became of age they could take it. You could not stop them from getting it that way, could you?

"Mr. Hoyle: *I am inclined to think we could stop the lease.*

"A. Well, they are leasing land all around.

"Mr. Hoyle: A straight lease?

"I don't know, I have not read the leases. I don't know whether it is on a straight lease, or how, but they are leasing it.

"Mr. Hoyle: *There are some of them that have been endeavoring to evade the law, but I don't know of any straight leases in this county. If there has been any, I would like to know of them.*

"Juror: *Don't some of the Japanese lease property around in this country?*

"Mr. Hoyle: *There are no straight leases that I know of in existence.*

"Juror: *How have they got by with it?*

"Mr. Hoyle: *They have been getting by with it under a so-called straight contract, and there are two of those cases up now.*

"Juror: *Supposing that man has six or seven children and buys land for all of them?*

"Juror: *He will earn the money of this five or six acres and go to work and buy another five or six acres and continue buying.*

"Juror: *Until he owns half of Petaluma.*

"A. *My idea of that is we ought to stop that with the seller, and not with the buyer so much.*

"Juror: *They claim they sold it through you, don't they?*

"A. *They claim that now to protect themselves, but that was not the understanding and that was not their endeavor or their desire. They knew who they were selling it to, they understood that very thoroughly.*' (Tr., 171 to 180.)

The quoted expressions of opinion and arguments of the district attorney

and of certain grand jurors could not have failed to impress and influence the trial jurors adversely to the defendants. It amounted to getting before the trial jury the argument of certain grand jurors, who, no doubt, were personally known to many if not all of the trial jurors. It was permitting the jury to hear illegal and improper argument against the defendants. In other words, it was as though the grand jurors and the district attorney had made these arguments and statements to the trial jurors outside the court room and during a recess; and being sanctioned in the way it was by the trial judge, it could not fail to be prejudicial to the defendants.

The testimony of defendant Cockrill before the grand jury, as shown by the transcript, was in no way incriminating. There was nothing in his testimony admitting any criminal act, or criminal intent in entering into the contract, either upon the part of himself or the defendant Ikada. On the contrary all his testimony and actions showed complete innocence of any conspiracy or intention to violate the Alien Land Law. These expressions of opinion therefore of the grand jurors and the district attorney as to what they deemed guilty acts or intents or violations of the law, had no legitimate place in the statement, and certainly should not have been allowed to go before the trial jury. (*Peo. vs. Ayhens*, 16 Cal. App. 618, at pp. 622-3-4.)

It is not competent for either an ordinary or an expert witness to give his opinion or conclusion as to the validity or construction of a statute or written instrument or as to any other question of law within the province of the court to decide. (16 C. J. 1546, and cases cited.)

ASSIGNMENT OF ERROR, NO. 9, AND ARGUMENT.

(9) The court erred in instructing the jury as appears in reporter's transcript, page 290, lines 13 to 18.

The court erred in giving that part of the following instruction printed in italics, to-wit:

"The jury are the sole judges of the evidence. It is for them alone in the exercise of legal discretion and in subordination to the rules of evidence to judge of the credibility of the witnesses, of the weight to be given to the evidence, and of its effect and conclusiveness to establish any fact for which it is offered. In so doing *they must consider the character and appearance of the witnesses*, and from these and such reasons as may have appeared to the jury upon the case presented, they may judge and determine as to the credibility, weight, effect and sufficiency of such testimony."

This is not only a departure from the law, it is hostility to the law, and is in our opinion reversible error, in that the jury were told that the weight and credibility of the testimony given by a witness was to be measured by the character *and appearance of the witness*, and that from such character and appearance, they were to judge and determine as to the credibility, weight, effect and sufficiency of such testimony.

Section 1847 of the Code of Civil Procedure says: "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or his motive or by contradictory evidence; and the jury are the exclusive judges of his credibility."

In the case of *Fries vs. American Lead Pencil Co.*, 141 Cal. 610, at page 612, the Supreme Court had under consideration an instruction given by the trial court almost identical in language, so far as it went, with the language complained of in the above instruction. In that case the trial court instructed the jury that "You are to judge of that (weight and credibility

of the testimony), by the *appearance of the witnesses* who have appeared on the witness stand." The Supreme Court said:

"Such is not only not the law, but it is hostility to the law. The law says that the presumption of truth telling may be repelled by the manner in which the witness testifies together with the character of his *testimony*. The appearance of the witness upon the stand is but one of the elements going to make up the manner in which he testifies, and to limit the jury in weighing the evidence to the appearance alone, and to charge them, as here they were charged, that the appearance of the witness alone is to govern them, is an error as injurious as it is unnecessary."

In the instruction given by the trial court in the instant case, the jury were told that in judging of the credibility of the witnesses, and the weight to be given to the evidence, they must consider the *character and appearance of the witnesses*.

Such an instruction was even more injurious than the one under consideration in *Fries vs. American Lead Pencil Co., supra*, because it not only instructed the jury they must consider the *appearance* of the witnesses, but also the *character* of the witnesses. They were not told that they were to consider the character of the testimony, but the character of the witnesses.

The reference to the character of the witnesses was not only not in accordance with law, but it was particularly harmful in that it assumed that there was evidence in the case affecting the character of one or more witnesses, and there was no such evidence whatever in the case. The jury might well have deemed it their duty under such instruction to take into consideration anything which they might have heard on the outside which in any way affected the character of any of the witnesses, either good or bad, or anything of that nature which they or any of them might personally know.

But the court went still further and told them they must consider not only character and appearance of the witnesses, but from such, and such reasons as may have appeared to the jury upon the case presented, they were to judge. There was no explanation of what was meant by this last phrase nor as to any legal limitation upon the jury in considering matters as may have appeared to them upon the case presented, nor whether they were limited to matters which so appeared from the evidence. Under that instruction the jury were free to consider anything that they might choose to consider in relation to the case whether occurring in the actual trial of the case or otherwise.

It is respectfully submitted that this instruction is wholly outside the law, was extremely injurious to the defendants and is reversible error.

ASSIGNMENT OF ERROR, NO. 10, AND ARGUMENT.

(10) The court erred in refusing to advise the jury to return a verdict of acquittal. (Tr., 203.)

The motion of defendants for an advisory verdict (Tr., p. 195) should have been granted.

The ground of the motion, the argument in support of it and the court's reasons for denial are reported verbatim in the transcript, pages 195 to 213. To repeat them all here would unnecessarily lengthen this brief and we respectfully therefore call the court's attention to the last cited pages of the transcript. We think a reading thereof will convince the court that the motion should have been granted.

The whole case of the prosecution rests upon the question of the intent with which Cockrill took the contract from the Souzas. This is a charge of

"conspiracy to effect a transfer of real property in violation of the Alien Land Law." (Tr., p. 13, lines 22-24.)

The overt act charged is the taking of the contract in the name of Cockrill from the Souzas.

The taking of the contract by Cockrill was at all times freely admitted.

All of the evidence of the prosecution on that subject was to the effect that Cockrill took the said contract for the benefit of and in trust for Ikada's native born minor children, a perfectly legal purpose. (See testimony of B. C. Souza on cross-examination, Tr., p. 133; testimony of Anna Souza on cross-examination, Tr., p. 116; testimony of defendant W. A. Cockrill before the grand jury, Tr., pp. 162, 163; statement of defendant Ikada, Tr., pp. 146, 148, 154, 155, 156.)

No evidence was offered to contradict the statements of the defendant Cockrill introduced by the prosecution that the contract was taken in the name of Cockrill for the use and benefit of defendant Ikada's native-born children and his direct evidence is confirmed by the further evidence of the prosecution that the defendant Cockrill immediately proceeded to have the birth of two of defendant Ikada's native-born children established of record. (Tr., pp. 163-4.)

Defendant Cockrill's statement in his testimony before the grand jury (Tr., p. 163), that he believed it to be better to take the preliminary contract in his name as trustee for the children until it was fully ascertained that the Souzas could give a good title to the property, is entirely consistent with innocence of any intent to violate the law.

The proceeding to establish of record the birth of two of defendant Ikada's native-born children, shows an additional reason for Cockrill's taking the contract in his own name, because, as he understood it, the transfer of the property would be made to all of the native-born children, and at the time of entering into the contract, the nativity of two of them had not been established of record. The whole record establishes that the transaction was entirely legitimate. It shows no conspiracy to violate the law, and there is not a scintilla of evidence to the contrary in the record.

The case should never have been submitted to a jury without advice by the court because it was plain that as a matter of law the evidence of the prosecution failed materially to measure up to the requirements which would justify the jury in dismissing from their minds the presumption of innocence which attaches to the defendants in every criminal case. A criminal intent is the essence of all criminal liability (16 C. J. 672) and the burden of proof is on the prosecution to prove beyond a reasonable doubt every fact and circumstance which is essential to the guilt of the defendant, and the burden of proof never shifts to the defendant. (16 C. J. 986.)

The *corpus delicti* must be proved by evidence independent of the extrajudicial admissions of the defendants. (*People vs. Simonsen*, 107 Cal. 345.) *In this case there was no evidence that either defendant—and if possible, less than both—intended that Cockrill should hold as trustee for the father, the vital fact to be found.* This made it the duty of the court upon request of the defendant to advise the jury to acquit. (*People vs. Ward*, 145 Cal. 736, 740.)

ASSIGNMENT OF ERROR, NO. 11, AND ARGUMENT.

(11) The court erred in instructing the jury as follows, reporter's transcript, page 285, lines 5 to 16:

"I instruct you that if you are convinced by the evidence beyond a reasonable doubt that the defendant, S. Ikada, is an alien not eligible to citizenship, and that the defendant, W. A. Cockrill, and said defendant S.

Ikada, conspired together to secure a transfer of agricultural or farming land and property, or an interest therein, from Bartholomeu C. Souza and May Souza, his wife, and that such transfer of such land and property, or any interest in such land and property was taken in the name of the defendant, W. A. Cockrill, to the end that the defendant, S. Ikada, might acquire, control, possess and enjoy the issues and profits arising out of the same, then I instruct you that your verdict should be guilty as charged."

This assignment of error in instructing the jury to the effect that the jury should find the defendants guilty if they believed from the evidence that the defendants conspired to effect a transfer of the property and that "such transfer of such land and property or any interest in such land or property was taken in the name of defendant W. A. Cockrill to the end that defendant S. Ikada might acquire, control, possess, and enjoy the issues and profits arising out of the same" is supported by our argument under Assignment No. 7, to which we respectfully refer the court. This instruction was erroneous for the reasons advanced under assignment No. 7 as to the sufficiency of the indictment and also because it is not a correct statement of the law.

Under the Yano decision an alien Japanese father, as the legal or natural guardian of his native-born children, may control, possess and enjoy the issue and profits arising out of agricultural property belonging to them. (In re Yano, 63 C. D. 515, 522.)

ASSIGNMENT OF ERROR, NO. 12, AND ARGUMENT.

(12) The court erred in refusing to give the following instruction requested by the defendants, appearing on clerk's transcript, page 49, lines 3 to 16:

"I instruct you further that you must not consider the testimony of Mr. Becker or Mr. Souza as to the purchase of lumber as evidence of any description against the defendant Cockrill, nor can you consider the testimony of Ivan Pedersen or Miss Hogan as evidence concerning Cockrill, nor is the testimony offered as to what Ikada said to the district attorney to be considered by you as evidence relating in any way to the defendant Cockrill and I instruct you that you are to disregard entirely all the said testimony so far as the defendant Cockrill is concerned. And further the Court does not intend by this instruction to imply that the said testimony has or has not any weight as to the other defendant, that is a matter for you to determine. I mean only that none of the said testimony is not to be considered by you so far as the defendant Cockrill is concerned."

In admitting the statements of the defendant Ikada made to the district attorney and to witness Ivan Pedersen, and also the testimony of the witnesses, Becker and Souza, as to the purchase of lumber, the court limited such evidence to the defendant Ikada (Tr., pp. 112, 113, 127, 135, 139, 145, 159).

The court in its instructions did state to the jury that "some testimony given on this trial has been admitted only for special and limited purposes. You must carefully bear in mind that testimony admitted for a limited purpose must not be considered for any other purpose than that for which it was admitted." (Tr., pp. 279-80.)

The court did not, however, explain to the jury what that testimony was, and the defendants were entitled to the instruction offered and quoted in order that the jury might fully understand that they could not consider any such testimony as against the defendant Cockrill.

With all due deference to the intelligence of the jury, we submit that the instructions given fall far short of that which could reasonably be

expected to inform the jury what evidence could not be considered against Cockrill. Both the defendants were entitled to have the jury more definitely informed on this point and the instruction offered and refused would have accomplished this necessary result.

In view of the fact that there were only two defendants, and that the charge was conspiracy, the jury should have been carefully instructed as to any limitation placed upon testimony admitted against one and not against the other, because *the jury could not find a verdict of guilty against either unless they found that the criminal intent existed in both of the defendants.*

In other words, under such a proper instruction as the one requested, the jury might believe that there was some guilty intent in the mind of the defendant as to whom the testimony was admitted, but such testimony not being applicable to the other defendant, they could not say that such other defendant also had the guilty intent, and therefore they must return a verdict of not guilty as to both defendants. We think it was reversible error to refuse the instruction.

ASSIGNMENT OF ERROR, NO. 13, AND ARGUMENT.

(13) The court erred in refusing to give the following instruction requested by the defendants, appearing on clerk's transcript, page 49, line 26, to page 50, line 6:

"I instruct you that no matter what you believe the intentions of defendant Ikada may have been, you cannot find the defendants guilty of conspiracy unless you find also that the defendant Cockrill had an intent to violate the law. In other words, if the intention of either Cockrill or Ikada was that the land should be a gift to the native-born children of Ikada, there was no conspiracy. The law provides a penalty only when at least two people agreed to violate the law."

The importance of this instruction is apparent, in connection with the instruction refused and referred to under assignment No. 12, and the same argument applies. Appellants were clearly and emphatically entitled to this instruction.

ASSIGNMENT OF ERROR, NO. 14, AND ARGUMENT.

(14) The court erred in refusing to give the following instruction requested by the defendants, appearing on clerk's transcript, page 50, lines 8 to 14:

"I instruct you that the Alien Land Law provides a penalty for a conspiracy to violate its provisions, but I also instruct you that an evasion of a law is not a violation of it, and that even if you believe that one or both defendants intend to evade the law, you cannot find either of them guilty unless the evidence shows beyond all reasonable doubt that both defendants intended not to evade but to violate the law."

It was error of the court to refuse this instruction because it declared the law laid down in the matter of Yano, *supra*. In view of the constant quoting of section 9 of the Alien Land Law, containing the false quantity of "evasion" the instruction was not only proper but necessary.

ASSIGNMENT OF ERROR, NO. 15, AND ARGUMENT.

(15) The court erred in refusing to give the following instruction requested by the defendants, appearing on clerk's transcript, page 51, lines 1 to 8:

"The court charges the jury that before it can convict the defendants, or either of them, upon the theory of conspiracy between them, you must

find from the evidence beyond a reasonable doubt and to a moral certainty that they conspired together to violate the provision of the Alien Land Law and that their purpose was, as alleged in the indictment that the defendant Cockrill should take title to the land in question and hold it in trust for the defendant Ikada."

In the absence of such an instruction, the jury may well have believed, and we think the record shows they did believe, that even though title to the land was to be taken eventually in the names of Ikada's native-born children, the fact that Ikada himself paid the purchase price constituted a violation of the Alien Land Law. The proposed instruction would have cleared the minds of the jurors of any confusion in that behalf.

ASSIGNMENT OF ERROR, NO. 16, AND ARGUMENT.

(16) The court erred in refusing to give the following instruction requested by the defendants, appearing on clerk's transcript, page 51, line 24, to page 52, line 14:

"The court further instructs the jury that as a matter of law the defendant Ikada, the father of the native-born children, could not by reason of the purchase or transfer of the real property to his native-born children acquire any title of interest whatever in the said property. And you are further instructed that if you believe from the evidence in the case that the defendant Ikada did move onto the property in question after the agreement between the Souzas and the defendant Cockrill was entered into for the purchase of said property, and that he did in fact proceed to make improvements thereon, and does now with his family reside thereon, such facts could not give the defendant Ikada any title or interest whatever in the said property, and his possession thereof would be only such possession as the father of any minor children might have of the property of such minor children. The father of minor children, under the law of this state, if in the possession of the property of such minor children must account for the same and all the rents, issues and profits thereof to the said children."

This instruction should have been given, in view of the language of the indictment complained of under assignment No. 7. The proposed instruction is also applicable under the decision in *In re Yano, supra*, page 522. It was a correct and applicable statement of the law and the defendants were entitled to have the jury instructed on this point.

ASSIGNMENT OF ERROR, NO. 17, AND ARGUMENT.

(17) The court erred in refusing to give the following instruction requested by the defendants, appearing on clerk's transcript, page 52, lines 16 to 23:

"The court further instructs the jury that the acts of the defendant Ikada in moving on to the land in question and making the improvement thereon, if you find from the evidence that he has done so, are entirely consistent with his innocent intent to take possession for his minor children, citizens of the United States, as their natural guardian, and to take such possession and make such improvements for the use and benefit of his said native-born children."

This instruction should have been given because it is the law as laid down in *In re Yano, supra*, at page 522, and contains a point on which the jury should have been clearly instructed.

The whole record indicates that the jury misunderstood the legal effect of certain acts of the defendant Ikada, and under the circumstances every care should have been taken to see that a correct conception of the law was in the mind of each person sitting in the jury box.

ASSIGNMENT OF ERROR, NO. 18, AND ARGUMENT.

(18) The court erred in refusing to give the following instruction requested by the defendants, appearing on clerk's transcript, page 53, lines 4 to 17:

"The court further instructs the jury that before the defendants can be convicted, the jury must find from the evidence in the case that the motives of the defendants were corrupt; in other words, that they both had the corrupt intention, in entering into the contract with the Souzas for the purchase of the land to violate the law by obtaining title to said land in the name of defendant Cockrill for the use and benefit of the defendant Ikada, and not for his native-born children; and unless the jury are satisfied beyond all reasonable doubt, and to a moral certainty, from the evidence in the case that such corrupt and unlawful motive and intent were in the minds of each and both of the defendants at the time the contract was entered into between the Souzas and the defendant Cockrill, you must find the defendants not guilty."

This instruction was peculiarly appropriate in view of the positive instruction given the court as to the presumption created by section 9 of the Alien Land Law. In giving its instructions as to this presumption the court nowhere explained to the jury that such presumption was only *prima facie*, and the instructions taken as a whole may well have conveyed to the jury the idea that the presumption became indisputable, after proof of the taking of the contract for the purchase of the land in the name of defendant Cockrill, whether or not he had a corrupt motive.

ASSIGNMENT OF ERROR, NO. 19, AND ARGUMENT.

(19) The court erred in denying defendants' motion for an order in arrest of judgment. (Tr., pp. 300 to 316.)

The motion in arrest of judgment should have been granted, because section 9 of the Alien Land Law is unconstitutional, violative of the Japanese-American treaty and not in any case applicable to criminal prosecutions, as is argued in assignments of error Nos. 1, 2, 3 and 4; and because the so-called second amended indictment should have been set aside, as is argued in assignments of error Nos. 5 and 6, and because the demurrer to the so-called second amended indictment should have been sustained as is argued in assignment of error No. 7.

ASSIGNMENT OF ERROR, NO. 20, AND ARGUMENT.

(20) The court erred in denying defendants' motion for a new trial. (Tr., pp. 316 to 323.)

The defendants specify the following particulars in which the evidence was insufficient to justify the verdict of the jury:

"1. The evidence was insufficient to sustain the allegations of the second amended indictment that the defendants wilfully, unlawfully and feloniously conspired together to effect a transfer of agricultural and farming real estate, land and property, in the County of Sonoma.

"2. That the evidence was insufficient to sustain the allegations that the defendants did wilfully, unlawfully and feloniously take and enter into an agreement to purchase certain agricultural and farming real estate, land and property, from Bartholomeu C. Souza and Mae C. Souza, in the name of said defendant, W. A. Cockrill, for the use, benefit, enjoyment, possession, occupation and control of said Y. Akado, also known as S. Ikada.

"3. That the evidence was insufficient to sustain the allegations that the agreement to purchase said land and property was taken in the name

of defendant, W. A. Cockrill, for the use, benefit, ownership, enjoyment, possession, occupation and control of said Y. Akado, also known as S. Ikada."

Defendants specify the following particulars in which the verdict of the jury was against law:

"1. The verdict is against law in each particular wherein the evidence is specified as being insufficient to justify the verdict.

"2. The verdict is contrary to the following instruction given by the court, to-wit:

"I instruct you that if the acts done by the defendants are as consistent with a theory of innocence or legal intent as they are with a theory of illegal intent, it is your duty to acquit the defendants. If, therefore, you should entertain a reasonable doubt as to whether the intentions of Ikada were in furtherance of a lawful or unlawful purpose, you are to give him the benefit of such doubt and acquit him. (Tr., p. 288.)

"3. The verdict is contrary to the following instruction given by the court, to-wit:

"The court further instructs the jury that if upon any reasonable hypothesis they can reconcile the evidence in the case with the innocence of the defendants rather than with guilt, that would be your bounden duty. (Tr., p. 288.)

"4. The evidence establishes without any contradiction that the contract of sale of real estate, plaintiff's Exhibit I, was taken in the name of defendant, W. A. Cockrill, as trustee for the native-born children of defendant Ikada, and with the intention that upon the consummation of the purchase of the said land the deed therefor should be made to defendant Ikada's native-born children, citizens of the United States.

"5. The evidence shows without conflict, that the defendants did not conspire to violate any provision of the Alien Land Law of California."

To make an affirmative argument supporting a negative proposition usually belongs in the field of logical gymnastics, and it is generally difficult in a brief to point out the insufficiency of evidence as a whole to sustain a verdict. Insufficiency can only be ascertained by a reading of all the evidence shown by the transcript. The learned attorney-general will doubtless point out where, in his opinion, the evidence measures up to the standard of proof required by the code (P. C., 1096) and we will then have our reply. As a guide to our thought, however, we make a brief resume of the situation proved as it appears to us:

The evidence of the prosecution consisted of the following:

First: The contract of purchase of the land from the Souzas by defendant Cockrill. (Tr., p. 124.)

Second: The testimony of the Souzas. (Tr., pp. 180 to 183.) Each of them on cross-examination stated without equivocation that the defendants informed them that Cockrill was contracting to purchase the same for defendant Ikada's native-born children. (Tr., pp. 116, 134.)

Third: The testimony of defendant Cockrill before the grand jury. (Tr., p. 159.) In this testimony, the testimony of the Souzas was fully corroborated by Mr. Cockrill. He maintained throughout that he entered into the contract for the purchase of said land for the said native-born children.

Fourth: Statement by defendant Ikada to Ivar Pedersen (Tr., p. 145), in which the Japanese defendant stated that the property had been purchased by his son. The whole of this testimony was excluded as to Cockrill (Tr., p. 145, at line 24) and is not to be considered as evidence of anything so far as Cockrill is concerned.

Fifth: Statement by defendant Ikada to the district attorney while

under arrest in the county jail. (Tr., p. 152.) In this statement he also maintained that the property was purchased for his son. All this testimony was excluded as to Cockrill. (Tr., p. 159, line 13.)

Sixth: The only other evidence for the prosecution was testimony of the Souzas that the defendant Ikada had soon after the execution of the contract moved with his family on the land in question and put up certain buildings, and the testimony of John P. Beck that he sold lumber to the defendant Ikada. All this testimony was also limited by the court and excluded as affecting Cockrill. (Tr., p. 113, lines 7 to 18; p. 127, line 21; p. 139, line 3.)

The evidence of the prosecution is wholly insufficient to justify a verdict of guilty. There is no evidence whatever against the defendant Cockrill. The jury therefore must have found such verdict as the result first, of the court's instruction as to the presumption provided by section 9 of the Alien Land Law; second, of prejudice derived from the admission of those portions of defendant Cockrill's testimony before the grand jury, and the district attorney, as to the meaning of the law, and expressions of the grand jury as to public sentiment against the Japanese.

This is not a case where it can be said that the court cannot interfere with the verdict because found upon conflicting evidence. There is here no conflict in the evidence on any material point. No contradiction was made of any evidence as to the circumstances and acts of all parties in connection with this transaction. The question of a conflict in the evidence does not arise. Where there is no conflict a simple question of the sufficiency of the evidence to justify the verdict is presented. And we think there can be no question that the evidence in this case falls far short of that sufficiency legally required to convict in a criminal case.

On the contrary, the untraversed evidence does establish that the contract for the purchase of said land was taken in the name of the defendant Cockrill for the native-born children of the defendant Ikada, and that there was no conspiracy to violate the Alien Land Law.

We have also specified the particulars in which we believe that the verdict is against law.

The reasons advanced for the insufficiency of the evidence are applicable to this point also.

The court instructed the jury that:

"If the acts done by the defendants are as consistent with a theory of innocence or legal intent as they are with a theory of illegal intent, it is your duty to acquit the defendants." (Tr., p. 288.)

It cannot be seriously questioned, we think, that the acts of the defendants were, to say the least, as consistent with a theory of innocence and legal intent as they were with the opposite theory. In fact, we cannot understand how a jury, under the evidence, could say that there was any support whatever for the claim that any acts of either defendant showed illegal intent. Such a theory could be based only upon mere suspicion and conjecture.

The only possible support that can be found for the jury's verdict of guilty is in what we have elsewhere in this brief contended was the error of the court in instructing the jury as to the presumption provided in section 9 of the Alien Land Law; and in that behalf there was no explanation to the jury of what a *prima facie* presumption is, and in view of the court's instruction that a presumption is a deduction which the law expressly directs to be made from particular facts (Tr., p. 289), the jury must have concluded that the presumption provided in section 9 was conclusive, and that they must find the defendants guilty, in view of the evidence that the defend-

ant Ikada had advanced the \$150 paid at the time of entering into the contract.

The verdict is contrary also to the following instruction given by the court, to-wit:

"The court further instructs the jury that if upon any reasonable hypothesis they can reconcile the evidence in the case with the innocence of the defendant rather than with guilt that would be their bounden duty." (Tr., p. 288.)

The jury must have wholly disregarded this instruction in order to find the defendants guilty, for it certainly cannot be said that they could not upon any reasonable hypothesis reconcile the evidence in the case with the innocence of the defendants, rather than with their guilt.

Counsel for defendants have endeavored to refrain from urging in this brief points of error which were doubtful or which could be brushed aside because they were not material, or because they were balanced by proceedings found in other portions of the transcript. We have endeavored to present for the consideration of the Court only those points which seemed serious enough to compel a reversal, standing each by itself, and we hope their number may not prejudice the court against their weight.

Respectfully submitted,

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2. RESPONDENT'S BRIEF, BY U. S. WEBB.

STATEMENT OF THE CASE.

Defendants were charged, by indictment of the grand jury of the County of Sonoma, with the crime of conspiracy to effect the transfer of real property in violation of the Alien Land Law of the State of California.

Defendants were thereupon duly tried and convicted of the offense charged.

Defendants moved for a new trial, which motion was denied, and each defendant was thereupon sentenced to pay a fine of \$750.

Defendants prosecute appeals from the judgments and the orders denying motion for new trial.

I.

POINTS AND AUTHORITIES.

In this case there was an indictment returned and filed, and two amended indictments filed thereafter in conformity with orders of the court permitting the filing thereof.

The first indictment appears at pages 3-4, clerk's transcript.

The first amended indictment appears at pages 10-11, clerk's transcript.

The second amended indictment appears at pages 13-15, clerk's transcript. Appellant claims that the second amended indictment does not constitute an indictment and also that it is not an information. Appellant claims that the language which was added to the second amended indictment constitutes an amendment of more than formal parts of the indictment, and that the amendment thereby shown constitutes an amendment in matter of substance. That the amendment of matter of substance goes beyond the constitutional power of amendment of an indictment.

See *People vs. Anthony*, 20 Cal. App. 586.

In that case an amendment to the indictment was properly made, and

it was held that amendments to indictments should be permitted in proper cases as to formal parts thereof, but should not extend to matters of substance.

This distinction, then, between formal parts of an indictment and matter of substance of an indictment requires careful consideration in each different case, in order to ascertain whether an amendment which may upon first impression appear to be as to the matter of substance, is not in reality an amendment as to formal parts of the indictment.

In the following case that which would at first seem to constitute an amendment of the indictment as to matter of substance was determined to be nothing more than an amendment as to matter of form.

The charge was murder and the name of the deceased was stated in the indictment as John Sonta. The indictment was held properly amended when it was changed so as to contain the name of James Sonta in place of John Sonta.

State vs. Tolla, 62 Atl. 675.

(Iowa.) In that case the charge of obtaining money by false pretenses was not changed in the amendment of the indictment, but at first impression it would seem that the language of the amendment constituted unpermissible matter of substance rather than matter of form. It was, however, in effect, held that the language of the amendment was matter of form only. The indictment before amendment charged obtaining money by false pretenses by means of a worthless check "drawn by accused," and it was by amendment changed so as to charge that the prosecutor indorsed accused's check and procured money thereon from a bank, which was paid to accused. The amendment was held to be proper and lawfully authorized.

State vs. Foxton, 166 Iowa 181; s. c. 147 N. W. 347.

(La.) The indictment, as first filed, charged a felonious shooting, but failed to charge that any human being was shot at. It was held proper to permit its amendment inserting the word "him" after the word "at", so as to read "shot at him"; whereas, before the amendment, it merely read "shot at." This amendment which at first impression would seem to be one as to substance, was in reality only an amendment as to matter of form, and the amended indictment was upheld.

State vs. Gibson, 120 La. 343; s. c. 45 So. 271.

(La.) The indictment was for burglary, and the place entered was described as "the storehouse of E. N. Lewis, known as the Collins Hardware Company." The indictment was amended so as to describe the place entered as "the storehouse of the Collins Hardware Company, Limited." It was held an amendment as to a formal matter, and not an amendment as to substance.

State vs. Sweeney, 135 La. 566; s. c. 65 So. 743.

(Miss.) In that case the charge was of selling spirituous and intoxicating liquors, but the word "liquors" was not set forth in the indictment. The indictment was amended so as to contain the word "liquors", and show the selling of spirituous and intoxicating liquors. It was held that the addition of the word "liquors" by amendment did not constitute an amendment as to matter of substance.

Keys vs. State, 110 Miss. 433; s. c. 70 So. 457. See also *People vs. Webber*, 44 Cal. App. 126.

In that case (amendment of indictment) the decision states:

"Taking into consideration the law as stated, the amendment did not

mislead the defendant and did not prejudice her in relation to any substantial right, or at all."

See also article VI, section 4½, constitution.

The reasoning of the last-quoted language, taken in connection with the recent amendment to the constitution, determines that "no miscarriage of justice" is shown in the case at bar by reason of the language which was added as an amendment in the second amended indictment.

As to amendment to indictment, see also *Ex parte Chamber*, 32 Cal. App. 476; *People vs. Kilfoil*, 27 Cal. App. 31.

The Alien Property Act of 1920 appears in Statutes 1921, page lxxxiii.

See section 9, subdivision (a) thereof:

"A *prima facie* presumption that the conveyance is made with such intent shall arise upon proof of any of the following group of facts:

"(a) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof."

As to the foregoing words "with such intent", there should be read in connection therewith the following language of said section 9 of the above act:

"* * * if the property interest involved is of such a character that an alien mentioned in section two hereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein."

On pages 5-25 of appellants' brief reference is made to section 9 of the Alien Property Act. Counsel for appellants claim that the *prima facie* presumption referred to in said section 9 shows an attempt unconstitutionally to provide a special rule of evidence.

See *People vs. Allen*, 37 Cal. App. 180.

It is there stated: "It was competent to establish *prima facie* that the liquid in question was whiskey."

See also, "In a prosecution for selling liquor in no-license territory, where there is proof beyond a reasonable doubt that the defendant sold the liquor, an instruction that in such a case the intent to violate the law is implied, is a correct statement." (Syllabus.)

See also *People vs. Wong Sang Lung*, 3 Cal. App. 223.

In that case (p. 223) it was held that the provisions of section 1102, of the Penal Code, "making the rules of evidence in civil cases applicable to criminal cases," requires that section 2061 of the Code of Civil Procedure be read in connection with other sections of the Penal Code.

Section 1102, Penal Code, reads as follows:

"The rules of evidence in civil actions are applicable also to criminal cases, except as otherwise provided in this code."

In the following case it was held that a presumption is evidence, and further that it is evidence which may outweigh the positive testimony of witnesses against it.

People vs. Milner, 122 Cal. 179.

The following is there stated:

"By section 2061, subdivision 2 of the Code of Civil Procedure, jurors are to be instructed 'that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or

other evidence satisfying their minds.' In this is a distinct recognition of the facts:

"1. That a presumption is evidence; and,

"2. That it is evidence which may outweigh the positive testimony of witnesses against it. It has been said that disputable presumptions are allowed to stand, not against the facts they represent, but in lieu of proof of the facts, and that when the fact is proven contrary to the presumption no conflict arises, but the presumption is simply overcome and dispelled. (*Savings, etc., Soc. vs. Burnett*, 106 Cal. 514.) This is true. Against a proved fact, or a fact admitted, a disputable presumption has no weight, but where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven; and, if they are not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption. In the *Burnett* case, *supra*, both parties testified to a state of facts contrary to the presumption. It was like an admission; it relieved the question from conflict. But here the burden of proving circumstances exonerating the defendant or reducing the grade of the crime, was cast upon him; and even though there be no direct contradictory evidence in the record, the jury was not bound to decide in accordance with the defendant's statement, if the presumption the better satisfied their minds."

See also the following case, where certain proof created the presumption *prima facie*:

People vs. Riley, 75 Cal. 100.

The following is there stated:

"* * * the court is authorized to declare a presumption of law. It is true that the presumption of identity of person from identity of name is a disputable presumption, which may be controverted by other evidence. (Code Civ. Proc., sec. 1963.) But the defendant introduced no evidence to overcome it, and no injury could have accrued to him by the omission of the court to add that identity of name only created the presumption *prima facie*."

An application of the conclusive presumption concerning the legitimacy of a child was considered in the following case:

People vs. Koller, 142 Cal. 621.

"The pointing of a loaded pistol, under the circumstances here shown, was such an act as would raise a presumption that the unlawful act was done with an unlawful intent."

People vs. Wells, 145 Cal. 138.

In the following case (in referring to a motion to set aside information) it is stated:

"The presumptions, while disputable, are in themselves evidence."

People vs. Siemens, 153 Cal. 390. See also *Sarraile vs. Calmon*, 142 Cal. 655.

In a case of murder the element of malice is very important, and if not proven there is no murder proven. In the following case it was stated:

"The court charged 'when a person deliberately, premeditatedly and unlawfully kills another, he is presumed to do so with express malice.' This was at least as favorable to the defendant as it should have been."

People vs. Cox, 76 Cal. 281.

In the law as administered in the United States courts, if a reasonable doubt is raised concerning the sanity of a defendant at the time of the killing (no matter from which side is produced such evidence), and if the

jury has such reasonable doubt concerning the sanity of defendant, it is proper that they may render a verdict of not guilty by reason of insanity.

Davis vs. United States, 160 U. S. 485.

But in the State of California, by a properly enacted statute conforming with all constitutional requirements, this rule has been changed and is of a much different character. By a special rule of evidence in this state it becomes necessary for the jury to determine whether a defendant was or was not insane at the time of the homicide, and as the law presumes him to be sane, he is required by a special rule of evidence to prove, by a preponderance of evidence that he was insane at the time of such homicide.

There are numerous other special rules of evidence found in the Penal Code, applicable to different kinds of crimes, and each of said special rules is deemed as complying with all constitutional requirements.

As to those special rules of evidence stated in the codes, see the following:

Section 1106, Penal Code (bigamy), establishes a special rule of evidence as to proof of second marriage, and requires additional proof of cohabitation.

Section 1107, Penal Code (forging bank bills), providing a special rule of evidence for proving by general reputation incorporation of the corporation.

Section 1108, Penal Code (abortion and seduction), providing a special rule of evidence requiring a special amount of evidence.

Section 1109, Penal Code (selling lottery tickets), establishes a special rule of evidence providing for proving, by circumstantial evidence of a certain grade, that the lottery ticket was signed and issued.

See sections 1110 and 1111, Penal Code, requiring a heavier grade of proof in certain instances, in cases treating of crimes.

See *Deyoe vs. Superior Court*, 140 Cal. 489.

The following is there stated:

"The Civil Code was, however, the appropriate place for the legislation in question, notwithstanding such legislation relates to procedure, for that code has always contained all provisions of law specially applicable to divorce and divorce cases, including such special rules relating to procedure therein as have from time to time been deemed essential by the legislature." (Italics ours.)

Appellant claims that the rule of evidence referred to in section 9 of the Alien Property Act should have been enacted in the Penal Code. The following excerpt from the foregoing case of *Deyoe vs. Superior Court* will show to the contrary:

"As was said in *Lewis vs. Dunne*, 134 Cal. 291, 'Nearly all of our general laws are arranged for convenience, under four main headings, to-wit: the Civil Code, the Code of Civil Procedure, the Penal Code, and the Political Code, but no one of these four codes is complete in itself; legislation under either code is inseparably interwoven with legislation under the others; and legislation upon any imaginable subject would not be held invalid because found in any particular code.' (See also *Enos vs. Snyder*, 131 Cal. 68.)" (Italics by the court.)

See also section 1102, Penal Code.

As to the claim of appellants that section 9 of the Alien Property Act shows a special rule of evidence which should have been enacted as a part of the Penal Code, see *Boggs vs. Gancard*, 148 Cal. 721.

The following is there stated:

"We are of the opinion that there is nothing in the contention that the amendatory act violates the provisions of our constitution relative to special laws regulating the practice of courts of justice. The right of the legis-

lature to provide a special proceeding in the courts for the determination of questions as to the validity of proceedings for the purchase of its public lands, and to make different provisions for the various classes of such lands, has long been recognized, and can not be doubted. The nature of the subject is such as to justify such provision. (See *Deyoe vs. Superior Court*, 140 Cal. 481.) So far as we can see, the ordinary rules as to practice, pleadings and evidence, including motion for new trial and appeal, are all recognized by the statute as applicable to the proceeding here authorized, and no change is therein attempted, except in the single particular that the statute requires the contestant to set forth in his complaint copies of the affidavits filed by himself and the applicant before the surveyor-general. This is for the purpose of enabling the court to determine what questions have been properly referred to it for adjudication, and is justified by the nature and object of the proceeding. The judgment of cancellation provided for is, in effect, simply a determination upon the question as to the right of the applicant to purchase the land." (Italics ours.)

The italics last hereinabove shown point out in the decision the special rule of pleading which was provided for by this special statute as to sale of public lands, and which the decision holds to be a constitutionally enacted rule of pleading, even though the same is not found in the Code of Civil Procedure, but in a separate statute.

The rule of evidence designated and defined by section 9 of the Alien Property Act is a proper rule, and to determine that the same is (constitutionally) unreasonable would go against the clear reasoning of *Grumbach vs. Leland*, 154 Cal. 679.

See *Ex parte King*, 157 Cal. 164.

See the reasoning set forth and cases cited on pages 164-165 of the decision of that case, showing that the legislature was warranted in making the distinctions made in the Alien Property Act, and in providing therein the special rule of evidence shown in said section 9 thereof.

Appellants claim that the court erred in instructing the jury and in such instruction using the words "burden of proof". See instruction given at page 284, transcript.

"If you find * * * and you further find from the evidence that the consideration was paid, or agreed or understood to be paid by an alien not entitled under the law to acquire, possess, enjoy and transfer agricultural real estate or an interest therein, that the burden of proving that such conveyance or agreement to convey such agricultural real estate or an interest therein was not made with intent to prevent, evade or avoid an escheat of said land to the state, is upon those persons claiming that it was not made with such intent."

First, let it be noted that the foregoing instruction containing the words "burden of proving" is an instruction treating of the single element of "intent".

See *People vs. Grill*, 3 Cal. App. 517.

Consideration should be had of the first twenty lines of page 517 of the decision of that case, where reference is made to an instruction treating of the presumption as to "intent". And the instruction would have been there upheld by the court if it had not contained at the end thereof the words "will not hold him guiltless".

The instruction in the case at bar does not contain that undesirable language.

In considering an instruction concerning presumption as to intent, the

entire language of pages 516 to 519, inclusive, of *People vs. Grill, supra*, should be given careful consideration.

See *People vs. Newcomer*, 118 Cal. 271.

The first eleven lines of page 271 of that decision may be considered here.

The Supreme Court there held that it was proper to refuse defendant's instruction to the effect that the burden of proving circumstances of justification does not rest upon defendant Newcomer, and that in that case the rule of section 1105, Penal Code, as to defendant showing circumstances of mitigation, was properly applicable.

But see, particularly, the statement by the court that the instructions elsewhere fully protected defendant Newcomer, stating, "Of course, under former decisions it is sufficient if the defendant raises a reasonable doubt of his justification; and that principle was fully stated in the charge."

So, in the case at bar, by the instructions which were given elsewhere, defendant was fully protected in favor of any showing in the case to the effect that the land was to be taken by defendant "as guardian of his native-born children."

See also *People v. Besold*, 154 Cal. 369.

In that case the instruction contained the words "* * * the natural presumption is that such assailant intended death, or other great bodily harm, and in the absence of evidence to the contrary, this presumption must prevail * * *."

The Supreme Court there stated: "We perceive no sound basis for objecting to this instruction. It correctly states the law."

Article VI, section 4½, constitution.

All of the instructions which were given in the case at bar should at all times be kept in mind (*People vs. Besold*, 154 Cal. 370), and then, in applying the foregoing rule of the constitution to this case it is plainly apparent that no miscarriage of justice is disclosed by reason of the giving of the instruction which is now under consideration.

II.

Appellant claims that the court erred in overruling his demurrer to the second amended indictment. (See pp. 43-44, appellants' brief.) The indictment charges that the contract to purchase the land was taken in the name of defendant Cockrill "for the use, benefit, enjoyment, possession, occupation and control" of defendant Akado. This language is proper language of necessary pleading and shows that the conspiracy was one to take over the land by Cockrill contrary to the provisions of section 9 of the Alien Property Act.

In the first half of page 44 of appellants' brief he claims that those words in the pleading do not negative the possibility that the matter of the taking of the title in Cockrill's name (and the pleading of the indictment with respect thereto) did not negative the possibility that the taking was for the father "as guardian of his children."

See following language stated in appellants' brief, p. 44:

"As their father he would be entitled to act as the legal, as well as the natural, guardian of his children, and would have the absolute right as such legal guardian to the 'use, benefit, occupancy and control' of the land, accounting for the same, of course, to the children."

But the second amended indictment (p. 14, clerk's transcript) states that Cockrill and his co-conspirator conspired together to "enter into an agreement to purchase certain agricultural and farming real estate * * * for the use, benefit, enjoyment, possession, occupation and control of said Y. Akado."

There is not a word in the indictment that such taking for Akado was to be of the nature of a taking for Akado as "a guardian" of any person whomsoever.

The language of the indictment is sufficient, and properly charges defendants with the criminal offense in question. Such was the decision of the Supreme Court in the following case:

In re Akado, 63 Cal. Dec. 577.

III.

At the trial testimony was had in relation to certain statements and admissions which were made by defendant, Cockrill, before the grand jury of Sonoma County.

See pages 46-59 appellants' brief.

See page 46 appellants' brief, where it is stated:

"The court permitted the prosecuting attorney to read to the jury, over the objections of the defense, portions of this transcript consisting of legal opinions by the district attorney and expressions of various jurors as to the meaning, intent and policy of the Alien Land Law, and also expressions of opinion by grand jurors as to defendant Ikada's guilty intent."

There are not shown (pp. 46-59, appellants' brief) "expressions of opinion by grand jurors as to defendant Ikada's guilty intent." And it was proper, under the rules of evidence, to permit in evidence (as a part of the entire conversation) the "expressions of various jurors (grand jurors)," for the reason that such expressions acted as and took the place of questions asked, to which, in substantial effect, answers were made by defendant Cockrill.

It is proper, under the rules of evidence, that admissions made by a party before a grand jury may be received in evidence at his trial.

People vs. Sexton, 132 Cal. 37; *People vs. Northey*, 77 Cal. 618; *People vs. Reggel*, 8 Utah 21; s. c. 28 Pac. 955; *State vs. Moran*, 15 Or. 262; s. c. 14 Pac. 419; *United States vs. Charles*, Fed. Cas. No. 14,786.

And the following case shows that such statements, when they involve a denial before the grand jury of a defendant's guilt, are admissible:

State vs. Campbell, 9 L. R. A. N. S. 534:

"Statements and declarations by a defendant in a criminal action, in denial of guilt, while a witness before a grand jury, are not confessions within the rule requiring them first to be shown to have been made voluntarily before they are competent evidence against him." (Syllabus.)

Now, it is apparent that by reference to the statement of defendant, Cockrill, before the grand jury, shown at pages 46-58 of appellants' brief, Cockrill made such statements in denial of his guilt, and, therefore, the reasoning of *State vs. Campbell*, 9 L. R. A. N. S. 534, *supra*, is quite applicable as showing that defendant can not successfully claim to have been harmed by them.

If there appears among those statements an admission against defendant's defense at Cockrill's trial, that is a risk which he voluntarily assumed in giving his testimony.

And when defendant, Cockrill, complains that the remarks of some of the grand jurors appear during such statement, it is quite obvious that the remarks of the grand jurors do not appear to be "proof of fact" such as would bind Cockrill as proven facts. Therefore, such remarks of grand jurors should be considered by reference to article VI, section 4½; constitution.

And it is evident that no miscarriage of justice is seen in the case coming from the remarks of such grand jurors, or coming from the admission of the statement as a whole.

IV.

On page 60 of appellants' brief an instruction is referred to which, in the body thereof, contained the words "they must consider the character and appearance of the witnesses."

As to this instruction appellants have cited the case of *Fries vs. American Lead Pencil Co.*, 141 Cal. 612.

First, it will be seen that the foregoing decision is a department decision of the supreme court, and the opinion written by Mr. Justice Henshaw, has failed to cite any decision in support of the reasoning which he has therein set forth.

When properly considered, the instruction in that case, and the instruction in the case at bar, constitute no more than a statement of "commonplace" matter, and as to a statement of commonplace matter in an instruction a strict rule of critical analysis is usually not applied.

In the case at bar the word "character" used in the instruction has no destructive or prejudicial quality, because no testimony was offered in the case to show that the character of any witness was bad, for veracity, etc. And, therefore, it must be presumed that the "character" of each witness was good.

So, if the word character as used in the instruction referred to the general character of a witness, the general character of each was, as matter of law, determined in the case by the evidence to be good. Therefore, does not the instruction mean "these witnesses of good character" must be considered as to their "appearance?"

And, of course, the jury have a right to look at each witness, and, in considering his testimony, also bear in mind his "appearance" when in court upon the witness stand. Is not this matter of appearance of a witness in court, when testifying, matter of no more than a "commonplace?"

The error disclosed in the reasoning of Mr. Justice Henshaw in the opinion in 141 Cal. 612, is in assuming that the language of the instruction there had the effect of stating to the jury that "nothing" more than character and appearance could be considered by them.

It merely called their attention to "commonplace" matter (a portion of it) which they had a right to consider.

As to instructions containing the words "character" and "appearance" of witnesses, see the two instructions set forth on page 266, sec. 336, vol. 1, *Brickwood Sackett's Instructions*, sec. 336.

Both those instructions used the words "character of the witness" and "manner on the stand" (equal to appearance in court), and also the words "character and appearance of the witnesses." Those two instructions were upheld in the following cases:

Titherington vs. State (Neb.), 106 N. W. 422; *Hardy vs. Mil. St. Ry. Co.*, 89 Wis. 183 s. c. 61 N. W. 771. See also *Jessen vs. Donahue* (Neb.), 96 N. W. 639.

In that case the instruction was upheld, and it used the words "and their apparent candor and fairness or want of such." No doubt those words "candor and fairness" were there used as the substantial equivalent in the case at bar of the words "character" when applied to the witness "in court." The instruction in the instant case did not say "character" as shown out of court.

V.

Appellants' brief at pages 63-66 refers to the request of defendants that the jury be instructed to render a verdict of not guilty. This objection

amounts to a claim that the evidence is insufficient to support the verdict, but it will be seen by the record that the evidence is ample to sustain the verdict of guilty. The reasoning shown in the last four lines of page 64 of appellants' brief amounts to a claim that the jury should have disregarded the evidence in the case, and when rendering their verdict should have based it entirely upon the evidence of defendant Cockrill (upon this feature of proof).

VI.

See instruction which is set forth on page 67, appellants' brief. Appellants claim that this instruction is erroneous, and refer to a possible holding by an alien father of land as guardian of his children.

By the instruction the attention of the jury was directed to the charge set forth in the indictment and before they could find a verdict of guilty it would be necessary for them to determine that the particular conspiracy referred to and described in the indictment had been proven.

If the appellants' claim (p. 68, brief) that the foregoing instruction should have contained some language as to an alien father, as guardian holding land for a native-born child, that matter has been fully covered by instructions given elsewhere. See instructions given at pages 286-287, transcript; page 281, lines 1-12, transcript.

VII.

See appellants' brief, pages 68-69, reference to defendants' instruction refused. This instruction referred to limitation of testimony, so as that referring to Cockrill was limited as to him and that referring to Ikada would be limited as to said defendant. The court during the taking of the testimony properly gave instructions as to the limited operation of such testimony; and see similar instruction given at pages 279-280, transcript.

VIII.

The following (defendants') refused instruction was covered by instructions given elsewhere (clerk's transcript, p. 49):

"I instruct you that no matter what you believe the intentions of defendant Ikada may have been, you can not find the defendants guilty of conspiracy unless you find also that the defendant Cockrill had an intent to violate the law. In other words, if the intention of either Cockrill or Ikada was that the land should be a gift to the native-born children of Ikada, there was no conspiracy. The law provides a penalty only when at least two people agree to violate the law."

This instruction was covered by the instructions given to the jury; see pages 286-287, transcript. See also page 281, lines 1-12, transcript. And see, as to foregoing instruction, and the words "intention of defendant Ikada" and "defendant Cockrill had an intent" the language of instruction was given as to necessity of proving "intent" of each of the alleged conspirators. See this at first twenty lines, page 288, transcript.

IX.

The following (defendant's) refused instruction was covered by instructions given elsewhere (clerk's transcript, p. 50):

"I instruct you that the Alien Land Law provides a penalty for a conspiracy to violate its provisions, but I also instruct you that an evasion of a law is not a violation of it, and that even if you believe that one or both defendants intend to evade the law, you can not find either of them guilty unless the evidence shows beyond all reasonable doubt that both defendants intended not to evade but to violate the law."

The above instruction (and particularly the feature treated of by the words "but to violate the law") was fully covered by instruction given at page 288, lines 1-5, transcript, using the words "you must believe that both defendants * * * had a guilty intention to violate the law * * *".

X.

The following (defendants') refused instruction was covered by instructions given elsewhere (clerk's transcript, p. 51):

"The court charges the jury that before it can convict the defendants, or either of them, upon the theory of conspiracy between them, you must find from the evidence beyond a reasonable doubt and to a moral certainty that they conspired together to violate the provisions of the Alien Land Law and that their purpose was, as alleged in the indictment that the defendant Cockrill should take title to the land in question and hold it in trust for the defendant Ikada."

See instruction given at page 286, last four lines, transcript; see also last twenty lines, page 288, transcript.

XI.

The instruction shown at pages 73-74, appellants' brief, was properly refused.

See the following language in body thereof:

"And you are further instructed that if you believe * * * defendant Ikada did move onto the property in question after the agreement between the Souzas and the defendant Cockrill * * * and his possession thereof would be only such possession as the father of any minor children might have of the property of such minor children * * *."

The last stated italicized language constitutes an "improper statement of fact" under which the jury being thereby instructed "what the facts proven were" would be, in effect, instructed to render a verdict of not guilty.

XII.

The following (defendants') refused instruction was covered by instructions given elsewhere (clerk's transcript, p. 52):

"The court further instructs the jury that the acts of the defendant Ikada in moving onto the land in question and making the improvements thereon, if you find from the evidence that he has done so, are entirely consistent with his innocent intent to take possession for his minor children, citizens of the United States, as their natural guardian, and to take such possession and make such improvements for the use and benefit of his said native-born children."

To state to the jury that the foregoing possible facts "are entirely consistent with his innocence" is to state matter of argument which should properly be confined to the language of argument of defendants' attorneys to the jury. As to the feature of an alien father holding possession of land, as guardian under an appointment by court of his native-born children, see full instructions which were given at pages 286-288, transcript.

XIII.

The following (defendants') refused instruction was covered by instructions given elsewhere (clerk's transcript, p. 53):

"The court further instructs the jury that before the defendants can be convicted, the jury must find from the evidence in the case that the motives of the defendants were corrupt; in other words, that they both had corrupt intention, in entering into the contract with the Souzas for the purchase

of the land to violate the law by obtaining title to said land in the name of defendant Cockrill for the use and benefit of the defendant Ikada, and not for his native-born children, and unless the jury are satisfied beyond all reasonable doubt, and to a moral certainty, from the evidence in the case that such corrupt and unlawful motive and intent were in the minds of each and both of the defendants at the time the contract was entered into between the Souzas and the defendant Cockrill, you must find the defendants not guilty."

As to the above words (as to both defendants) that "the jury must find * * * that they both had the corrupt intention * * * to violate the law * * *," see instruction given at page 288, lines 1-5, transcript, showing the words, "You must believe that both defendants * * * had a guilty intention to violate the law * * *." And as to the last six lines of the foregoing refused instruction (as to possible purchase by a guardian of his native-born children) see instructions given at pages 286-288, transcript.

XIV.

The motion in arrest of judgment was properly denied.

A motion in arrest of judgment can not be used to perform the office of a demurrer.

People vs. Gardner, 98 Cal. 128.

The indictment properly charged a criminal offense.

In re Akado, 63 Cal. Dec. 577, *supra*.

XV.

The evidence is sufficient to support the verdict.

The testimony of Mrs. Souza (Trans., p. 109) shows that at the beginning there was no thought or suggestion that the land was being bought otherwise than for defendant Ikada. "She told Ikada she didn't think a Japanese could buy land."

See transcript, page 244, explanation of the district attorney concerning what the testimony showed. Cockrill's statement of having taken the matter up with the district attorney and his pretending that the land could be taken for the children of Ikada, the jury had a right to find were statements made by Cockrill to quiet the fears of the Souzas when they were considering selling their land. (P. 109): "Yes, him and another fellow were there and we told him we didn't think a Japanese could buy * * *. They said they could get an attorney that would buy, so we didn't hear any more about it for two——."

The jury had a right to infer (this testimony referring to both defendants) by reference to the answer (p. 110, lines 6-12, Trans.) that Cockrill was explaining to the Souzas how he, Cockrill, could arrange for evading the Alien Land Law.

It will be noticed in this answer that nothing was said about a native-born Japanese child buying land, but, on the contrary, there is a reference that an (alien) Japanese "could buy" if he only had native-born children.

It was proper for the jury to consider this scheme of Cockrill's for evading the law, which he as an attorney had sworn to uphold.

Defendant Ikada went (p. 111, Trans.) into possession of the land and out of his own money caused buildings (p. 112, Trans.) to be constructed upon the land.

Defendant Ikada (p. 116, Trans.) told Mrs. Souza that he wanted to buy the land for himself (Ikada).

"Q. Did the Japanese, Mr. Ikada, ever say to you that he wanted to buy that land for himself, Mrs. Souza?

"A. Yes. We told him he couldn't buy it. He said he had children; he wanted it for himself for a home."

Both of defendants told the Souzas that the land was to be bought for the Japanese (Ikada). (P. 124, Trans.)

"Q. Was anything said by Mr. Cockrill as to whom he was purchasing the property for? A. You mean to pay for the land?

"Q. I don't mean that. Did he tell you whom he was buying the property for? A. I know it is for the Japanese.

"Q. How do you know? A. Because he told me so.

"Q. Who did? A. Both, all of them, everybody know it, that it is for the Japanese. That is the reason I told him—

"Q. Ikada? A. Yes. That is the reason I didn't want to sell to him because I know I get me into trouble. He told me no trouble, see? I took his word, if I no took his word I never make agreement."

It will be seen that this portion of the evidence applies to both defendants. It is to be gathered therefrom that each defendant knew what the real nature of the transaction—the taking of land for Ikada—was to be. And this evidence to some extent tends to disclose the conspiracy of the two defendants to violate the law in question.

Defendant, Ikada, bought about \$1,200 worth of lumber (p. 139, Trans.), which he was to use in placing buildings on the land in question. See statements of defendant Ikada, pp. 147-159, transcript. The jury had a right to search through these statements and pick out therefrom what would truthfully go to show the taking of the land by Cockrill for the defendant, Ikada, and not for Ikada's children. This power and duty of searching out from a mass of testimony what has actually been proved thereby, is well illustrated by the decision (p. 680) of the following case of rape, in which case contradictory statements of the prosecutrix were considered and the truth as proven separated therefrom.

People vs. Preston, 19 Cal. App. 680.

See contract to purchase the land of the Souzas under which defendant Cockrill was to hold the title for a time.

The jury (under the rule as to consideration of circumstantial evidence) had a right to draw the inference, from the existence of this contract, that Cockrill was to hold the land for defendant Ikada, and not for Ikada's children.

If the land was to be held for the children of Ikada there should have been some mention of that in the contract, and not finding any such recital the jury had a right to draw the inference that the holding was to be for Ikada himself.

This contract and the wording thereof, added to the fact that defendant, Ikada, immediately began to plan building on the land, and that for that purpose he did pay out and invest a very large sum of money out of his own funds, to go into the building up and betterment of the real estate, would present a strong showing of proof from which the jury would have a right to draw the inference that the land was to be possessed, used and enjoyed by defendant, Ikada, and not by either of his children.

The existence of a conspiracy may be established by proof of acts and conduct, as well as by proof of an express agreement.

Stevens vs. State, 8 Ga. App. 217; s. c. 68 S. E. 874; *Osborne vs. State*, 99 Miss. 410; s. c. 55 So. 52. See also *People vs. Kizer*, 22 Cal. App. 10.

In that case it was held that a conspiracy may be proved by circumstantial evidence, and the verdict of guilty was there held supported by the evidence, although defendant's connection with the offense was established only by circumstantial evidence. And further held that knowledge of the conspiracy may be shown by independent evidence, whether affecting both defendants or each defendant separately; the question being "Did both parties have knowledge of the conspiracy actually formed, to which they afterward became parties through a violation of the law?"

United States vs. Nunnemacher, 7 Biss. 111; s. c. 27 Fed. Cas. No. 15902.

The following is there stated:

"To establish a conspiracy it is not necessary that there should be an explicit or formal agreement for the unlawful scheme between the parties, nor is it essential that direct or positive proof be made of an express agreement to do the act forbidden by law. In such cases it is frequently impossible to produce such proof, because conspiracies are not usually meditated and planned in the presence of witnesses nor parties thereto, nor in the terms of express stipulations. Hence it is competent to prove the alleged conspiracy by circumstances. The understanding, combination or agreement between the parties in a given case, to effect the unlawful purpose charged, must be proved, because without the corrupt agreement or understanding there is no conspiracy. But circumstantial evidence may be resorted to, to show the agreement or conspiracy." (*Italics ours.*)

A conspiracy may be established by circumstantial evidence.

Smith vs. United States, 157 Fed. 721; *People vs. Sacramento Butchers' P. Assn.*, 12 Cal. App. 471; *People vs. Kizer*, 22 Cal. App. 10; *People vs. Corey*, 26 Cal. App. 735; *United States vs. Cole*, 153 Fed. 801.

In that case it was held that guilty connection of a conspirator may be established by showing association of the persons accused in and for the purpose of procuring the illegal object of the conspiracy.

In New York it was held competent to prove isolated acts as steps by which a conspiracy itself may be established.

State vs. Miles, 192 N. Y. 541; s. c. 84 N. E. 1117.

Section 15, Penal Code, as it applies to the case at bar, provides that a crime is an act committed in violation of a law forbidding it, to which is annexed, upon conviction, the punishment of a fine.

Now upon a consideration of the Alien Land Law, it is apparent that the act "forbidden" is the taking of the title, possession or enjoyment of an interest in real property in fee, or the acquiring of a leasehold or "other interest in real property less than the fee" (Sec. 8), and that only the acquiring, possessing and enjoying defined in section 2 of the act is lawful.

It is clear that any other acquiring, possessing or enjoying of any interest in real estate by an alien not capable of acquiring citizenship is unlawful, and is "forbidden." Therefore, the presumption mentioned in section 9 of the act operates in the consideration of an act (in regard to the possessing or enjoying of an interest in real estate) which has been "forbidden" (in direct words forbidden, or forbidden by statutory language which shows the "forbidding" of an act) by the Alien Land Law.

Then section 15, Penal Code, operates in the matter of the construction, application and ascertainment of the legal effect of the "presumption" mentioned in said section 9 of the act.

In paragraph I hereof the distinction between a formal amendment of an indictment, and an amendment as to substance has been referred to. In a Vermont case the following language is stated from 50 Vt. 731:

"It is obvious, without illustration, that a defect that does not affect the merits of the case, or the evidence necessary to be given to maintain the indictment, can be regarded as only formal." (58 Vt. 524.)

And in California the principle last stated is to be considered also by the application thereto (as to a pleading) of the recent amendment to the constitution. (Art. VI, sec. 4½, Constitution.)

For the foregoing reasons we respectfully ask that the judgments and orders be affirmed.

Respectfully submitted,

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J. CHARLES JONES,

Deputy Attorney-General,

Attorneys for Respondent.

3. APPELLANTS' CLOSING BRIEF, BY ALGERNON CROFTON.

Replying to respondent's arguments in the order of their making and endeavoring not to repeat unnecessarily such positions of our opening brief as remain uninvaded, we submit:

I.

Respondent admits that an indictment may not be amended in matters of substance, but contends that close examination will show that the amendments made to the original and first amended indictments were formal only, although he confesses that at first impression they might be considered substantial.

This seems audacious when the character of the amendments is scrutinized, and it is noteworthy that the learned counsel for respondent make no effort whatever to justify specifically any single one of the amendments complained of. Counsel do cite cases where amendments have been allowed as formal, but they produce no authority (and we believe none exists) which holds for instance that the allegation of time and place is not a matter of substance. This is elementary, and we cite but one authority—*People vs. Craig*, 59 Cal. 370.

Neither does respondent even allege that any other of the amendments set out on pages 26, 27, 28 and 29 of the opening brief is not a matter of substance.

It seems to be the fact that the original and the first amended indictment were amended in several matters of substance without resubmission to the grand jury, and if that be the case, the only legal conclusion is that the motion to set aside the second amended indictment should have been granted.

II.

In reply to appellants' contention that the special rule of evidence created in section 9 is unconstitutional, respondent cites a number of authorities showing that special presumptions may be created by law, and that such presumptions can be used as evidence.

With this we quite agree, but it is no answer to our suggestion that the special rule of section 9 is applicable in the case of transfers made by certain persons only and not to all persons alike, and that it thus denies to some the equal protection of the laws.

The presumptions cited by respondent apply to all persons. Otherwise, they would be unconstitutional.

To illustrate: The first presumption cited in alleged analogy is that an intent to violate the law is implied from the fact of selling whiskey in no license territory. (Respondent's brief, p. 7.) Suppose the presumption was that an intent to violate the law would be implied only when an alien sold whiskey in no license territory. Surely the attorney-general will not argue that such a presumption would be constitutional.

No other defense of the constitutionality of section 9 appears in the reply brief.

III.

If the attorney-general does not actually concede that the special presumption of section 9 violates the Japanese-American treaty, it is true, at least, that no argument to the contrary appears in the reply brief.

IV.

In opposition to appellants' theory that the presumption of section 9 was not intended for application to criminal proceedings (and cannot, in fact, be applied there, no matter what the intentions), the attorney-general produces authority to show that rules of evidence contained in one code are generally applicable to proceedings under another. (Respondent's brief, p. 13 *et seq.*)

This we have never doubted. But it does not answer at all our allegation that a presumption of an intent "to prevent and avoid escheat" cannot be used to prove an intent "to transfer land to an ineligible alien"; and that it is not possible to apply the presumption of section 9 except in an escheat proceeding, for which alone it was clearly intended, to which alone it is in any way related or applicable, and outside of which it is meaningless.

V.

What we consider to be the first argument seriously advanced by respondent we find on page 15 of his brief, where he asserts with disappointing brevity that ineligible aliens may be classified by the legislature so that special rules of evidence may be applied to them without violating the Constitution.

Most elaborate reply might be made to this, for few questions relating to the Fourteenth Amendment have elicited more profound discussion. Fortunately, the question is definitely settled by the supreme court of California in the Yano case (63 C. D. 515), where the court said at pages 520, 521:

"It cannot be successfully contended that the law may be declared valid in this respect on the ground that persons who are ineligible to citizenship under the laws of the United States form, by reason of that fact alone, a class by themselves, for which the state may enact peculiar legislation depriving them of rights or privileges which are accorded to others not of that class."

And repeating the argument of the opening brief we repeat that the right of a father to make a gift to his child, whether direct or in trust, does not depend on his eligibility to citizenship, any more than does his right to guardianship which was upheld in the Yano case, on which point the court said at page 521:

"It (the right of guardianship) has no relation thereto. Such privilege is no doubt as much prized by a Japanese resident of good character who is not a citizen of this country and cannot become such, as by any other father of like character who is a citizen or is eligible to become one. A law denying the privilege to one class and giving it to the other cannot be said to be a law justified by a classification based on a distinction which calls for such peculiar legislation. Such attempted classification does not relieve the act from the charge that it violates the Fourteenth Amendment."

There seems to be no escape from the conclusion that this mystifying presumption violates the Constitution. Certainly none has been pointed out in the oral or the printed arguments.

VI.

Passing to the appellants' contention that the evidence was insufficient to support the verdict, or in fact, that there was no evidence at all to support it, we recall the direct request of the court made at the oral argument that the evidence supporting the verdict be pointed out by the learned attorney-general. This was not immediately done, but in the respondent's brief, beginning at page 32, such of the testimony as could be imagined as being responsive to the request in any way, is marshaled and presented for consideration.

First, is a statement that Mrs. Souza told Ikada that she didn't think a Japanese could buy land. Seriously, we urge that such a statement made by Mrs. Souza is not evidence that either of the defendants were conspiring to violate the law.

Next, respondent refers the court to the district attorney's address to the jury (Trans., p. 244). This is not evidence, but nevertheless we submit (a) that the respondent is in error when he implies that Cockrill was "*pretending* that the land could be taken for the children of Ikada" (respondent's brief, p. 33), because such a transaction is and was perfectly proper and legal; and (b) that the district attorney's speech misstated the fact when he said that at the beginning there was "no thought of buying this land for the Japanese native-born children." Mrs. Souza testified that she understood from Cockrill and Ikada that the native-born children could buy the land legally, and that *she signed the agreement with that understanding* (Trans., p. 116, line 22). Mr. Souza, the other grantor, testified that *he understood he was selling the land to Mr. Cockrill for the benefit of the children* (Trans., p. 134, line 1).

So even considered as testimony, the portion of the district attorney's address quoted by the respondent is not supported by the record.

It seems impossible to gather from the testimony of the Souzas any idea except that they sold to Mr. Cockrill for the children, and that they both distinctly so understood. Isolated phrases cannot be picked out of testimony, cut from their context and used as a base on which to rest an implication of crime. Certainly no such attempt should in justice be permitted here when the unequivocal closing statement of Mr. and Mrs. Souza was that *each of them clearly understood that the land was to be bought for the native-born children*.

The court will, we hope, bear in mind also that the Souzas, as well as the defendant, Ikada, are obviously not adept with the English language, and will protect the defendants from unjust inferences arising from the brevity or cloudiness of their speech.

The building of chicken houses on the land by Ikada is not evidence against Cockrill, because it was limited to Ikada only by court rulings at the trial. (Tr., p. 113, line 7; p. 127, line 21; p. 139, line 3.) Nor under the Yano case (*supra*) is it evidence against Ikada. However, it is not necessary to consider the latter point, because the charge is conspiracy, and if there is no evidence against Cockrill, Ikada cannot be convicted of conspiring with himself.

Next the respondent claims that if the land was to be held for the children, some mention of that should have appeared in the contract, and because the contract was silent on the point of whom Cockrill held for, he says, the jury had the right to infer that the holding was to be for Ikada.

This reasoning cannot be followed. No legal reason exists why the beneficiary of Trustee Cockrill should be named in the contract. Neither Ikada nor the children were mentioned. They could have been, but it was not necessary. The theory of innocence is as consistent with the fact as the theory of guilt, and thus must be applied.

We repeat that the record shows no evidence against Cockrill except the presumption of section 9, and that presumption clearly, almost, we think, admittedly, violates the Constitution, contravenes the treaty, illegally opposes the presumption of innocence, and is not possible of application to a charge of criminal conspiracy, where it would be proof only of an intent immaterial here.

VII.

Again: In order to avoid a reversal of the case at bar, it is apparently necessary to overrule a decision of the supreme court of California—*Fries vs. American Lead Pencil Co.*, 141 Cal. 612.

In that case it was flatly held to be reversible error to give an instruction such as the one complained of by the defendants here on page 60 of their opening brief.

The argument of the attorney-general that this case be disregarded leaves us unconvinced, and the authorities cited from other jurisdictions will evoke in the minds of the logical but scant enthusiasts for the project.

VIII.

To respondent's arguments on the various instructions given and refused, appellants think it necessary to oppose only the arguments made on each point in their opening brief. We might paraphrase and thus repeat them here, but after a re-reading of them we think the points are made clearly, and we submit them as made to the decision of the court.

IX.

According to appellants' theories it is possible, nay compulsory, to reverse this case upon the technical points urged, such, for instance, as the invalidity of the indictment.

Should the court deem this to be the fact we respectfully suggest that the validity and office of the presumption in section 9 of the Alien Land Law is of sufficient importance to warrant the court passing upon the questions raised in that regard, whether necessary to a decision of the case or not. Such a surplus opinion was rendered by the Supreme Court in the Yano case for the guidance of the courts below, and here would make the way clear for bench, bar and citizens in future.

Respectfully submitted,

ALGERNON CROFTON,
CHAS. A. WETMORE, Jr.,
FRANK DURYEA.

Attorneys for Appellants.

4. DECISION OF THE APPELLATE COURT.

[1] ALIEN LAND LAW—CONSPIRACY TO EFFECT TRANSFER OF REAL PROPERTY—PLEADING—INDICTMENT—AGREEMENT TO PURCHASE—SUFFICIENCY OF ALLEGATION.—An indictment for conspiracy to effect a transfer of real property in violation of the Alien Land Law was not rendered insufficient because of its failure to allege that the defendants unlawfully, etc., did "conspire to effect a transfer", etc., where it contained an allegation that the defendants "did wilfully, unlawfully and feloniously take and enter into an agreement to purchase certain real property", etc.

[2] WORDS AND PHRASES—MEANING OF WORD "PURCHASE."—The meaning of the word "purchase" in a judicial sense is quite synonymous with its signification as it is colloquially used and understood, and when used for the purpose of characterizing a transaction involving property of any kind it is to be understood therefrom that there has been an acquisition by one or more parties of the title to such property.

[3] ALIEN LAND LAW—CHARACTER OF LAND PURCHASED—ALLEGATION SHOWING UNNECESSARY.—In such indictment it was not necessary that there should have been an allegation that the real property which it was alleged was purchased by the defendants was agricultural or farming land, or not land which the alien defendant may acquire for residential or commercial purposes.

[4] ID.—PURCHASE NOT IN SATISFACTION OF LIEN—ALLEGATION UNNECESSARY.—It was not necessary to allege in such indictment that the acquisition of the land was not to be consummated for the purpose of enforcing or satisfying any lien existing upon real property at the time of the enactment of the Alien Land Law.

[5] ID.—CONVEYANCE MADE WITH INTENT TO AVOID ESCHEAT—PRIMA FACIE PRESUMPTION CREATED BY SECTION 9—APPLICABILITY OF TO CRIMINAL ACTIONS.—The provision in section 9 of the Alien Land Law that a prima facie presumption that a conveyance is made with intent to prevent, evade or avoid escheat to the state as therein provided shall arise upon proof of "(a) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof," applies to criminal as well as civil actions under the act.

[6] ID.—PRESUMPTION CREATED BY SECTION 9—EQUAL PROTECTION OF LAW—NON-VIOLATION OF TREATY WITH JAPAN.—In so far as it applies to criminal cases arising under the Alien Land Law, the provision of section 9 thereof as to the conditions upon which the disputable presumption of an invalid conveyance will arise, is neither amenable to the objection that it denies to any person or class of persons within this state the equal protection of the law nor subject to the criticism that it infringes any rights guaranteed to alien Japanese denizens within the state by article I, paragraph 3, of the treaty of 1911 between our government and Japan.

[7] ID.—RULES OF EVIDENCE—POWER TO CHANGE.—It is within the constitutional right of the legislature, or of the people, in the exercise of the powers of initiative which they have reserved to themselves, to change any rule of evidence now existing and place upon a defendant in a criminal case, of whatsoever character, a heavier burden in the trial of the charge against him than he is under the existing system required to bear.

[8] ID.—EFFECT OF PRESUMPTION UPON QUESTION OF REASONABLE DOUBT.—The presumption arising under section 9 of the Alien Land Law as to an invalid conveyance upon proof of certain facts therein specified was not intended to, nor has it the effect of, relieving the people of the burden of proving the guilt of persons prosecuted under section 10 of said law beyond every reasonable doubt. It is a mere disputable presumption, the effect of which is to be overcome by such evidence only presented by the defendants as will be sufficient to create a reasonable doubt of their guilt.

[9] ID.—CONSPIRACY—EVIDENCE BEFORE GRAND JURY—DISCUSSION OF MEANING OF PROVISIONS OF ACT—EFFECT OF INTRODUCTION OF UPON RIGHTS OF DEFENDANTS.—In this prosecution for conspiracy to effect a transfer of real property to an alien in violation of the Alien Land Law, the introduction in evidence of a discussion that took place before the grand jury between the district attorney, his assistant, one of the defendants and some of the grand jurors as to the meaning of the several provisions of the Alien Land Law, did not exercise any baleful effect upon the rights of the defendants.

[10] ID.—VERDICT—EVIDENCE.—In such prosecution the evidence was sufficient to support the verdict of guilty.

Appeal by defendants from a judgment of the superior court of Sonoma County, Emmet Seawell, judge, of conviction of conspiracy to violate the alien land law. *Affirmed.*

For Appellants—Chas. A. Wetmore, Jr.; Gillogley, Crofton & Payne; Frank A. Duryea.

For Respondent—U. S. Webb, attorney-general; J. Chas. Jones, deputy attorney-general.

The defendants, Cockrill, a lawyer by profession, and Akada, a native of Japan, were indicted by the grand jury of Sonoma County for the crime of conspiring to cause or effect the transfer of real property to an alien ineligible to citizenship under the laws of the United States, in violation of the provisions of an initiative act adopted by the people at the general election held on November 2, 1920, and designated and known as the "Alien Land Law."

The defendants demurred to the indictment on general and special grounds and also moved to set it aside for alleged statutory reasons. The motion was disallowed, but the district attorney, conceding the force of the demurrer in a certain particular, was, upon motion, allowed to amend the indictment. Like proceedings were had as to the amended indictment, and, by leave of the court, the district attorney again amended the indictment, and it was upon the second amended indictment that the defendants were finally arraigned, tried and convicted of the crime above stated.

At the time fixed for the arraignment of the defendants for sentence, the latter, through their counsel, interposed a motion in arrest of judgment and also a motion for a new trial, both of which were denied.

The appeal is by the defendants from the judgment and the order denying their application for a new trial.

The transaction out of which this prosecution developed took place on the 26th day of August, 1921, negotiations for its consummation having previously been carried on for several weeks by the defendants with B. C. Souza and Mae C. Souza, his wife, the parties owning the land involved in the transaction. The Souzas were the owners of approximately 30 acres of agricultural land situated near Petaluma, in Sonoma County. When the defendants proposed to purchase the land, the Souzas stated to them that, if the purchase of the land was to be made for Akada himself and the property to be for his own possession, occupation and use, they did not think that the sale could be made under the law, referring, of course, to the Alien Land Law. Akada and his wife (also a native of Japan) had, prior to the transaction here involved, lived on a farm in Sonoma County for a number of years and during that time several children were born to them, and both Akada and Cockrill declared to the Souzas that the land was to be purchased for the American-born children of said Akada. After considerable discussion of the matter, Cockrill, so the Souzas testified, stated that he had consulted the district attorney of Sonoma County about the transaction and had been advised by that official that if the land was to be purchased for the American-born children of Akada the transaction would be perfectly legal. This statement was positively denied by the district attorney. He testified that no such advice was given by him to Cockrill; that the latter had never consulted him about the matter.

Finally a written agreement for the purchase of the land, dated the 26th day of August, 1921, was entered into between the Souzas and the defendant Cockrill whereby the land was sold to the latter for the sum of \$2,250. Upon the execution of this agreement Cockrill paid the vendors the sum of \$150. The agreement provided that on the execution of a deed and certificate of title to the property the sum of \$1,100 was to be paid and that the balance of the purchase price, \$1,000, was "to be covered by a mortgage on said property, said mortgage to be held by parties of the first part (the Souzas) or their assigns." The Souzas, as we have stated, testified that the defendants represented to them at all times that the land was to be purchased for and to be owned by the American-born children of the

defendant Akada. Akada furnished the money with which the payments on the land were made.

It appears that the abstract of title disclosed some defects in the title, and on September 24, 1921, Cockrill, representing the Souzas as their attorney, commenced a suit to quiet title in the superior court of Sonoma County. There is no question raised here as to the fact that four of the children of Akada, for whom it was claimed by Cockrill and Akada the land was purchased, were of American birth.

After the action to quiet title was commenced Cockrill was subpoenaed to appear before the grand jury to give testimony as to the transaction. Before the inquisitorial body he testified that Akada purchased the property for his American-born children; that the contract of sale was taken in Cockrill's name as trustee for said children and that the intention was to complete the transaction by taking a deed in the name of said children and then having a guardian of their estates appointed for them.

It appears that at the time of the several transactions herein referred to, while believing that Akada's native-born children could take title to agricultural lands in this state, and that it was not unlawful for such purpose, Cockrill was of the opinion that an alien Japanese father could not act as guardian of his children's estate and hence "arrangements were made to have an American citizen appointed as such guardian as soon as the title should be found good and the actual transfer made." Parenthetically, we may say that the Supreme Court in the case of *Estate and Guardianship of Yano*, 63 Cal. Dec. 515, decided subsequently to the transactions above referred to, held that an alien incapable of becoming a citizen of this country may not only furnish the money for the purchase of agricultural lands for his American-born children, but may also act as guardian of the persons and estate of such children.

There was testimony to the effect that, upon the execution of the agreement of purchase and sale, the defendant Akada commenced to improve the land by erecting thereon a number of buildings which, aside from the one in which he and his family were to reside, were to be used as "chicken houses." All this testimony was by the court limited in its application to the defendant Akada. There were also admitted in evidence certain statements made by Cockrill and Akada when testifying before the grand jury regarding the transaction involved herein, as was also an extra-judicial statement by Akada relative to said transaction, in which, however, he declared that the property was bought for his children, but in which he gave what appears to be an inconsistent explanation as to the source from which the money used in purchasing the property came. The above statement embraces, substantially, all evidence of material importance introduced by the people in support of the charge. As to the defense, Cockrill's testimony was all that was received in rebuttal of the showing made by the people, Akada not having been called to testify. Cockrill's testimony consisted of an effort on his part to explain that the transaction involving the purchase of the land was carried on in good faith and according to a conscientious interpretation by him of the provisions of the Alien Land Law and that the intention was to purchase the land for Akada's American-born children.

The defendants advance a number of points on which they claim to be entitled to a reversal of the judgment and the order. Most of these points, while involving challenges of the legal soundness of certain given instructions and the action of the court in disallowing others, proposed by

defendants, and rulings of the court as to the admissibility of certain evidence, in reality involve an assault upon certain portions of the Alien Land Law upon the ground of their alleged invalidity. These points we will now proceed to consider.

1. The defendants vigorously contend that, in allowing the purported indictment to be amended, the court committed error in this: That the indictment, as originally filed, did not state an offense under the act in question, and hence no amendment thereof, even if thus an offense under said law was stated, could make it an indictment, since the situation in such case would be as if the grand jury had not found and presented an indictment against the accused.

The authority for the allowance of amendments of indictments and informations is in section 1008 of the Penal Code, so much of which as is apposite to the present consideration reads as follows: "An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court, where it can be done without prejudice to the substantial rights of the defendant. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

The particulars in which it is claimed that the indictment as originally filed was insufficient because of the want of facts or in the statement of the offense thereby sought to be charged are as follows:

"First, the indictment did not charge that the land involved was agricultural land or that it was not land which an alien Japanese might acquire for residence or commercial purposes in accordance with the treaty between the United States and Japan;

"Second, the grand jury did not find or charge that the transaction was for the use or benefit in any way of the defendant Akada;

"Third, the grand jury did not find or charge that the land was not to be acquired for the use and benefit of defendant Cockrill, in whose name the contract was taken;

"Fourth, the grand jury did not find or charge that the contract was not taken, or that the land was not to be finally transferred, in satisfaction of any lien thereof."

Clearly, if the document filed as an indictment in the first instance stated no offense under the Alien Land Law and the purported second amended indictment, upon which the accused were tried, does state such an offense, then it must be held that the purported trial and the conviction of the defendants were *coram non judice* and absolutely void, inasmuch as the document purporting to be the second amended indictment would be no indictment at all, it not having been found and presented by the grand jury. Nor could the document stand as an information, since the prerequisites of the filing of an information are wanting. (Secs. 809, 872, Pen. Code.)

The primary question, then, is whether the "original indictment" stated an offense under the Alien Land Law; and this question must be determined upon a consideration of certain provisions of said law and certain provisions of the treaty between this government and the Empire of Japan.

The first section of the act in question reads as follows: "All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein,

in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

Section 2 provides: "All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Section 7 reads in part as follows: "Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section 2 of this act or by any company, association or corporation mentioned in section 3 of this act, shall escheat to, and become and remain the property of the State of California. * * * The provisions of this section and of sections 2 and 3 of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon, or interest in such property, so long as such real property so acquired shall remain the property of the alien company, association or corporation acquiring the same in such manner. No alien, company, association or corporation mentioned in section 2 or section 3 hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt."

The first part of section 8 contains a similar provision as to escheat in relation to any leasehold or other interest in real property less than the fee acquired in violation of the provisions of the act by any alien mentioned in section 2 of said act or by any alien, company, association or corporation mentioned in section 3. There are other provisions in said section which are not material to this inquiry.

Section 10, upon which the indictment herein is predicated, reads as follows: "If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

The initial clause of article I of the treaty between the United States and Japan reads as follows: "The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

It will be noted that sections 1 and 2 of the Alien Land Law describe and designate the classes of aliens competent to acquire and possess real property in this state, the first including all that class of aliens that are eligible to acquire the rights of citizenship in the United States and the second embracing all aliens, whether they are or are not eligible to citizenship of this country, that are entitled to acquire and possess real property by virtue of the provisions of any treaty between this government and the country of which such aliens are natives guaranteeing such right.

While section 3 is not particularly important to the discussion of the points herein made, it may be explained that it guarantees the right to own real property by such aliens as are not mentioned in sections 1 and 2 as

may constitute a majority of the members of any company, association or corporation organized under the laws of this state or any other state or nation or who hold a majority of the issued capital stock of said company, etc., and which corporation is authorized to acquire, possess, enjoy and convey real property or any interest therein in this state, in the manner and to the extent and for the purposes prescribed by any treaty existing at the time of the enactment of said law between the Government of the United States and the nation or country of which such members or stockholders are citizens or subjects. Obviously, no other class of aliens ineligible to become citizens of the United States than those classes mentioned in the above sections of the Alien Land Law are entitled to acquire agricultural or farming land in this state.

With this understanding of the provisions of the Alien Land Law and the provisions of the treaty between this Government and the Government of Japan which are pertinent to the present investigation, we will proceed to an examination of the indictment as it was found and presented by the grand jury to the superior court. That pleading is in the following language:

"W. A. Cockrill and Y. Akado are accused by the grand jury of the County of Sonoma, State of California, by this indictment, found this 15th day of November, one thousand nine hundred and twenty-one, of the crime of conspiracy to effect a transfer of real property in violation of the Alien Land Law of the State of California, committed as follows:

"The said W. A. Cockrill and Y. Akado on or about the 19th day of September, nineteen hundred and twenty-one, at and in said County of Sonoma, State of California, that the said defendants W. A. Cockrill and Y. Akado did then and there wilfully, unlawfully and feloniously conspire together to effect a transfer of real property in the County of Sonoma, State of California, and an interest therein, and did so wilfully, unlawfully and feloniously take and enter into an agreement to purchase certain real property from Bartholomeu C. Souza and Mary C. Souza in the name of said defendant W. A. Cockrill and paid thereon on the purchase price thereof the sum of one hundred and fifty dollars, lawful money of the United States, which said money so paid on said purchase price was paid by said defendant Y. Akado, said Y. Akado being an alien and a subject of the Empire of Japan and not being then and there an alien eligible to citizenship under the laws of the United States, and there not being then and there any treaty existing between the Government of the United States and the Government of the Empire of Japan providing for the acquiring, possessing, enjoying and transferring real property or any interest therein, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of California."

[1] It will be observed that the indictment, as it was originally framed, is, substantially, in the language of section 10 upon which it was founded. It is true that the pleader in preparing the indictment used the word "purchase", which is not employed in section 10, in the place of the word "transfer", which is used in said section in defining the offense. In other words, the indictment, in the place of alleging in that portion thereof directly charging the offense, that the defendants unlawfully, etc., did "conspire to effect a transfer", etc., as is the language of section 10, alleges that the defendants did wilfully, unlawfully and feloniously take and enter into an agreement "to purchase certain real property", etc. But, even in those cases in which the crime may properly be stated in a criminal pleading in the exact language of the statute defining it, a departure from the pre-

cise language of the statute in setting forth the crime in an indictment or information will not have the effect of vitiating the pleading if the language employed in such pleading describes the offense sought to be so charged with clearness equal to that of the language of the statute itself. Indeed, the word "purchase", taken alone, and as it is used in the present case, is much more scopeful than would be the word "transfer", taken alone, if it were likewise used. To say that one had effected the transfer of real property without further explanation or amplification of the proposition would be ambiguous as to the persons by whom and to whom the transfer is made. In the present case, for instance, if there was nothing more in the indictment than the allegation that the defendants had formed a conspiracy to effect a transfer of real property contrary to the provisions of the Alien Land Law, the indictment would be obnoxious to the objection of uncertainty and ambiguity. In fact, it would probably be held not to state an offense under the law. The word "purchase" has a definite and well-understood juridicial meaning. [2] Indeed, its meaning in a juridicial sense is quite synonymous with its signification as it is colloquially used and understood, and when used for the purpose of characterizing a transaction involving property of any kind it is readily to be understood therefrom that there has been an acquisition by one or more parties of the title to such property. "Purchase," states Webster in his dictionary, means "to acquire; to buy for a price." This is undoubtedly the popular meaning. In law, it "includes every mode of coming to an estate except by inheritance". (*Greer vs. Blanchard*, 40 Cal. 194, 197.) In *Marsh vs. Lott*, 8 Cal. 384, 391, which was a suit for the specific performance of a contract of option to buy real property and in which agreement it was covenanted that the proposed vendee was thereby given "an option to purchase" certain real property, the appellate court had occasion to interpret the word "purchase" as used in such agreement and in explaining the meaning of said word said: "By reference to said agreement, we find that she gave plaintiff an option to purchase her property. The word 'purchase' implies the acquisition of; so that he (proposed vendee) was given the right to acquire the property of defendant, which in this case could not be otherwise than by a deed of conveyance."

Thus must it readily be seen that, in alleging that the defendants, one of whom was an alien ineligible to citizenship of this country, conspired to purchase certain real property, the indictment stated an offense against which the statute inveighs. In other words, the sum and substance of the charge as laid in the indictment before its amendment was that the defendants, one an alien legally incapable of becoming a citizen of the United States, and the other, as we may assume from his name, a citizen of this country or, if not already one, a person who is eligible to become such, entered into a conspiracy to effect a transfer to themselves of certain real property, contrary to the terms of the Alien Land Law of the State of California and that, in pursuance of the execution of such conspiracy, they committed two distinct overt acts, to-wit: 1. That they entered into a written agreement with the owners of said real property for the acquisition thereof; 2. That on the execution of said agreement, they paid to the vendors, with money furnished by the alleged alien defendant, the sum of \$150 on the purchase price. (Sec. 1104, Pen. Code.) Of course, the indictment necessarily means that the intent of the defendants was to prevent, evade or avoid an escheat as provided in the act.

[3] But, as we have seen, it is urged that, to state an offense under the law in question, it was necessary that there should have been an allegation

in the indictment that the real property which it is alleged was purchased by the defendants was agricultural or farming land, or not land which such alien may acquire for residential or commercial purposes. It is to be conceded that, as it was originally framed, the indictment is by no means a model criminal pleading. It is further to be conceded that, since under their treaty rights Japanese aliens may own certain houses, manufactories, shops, etc., and which possibly might be susceptible of the construction that thus they are guaranteed the right to own the land upon which such houses, etc., were erected and are maintained, it would have been the result only of the exercise of wisdom if the pleader, in drafting the indictment, had also alleged that the real property which it is charged that the defendants acquired or entered into an agreement to acquire was agricultural or farming land; still, as is to be understood from what we have said above, we do not think that allegation was indispensably essential to the statement of the offense denounced by section 10 of the act. In construing the indictment we must consider section 10, on which it is based, together with the other provisions of the Alien Land Law and the provision of the treaty between this Government and the Empire of Japan guaranteeing to alien Japanese certain rights as to real property. Thus viewing the indictment, it seems to us that but one conclusion can follow, and that is that the "real property" which that pleading charges the defendants with having conspired to acquire is the "real property" which the act in question declares that an alien ineligible to citizenship of the United States has no right to acquire or own in this state. The defendants could not have misunderstood the indictment to mean anything else and it must, therefore, be held as true, as we have hitherto declared, that the indictment as it was presented to the superior court by the grand jury, while inartificially phrased, was, in all other respects, sufficient to notify the defendants of the particular offense with which they were charged so that they could not be misled as to its real meaning or placed in such a position as not to be able to meet by any defense they may have the charge of conspiring to effect the transfer of agricultural land to an alien not competent under our laws to become a citizen or acquire the rights of citizenship of the United States. This is all that is required of any criminal pleading. It may be added that the evidence without conflict shows that the "real property" referred to in the indictment was farming land, and that the defendants, from the character of the cross-examination of the witnesses for the prosecution, appeared to have understood that the indictment so charged.

[4] It was not necessary, in the statement of the offense denounced by section 10 of the act in question, to allege that the acquisition of said land was not to be consummated for the purpose of enforcing or satisfying any lien existing upon real property at the time of the enactment of the Alien Land Law. Indeed, the very allegation that the defendants conspired to purchase certain real property itself plainly negatives the existence of the exception relating to the acquisition of real property through the enforcement or satisfaction of any lien or mortgage, provided in section 7 of the Alien Land Law.

The amended indictment added the allegation that the real property concerned herein was agricultural and farming land; that the contract was taken in the name of the defendant Cockrill for the "use, benefit, enjoyment, possession, occupation and control of defendant Akada"; that there was no provision in the treaty between the United States and Japan guaranteeing to Japanese aliens the right to acquire agricultural land. The second amended indictment, in addition to the matters set out in the amended indictment, supplied the omission in the amended indictment to

state the time at which the alleged crime was committed; that the said land "was and is not acquired in the enforcement or satisfaction of any lien", etc.; that the land was taken in the name of the defendant Cockrill for the use and benefit of the defendant Akada, "with the intent and for the purpose of preventing, evading and avoiding the escheating of said land and property to the state"; that defendant Cockrill had no interest in the fee of said land or otherwise.

The only material change made by either amendment was that involved in the allegation that the real property which the defendants conspired to have transferred to themselves was "agricultural or farming land." The other changes were not essential to the statement of the offense. We have already disposed of the proposition that the indictment should have alleged that the land was not acquired in the enforcement or satisfaction of any lien, etc. The allegation that Cockrill had no interest in the fee is immaterial, since the indictment, as originally presented, alleged that the land was purchased by him and the defendant Akada, thus showing that Akada himself had acquired an interest in the land and that the purpose of the conspiracy or combination between him and Cockrill was to effect that result with respect to said real property.

It is clear that it cannot be held that the change effected in the indictment by the amendment thereof, as above indicated, affected the substance of the crime charged, but merely resulted in stating the offense or the transaction from which it arose in greater detail. Precisely the same offense as was stated in the indictment as it was originally framed is merely set forth with more particularity in the indictment as amended. The substantial rights of the defendants could not, therefore, have been prejudiced by the amendment. (Sec. 1008, Pen. Code.)

We may add that, since the indictment, both as originally filed and as amended, stated the offense designed to be therein charged and the original indictment appearing to have been found, endorsed, returned and presented according to the requirements of the law, the motions to set aside the amended and second amended indictment were properly denied. And for the reasons stated above in holding that the indictment, as originally framed, was exempt from the claims of the demurrer thereto, the motion in arrest of judgment was properly denied.

2. The next assignment which is to be considered is that the court committed error resulting in serious prejudice to the substantial rights of the defendants by incorporating into its charge and thus reading to the jury certain provisions of the Alien Land Law. The provisions made a part of the court's charge to the jury comprehend all of sections 1, 2 and 10 and a portion of section 9 of said act. Sections 1, 2 and 10 are hereinabove reproduced. As to these, as parts of the court's charge, there is no objection suggested. It is, however, objected that it was error from which the defendants sustained serious damage to their substantial rights for the court to have embraced within its charge that portion of section 9 of the act establishing a disputable presumption of the guilt of persons charged under section 10 upon the proof of certain facts. So much of said section as was included within the charge to the jury reads as follows:

"Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section two hereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid

escheat as provided for herein. A *prima facie* presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:

"(a) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof;"

There are three other distinct acts the doing of which, or any one of which, will raise the presumption mentioned. The specific grounds upon which objection is urged against said instruction is: (a) That the said presumption was intended by the legislature to be invoked and applied exclusively in civil actions authorized by sections 7 and 8 of said act to be brought for the purpose of securing a decree escheating to the state any real property or leasehold interest in such property which has been acquired in violation of the terms of the act; (b) That said portion of section 9 is violative of that part of section 1 of article XIV of the Constitution of the United States which provides that "no state shall deny to any person within its jurisdiction the equal protection of the law"; (c) That it is in direct contravention of the terms of article I, paragraph 3 of the American-Japanese treaty of 1911; (d) That the provision as to said presumption is invalid because, when given as an instruction to a jury in a case arising under section 10 of the act, it contradicts and destroys the effect of the presumption that all persons accused of public crime are innocent until their guilt is established beyond a reasonable doubt.

[5] (a) The statute does not expressly limit the application of the presumption to any particular action or proceeding which may, by virtue of certain of its provisions, be instituted in the superior court. Nor, as we read the statute, is there any reason arising from the statute itself or from a reasonable construction thereof which inclines us to the belief that it was the legislative intent that the presumption should have application only to civil cases or proceedings in escheat, as authorized by the act.

Section 1102 of the Penal Code provides that:

"The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code."

We know of no other section or provision of the Penal Code whose language is such as to require the conclusion that the application of the presumption in question should not as well be applied to a criminal as a civil action authorized by the act. Hence, we hold that the presumption was properly stated to the jury in the charge of the court in this case.

(b) and (c) The two propositions thus designated hereinabove may be considered together since both involve the general contention that the presumption in question is discriminatory in its operation, in that it is applicable alone to cases in which a particular or single class or race of people is proceeded against in this state in an action in the courts of this state. [6] But we think it will require but little reflection and no argument to satisfy any mind unfettered by prejudice against the Alien Land Law or unembarrassed by partisanship in favor of those accused under section 10 in a particular case that, in so far as it applies to criminal cases arising under the act in question, the provision of section 9 as to the conditions upon which the presumption will arise, is neither amenable to the objection that it denies to any person or class of persons within this state the equal protection of the law nor subject to the criticism that it infringes any rights guaranteed to alien Japanese denizens within the State of California

by article I, paragraph 3, of the treaty of 1911 between our Government and Japan. The only criminal proceeding authorized by the act is that which may arise under section 10 thereof, and that section is, it will be observed, sweeping in its scope. It excepts no one from its operative effect, but by its very language is made to apply to all persons, regardless of their race, nativity or color. If two or more American-born citizens were to conspire to do the act or acts inhibited by said section their conduct in that regard would clearly fall within the condemnation of the section. Indeed, no better illustration of the legal soundness of this proposition can be found than in the instant case, in which, as we have reason to know, one of the accused is a native of the United States. In its application to criminal cases arising under section 10 of the act, the *prima facie* presumption, which may arise under the conditions indicated by section 9 is, in its scope and effect, coextensive only with the scope of section 10. The presumption, therefore, as a rule of evidence, necessarily applies alike to all persons, irrespective of nativity, race or color, who by their conduct, come within the ban of section 10. It follows, then, that the rule as to the presumption is not in anywise or in any sense discriminatory as against any class or race of people or violative of any treaty rights of alien Japanese residing in this state.

The proposition decided in *In re Terui*, 187 Cal. 20, cited by the appellants, bears no relationship in a legal sense to the points here under consideration. In that case, the supreme court had before it the question of the constitutionality of an act of the legislature of 1921, imposing upon and exacting from "every alien male inhabitant of this state over twenty-one years of age and under sixty years of age" except certain enumerated incompetents, the payment of an annual poll or head tax of ten dollars. Former Chief Justice Angellotti, voicing the views of the court, held, as quite obviously no other conclusion could justly be announced under such circumstances, that, quoting from the syllabi:

'In view of the provisions of the existing treaty between the United States and Japan, providing, among other things, that the citizens or subjects of neither shall be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects, the alien poll tax law of California is ineffective for any purpose with relation to any citizen of Japan.'

This is all that was decided in the *Terui* case and thus readily is it to be perceived that, as stated, it has no application to or bearing upon the points here under discussion.

(d) Finally it is said, as we have seen, that the effect of embracing the presumption in an instruction addressed to a jury in a criminal action based on section 10 is to shift the burden of proof to the accused and so nullify the effect of the rule that the presumption of innocence abides with a defendant in a criminal case until the jury, from the evidence, has been convinced of his guilt beyond all reasonable doubt.

It will not be denied that, if it be within the competence of the legislature, in the exercise of its powers under the Constitution, to establish such a rule of evidence as is involved in the *prima facie* presumption under consideration, a trial court may, if by so doing it does not enter upon the domain of fact, instruct the jury as a matter of law that such presumption will arise upon the proof of a certain fact or group of facts in any criminal case to which it is applicable. And we know of no constitutional restriction upon the legislature to create or establish any rule of evidence whose effect, when applied, is not to deny to any person accused of crime a trial

by due process of law. [7] Indeed, it is in our opinion within the constitutional right of the legislature, or of the people, in the exercise of the powers of initiative which they have reserved to themselves, to change any rule of evidence now existing and place upon a defendant in a criminal case, of whatsoever character, a heavier burden in the trial of the charge against him than he is under the existing system required to bear.

[8] But we do not understand that the presumption referred to was intended to relieve the people of the burden of proving the guilt of persons prosecuted under section 10 of the act beyond every reasonable doubt; nor do we think, when properly applied, the presumption will have that effect. It is a mere disputable presumption, the effect of which is to be overcome by such evidence only presented by the defendants as will be sufficient to create a reasonable doubt of their guilt. Its meaning is simply this: That, after the people have shown by sufficient evidence, either direct or circumstantial, that the persons charged have by their joint acts effected a transfer of farming or agricultural land to an alien ineligible to become a citizen of the United States, then it rests with those persons to explain the transaction consistently with good faith and honest intentions or that the combination was formed with no intention to effect the wrongful result which their acts may appear upon their face to have brought about. The "burden" is neither in principle nor degree different from that imposed by the law on a person charged with the crime of murder. Section 1105 of the Penal Code provides:

"Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

The above section, which obviously casts upon a defendant in a murder case the burden of a certain degree, after the homicide has been shown by the people to have been committed by him, has in innumerable cases been held to represent a perfectly valid exercise of legislative power. But by it there was no intention in the legislature to say that the burden of proving the defendant's guilt beyond a reasonable doubt was not still upon the people, the quantum of evidence which he was required to present to support that burden being such only as would or will raise a reasonable doubt of his guilt of the crime of murder. (*People vs. Bushton*, 80 Cal. 160, 164; *People vs. Boling*, 83 Cal. 380, 382; *People vs. Ah Gee Young*, 86 Cal. 144, 146; *People vs. Newcomer*, 118 Cal. 263, 271; *People vs. Rodriguez*, 182 Cal. 197.) It should be suggested in this connection that an instruction to a jury declaring the *prima facie* presumption provided by section 9 of the act should always be accompanied by an instruction that the burden thus placed upon the defendants charged under section 10 of the act was only such as required the defendants to introduce evidence sufficient to create a reasonable doubt of their guilt.

It is, however, clear from its charge to the jury in the instant case, that the trial court did not regard the burden cast upon the defendants by the presumption in question as amounting to more than a demand upon them, in sustaining the burden, to introduce such evidence only as would create a reasonable doubt of their guilt of the offense charged. The court explicitly instructed the jury that the burden of proving the guilt of the defendants was upon the people and that "every essential fact, or every essential to a conviction, must be established beyond a reasonable doubt and to a moral certainty"; that upon the plea entered by the defendants of not guilty to the indictment, the presumption of innocence arose and that said presumption "accompanies the defendants throughout the trial, and goes with you in

your retirement to the jury room to deliberate upon your verdict. It will avail to acquit the defendants unless it be overcome by sufficient proof of guilt. You must examine the evidence by the light of that presumption, and unless, upon examining it, you find it sufficiently strong to overcome the presumption of innocence, to remove it and, moreover, to satisfy you of the defendants' guilt beyond all reasonable doubt and to a moral certainty, they would be entitled to an acquittal at your hands". Again, in another part of the charge, the court further instructed the jury that "the law presumes every man to be innocent until his guilt is established beyond a reasonable doubt and this presumption attaches at every stage of the case, and to every fact essential to a conviction". These instructions certainly were sufficient to convey to the mind of any intelligent man or woman that the *prima facie* presumption arising upon a proof of certain facts in connection with the transaction culminating in the execution of the alleged conspiracy does not have the effect of attaching to the defendants any further burden than that of creating by the introduction of testimony in rebuttal of the presumption a reasonable doubt of their guilt.

The court's action in giving and refusing to give other instructions is criticized. It is not necessary to give these assignments special attention herein for the reason that the court's charge covered every important principle pertinent to the case. Every principle embraced in the instructions proposed by the defendants but rejected by the court was covered by the court's charge. The criticism of certain other given instructions than the one embracing a statement of certain provisions of the Alien Land Law and above considered, we find, upon a careful examination thereof, is without merit.

3. The court allowed the district attorney to introduce before the trial jury certain alleged statements made by the defendant Cockrill before the grand jury relating to the transaction herein involved. This testimony was limited in its effect to the defendant Cockrill. Counsel for the defendants stated that they had no objection to offer to the introduction of any portions of the statement made by Cockrill before the grand jury which involved the facts of said transaction. It transpired, however, that the alleged "statement" consisted entirely of a discussion between the district attorney, his assistant, Cockrill and some of the grand jurors as to the meaning of the several provisions of the Alien Land Law. To these matters counsel for the defendants vigorously objected. But the court, while stating that they involved mere matters of argument as to the meaning of the law, permitted them to go into the record and before the jury, saying that they were only argumentative and so were innocuous in their effect upon the rights of the defendants and were so intermingled with certain facts testified to by Cockrill before the grand jury which the people were entitled to introduce before the trial jury that they could not be segregated from the facts without much waste of time and great inconvenience. [9] We have given this assignment serious consideration and thus have not been able to persuade ourselves that the introduction of those matters before the jury exercised any baleful effect upon the rights of the accused. Of course, those matters should not have been permitted to be introduced into the case and should have been stricken from the record, but the opinions expressed by Cockrill, the district attorney, his assistant and some of the jurors as to the meaning of the provisions of the Alien Land Law corresponded in a measure with the statement of the law by the court in its charge to the jury. Besides, the record shows that counsel on both sides, in their arguments before the jury, read and gave their respective interpretations of the provisions of said law applicable to the case. There was no expression by

either the district attorney, his assistant or any of the grand jurors contained in the alleged statement of Cockrill before the grand jury upon the question of the guilt or innocence of the defendants. Moreover, Cockrill, when asked by the district attorney or his assistant or any grand juror a question calling for his opinion as to the meaning of certain provisions of the law, invariably answered and gave his conception of the meaning of said provisions. While these are our views with respect to the admission of the matters referred to in evidence, we are not prepared to deny that there is some force in a suggestion made by the court, when ruling upon the question of the admissibility of Cockrill's testimony before the grand jury, that the discussion of the provisions of the Alien Land Law by the parties named before the grand jury and thus securing the opinion of Cockrill regarding certain provisions thereof might have been construed to disclose his real state of mind with regard to the transaction—that is to say, it may well be regarded as tending to reveal in a measure his real intentions relative to that matter. In that view the discussion between Cockrill and others before the grand jury as to the meaning of certain provisions of the law would be admissible in evidence at the trial as against him.

[10] It is lastly contended that the evidence is wholly insufficient to support the verdict, particularly as to the defendant Cockrill. We have above given herein the substance of the evidence introduced by the people and directly addressed to the proof of the charge. Laying aside, for the moment, the instruction containing the provision of the act as to the *prima facie* presumption arising upon the proof of certain facts or the doing of certain acts, it is clear to our minds that the evidence directly presented by the people was such that it would be an unwarranted interference with the province of the jury for a reviewing court to declare that the conclusion arrived at by the jury was not fortified by sufficient proof. In addition to the admitted facts (above referred to) that Akada furnished the money which was paid on the purchase price, that Cockrill took the contract of sale in his name, is the testimony of the Souzas that, prior to the time at which Cockrill appeared in the transaction, Akada undertook to negotiate the purchase of the property for himself. Explicitly did B. C. Souza so testify, and further testified that he (Souza) told Akada at that time that he could not sell the land to an alien Japanese, and advised Akada to consult an attorney. It further appears from the testimony of said Souza (and this is not contradicted) that immediately upon the execution of the contract of sale and the payments required thereby being made, Akada himself took possession of the property, although the contract was still in Cockrill's name. And here we may pause to suggest that the jury were well justified in viewing (and we may assume in support of the verdict that they did so view it) the fact of the taking possession of the land by Akada immediately upon the execution of the contract of sale as reflecting the purpose or intent of the defendants while prosecuting the negotiations for the purchase of the land; that the real intention of the defendants was to purchase the land for Akada and to take it in Cockrill's name as a mere camouflage of such intent. It also appears that no steps had been taken by Cockrill or Akada after the execution of the agreement and Akada took possession of the property to secure the appointment of a guardian for the latter's children. As stated above, Akada, in a conversation with certain parties, after the contract was executed, but prior to the execution of the conveyance of the land according to the terms of the agreement, declared that the money with which certain payments were made on the purchase price belonged to his children, the eldest of whom was about seven years of age, but could not, or at least did not,

make a satisfactory explanation as to where or how they kept the money. He also stated that he was going to live on the land with the boy and "run it." Then there was the testimony of the Souzas that, prior to the execution of the agreement of sale, Cockrill said to them that he had consulted the district attorney of Sonoma County about that particular case, and that that official told him (Cockrill) that it was a valid transaction, and, as seen, the denial of the district attorney that he ever gave any such advice to Cockrill or that the latter ever consulted him about said transaction.

Thus it is clear that there was sufficient evidence introduced by the people, if credited or believed by the jury, as the verdict shows that it was, to warrant a verdict of guilty as to both defendants. It is true that Cockrill's testimony tended to contradict the bad faith or any wrongful motive at the bottom of the transaction which is to be implied from the testimony presented by the people. It is also true that Cockrill explained, as to the statement of the Souzas, that he said to them that he had consulted the district attorney about this particular case, that, when speaking to the Souzas of his interview with said official, he had reference, and so explained to the Souzas, to another and entirely different case. But it was obviously with the jury to accept the stories of the Souzas on all the matters as to which they testified and reject the testimony of Cockrill as to any matters to which he testified. This they evidently did.

But, as we have seen, a *prima facie* presumption of guilt arose upon the uncontradicted fact that Akada, being an alien, ineligible to become a citizen of the United States, furnished the money with which payments upon the purchase price of the land were made. If there had been no other testimony introduced after the proof or the admission of this fact—if, in other words, the defense had introduced no proof whatever or attempted to make any showing in rebuttal of the presumption referred to—it would have been the duty of the jury under the law to return a verdict of guilty. As we have shown, however, there is plenty of testimony in the record which strengthens and supports the presumption.

We have now given painstaking consideration to the points advanced against the validity of the judgment and the order appealed from and, as must be apparent from the foregoing discussion, have found no just legal reason for disturbing either.

The judgment and the order are, accordingly, affirmed.

HART, J.

We concur:

BURNETT, J.

FINCH, P. J.

5. PETITION FOR HEARING IN THE SUPREME COURT AFTER DECISION IN THE DISTRICT COURT OF APPEAL, BY ALGERNON CROFTON.

To the Honorable Curtis D. Wilbur, Chief Justice, and to the Associate Justices of the Supreme Court of California:

The petition of W. S. Cockrill and S. Ikada respectfully shows:

That on April 30, 1923, the district court of appeal of the State of California, in and for the Third Appellate District, rendered and filed its judgment affirming the judgment of the superior court of Sonoma County in the above-entitled cause, convicting the defendants, your petitioners, of conspiracy to violate the Alien Land Law, and the said judgment of the district court of appeal became final on May 30, 1923.

I.

Two reasons why a hearing after judgment in the district court of appeal may be granted by the supreme court appear in the decisions: First, to correct error appearing on the face of the opinion of the appellate court. (*Burke vs. Mazy*, 10 Cal. App. 206, 211.) Secondly, to obtain a final decision by the court of last resort upon a doubtful and important question of law. (*Id.* and *People vs. Davies*, 147 Cal. 346.)

Your petitioners hope herein to present their case in such wise that both reasons will be clearly applicable.

II.

The errors alleged are these:

(1) That the appellate court upholds the validity of an original indictment which omitted allegations of fact without which a public offense was not stated.

(2) That the appellate court holds that an amended indictment which omitted to charge either the time or the place of the alleged offense was amendable.

(3) That the appellate court holds that a second amended indictment, containing the vital allegations of fact and of time and place, previously omitted and which were added by the district attorney without resubmission to the grand jury, was an indictment found and presented by the grand jury.

(4) That the appellate court overlooks entirely in its opinion the fact that while a questioned rule of evidence does apply equally to all transferees or donees, it does not apply equally to all transferees or donors, and is thus unconstitutional and in violation of a treaty.

(5) That on the statement of facts made by the appellate court there is no evidence of a conspiracy to commit any offense.

III.

The original indictment omitted to allege that the land involved was agricultural land, and that it was not taken in satisfaction of a lien, and that it was taken for Ikada's benefit. These were essential allegations.

We take the words of the appellate court's decision as a premise for our argument on this point: "Clearly," says the court, "if the document filed as an indictment stated no offense under the Alien Land Law, and the purported second amended indictment, upon which the accused were tried, does state such an offense, then it must be held that the purported trial and the conviction of the defendants were *coram non judice* and absolutely void, inasmuch as the document purporting to be the second amended indictment would be no indictment at all, it not having been found and presented by the grand jury."

So be it. And let it be further remembered that an indictment may not be amended in matters of substance (*Ex parte Chambers*, 32 Cal. App. 476).

As the treaty existing between the United States and Japan allows Japanese subjects "to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes" it appears that the only land in which Japanese may hold no interest is agricultural land. (This is conceded for the sake of argument in the appellate court's decision.)

If this be true it follows that the indictment here should have alleged that the land in question was agricultural land in order to state an offense. It did not so allege, describing it only as "real property."

The appellate court said: "we do not think that allegation was indispensably essential." It supports that decision by stating that but one "con-

clusion" could follow, namely, "that the 'real property' which that pleading charges the defendants with having conspired to acquire is the 'real property' which the act in question declares that an alien ineligible to citizenship of the United States has no right to acquire."

Nothing is more certain in pleading than the rule that an indictment must state facts which must constitute an offense without the aid of conclusion, inference or implication.

"It is an elementary principle of criminal law that the indictment must show that a crime has been committed." (*People vs. Schmitz*, [Cal., 1908], 94 Pac. 419, 422.)

"In no case can the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence, and *if the facts stated may or may not constitute a crime, the presumption is that no crime has been charged.*" (*People vs. Terrill*, 127 Cal. 100.)

In the instant case the original indictment charged only a conspiracy to transfer land to a Japanese.

Unless that land was agricultural land such an act was not a crime. The original indictment did not charge it was agricultural land.

Again, if the land was to be transferred or purchased in enforcement or satisfaction of any lien thereon, the act complained of was not a crime. (Alien Land Law, sec. 7.) The original indictment did not negative the exception.

Again, unless the land, title to which the indictment alleges was taken in the name of Cockrill, was to be held for the use or benefit of Ikada, the transaction was legal. The original indictment did not charge that the transfer was for Ikada's benefit.

Clearly, then, the act originally charged might or might not have been a crime, and so, under *People vs. Terrill*, *supra*, the presumption was that no crime was charged, the indictment was void and could not be amended to state an offense, without resubmission to the grand jury.

The rule is nicely stated in 7 A. L. R. 1548, as follows:

"An indictment which has omitted an allegation proof of which is necessary to a conviction is fatally defective, and the court cannot authorize an amendment curing the defect."

IV.

The amended indictment failed to state either the time or place of the alleged offense. These were material allegations, matters of substance and the indictment could not be amended in these respects by the district attorney.

But whether it was necessary or not to allege that the land was agricultural land, no denial can be made that the allegations of time and place are material allegations of any indictment (*People vs. Craig*, 59 Cal. 370), and especially of this one, for reasons stated on page 8 of this petition.

The amended indictment contained no allegation as to either of these essential matters.

The fact that the time and place were stated in the original indictment cannot save their omission in the amended pleading. The defendants were no longer faced with the original charge. Nothing contained in it could be availed of by them either to their advantage or detriment. It was without further effect and was supplanted for all purposes by the amended indictment. The allegations of the first indictment cannot be read with the second for the purpose of curing a defect therein, any more than the allegations of one count in an indictment can be incorporated in a second with or without reference (*People vs. Ellenwood*, 119 Cal. 166; *People vs. Evan-*

hoff, 45 Cal. App. 108), or any more than the jurisdictional allegations of an original complaint could be used to remedy their omission in an amended one.

Yet the appellate court refers only casually to these vital defects saying merely, "The second amended indictment in addition to the matters set out in the amended indictment, supplied the omission in the amended indictment to state the time at which the alleged crime was committed." (41 C. A. D. 94.)

Your petitioners urge that the amended indictment failing to allege vital facts, among them time and place, was fatally defective and that the supplying of the omission by the district attorney did not make the accusation one found and presented by the grand jury.

To recapitulate: With the exception of the allegation of time and place, none of the added and vital allegations of fact found in the first and second amended indictments were in the original document presented by the grand jury. And the amended indictment which took the place of the original did not contain the requisite statement as to time or place.

Each one of these allegations was material and was a matter of substance, and required proof in order to convict. No conviction could have been had without proof that the land was agricultural land, that the alleged conspiracy took place after the Alien Land Law was in effect, and that the conspiracy was made in Sonoma County. (The amended indictment does state that the land was in Sonoma County, but not that the conspiracy took place there.)

Therefore, the final accusation, the second amended indictment, should, like its predecessors, have been set aside on defendants' motion, because it was "not found, endorsed and presented as prescribed in this code." (P. C., 995.)

V.

The rule of evidence which the appellate court holds applies equally to all persons, does not apply equally to all donors but only to all donees, and thus clearly contravenes the Constitution.

The rule of evidence in question is the presumption raised by section 9 of the Alien Land Law which section so far as it is material here, provides as follows:

"Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section two hereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein. A *prima facie* presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:

"(a) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof."

The constitutional provision violated is the right of the Japanese father to the equal protection of the laws, guaranteed by section 1, article XIV of the Constitution of the United States.

The decision of the appellate court holds that the presumption referred to in subdivision a of section 9, is a rule of evidence applicable to all persons alike.

That is true so far as donees of a gift of land made by a Japanese are concerned. But it is not true as to donors. A Japanese donor has a pre-

sumption of guilty intent raised against him while donors of other nationalities have not.

To illustrate: It is the law of California that a Japanese father may make a gift of land to his American-born child and may supply the money for the purchase price. (*In re Yano*, 63 C. D. 515, 518.)

The same right is possessed by a father of any other nationality, native or alien.

It goes without saying that either father has also the right to purchase the property and place it in the hands of a trustee for the child.

Now if both fathers buy a piece of land for their respective children, the child of the Japanese father will hold the land subject to the right of the state to bring an action for escheat and in such an action the child would have to disprove the presumption. It is true that the other child would have no presumption to disprove, but as the presumption would be raised equally against all persons receiving such a gift from a Japanese, the presumption does not conflict with the Fourteenth Amendment when viewed from this angle, that is so far as the donee's right is concerned.

Your petitioners never contended that it did.

But there are two ends to a gift, donee and donor. To the donees the presumption applies equally. To donors it decidedly does not. This point, as your petitioners believe, was overlooked by the appellate court, and it is the point on which the presumption's unconstitutionality is urged.

The two fathers have equal rights to make a gift to their children, with or without the interposition of a trustee.

When the Japanese father exercises his legal right, he is faced, as in the instant case, with a presumption which might result in the escheat of his gift, unless he can prove the contrary.

The other father can make his gift free of encumbrance. Yet the legality of both gifts is the same.

It cannot be gainsaid that the legal right to make a gift, assured the Japanese father by the Constitution and the law, is hamstrung by this presumption, and it cannot be gainsaid that this burden is laid only on aliens ineligible to citizenship and not on any other persons.

It needs no argument, to use the phrasing of the Supreme Court in the *Estate of Yano*, 63 C. D. 515, 520, to demonstrate the proposition that a law which gives to one person a right and withholds it from another, both being alike competent in all respects, is not equal as between the two persons. The person from whom it is withheld is not accorded the equal protection of the law.

What we urge here is that when a Japanese exercises his legal right to convey land to a trustee for his American-born child, he cannot be burdened with a presumption which favors the nullification of his gift, unless the same presumption is raised against all the gifts of all other donors. Nor can any theory of classification be invoked to aid the presumption's validity, as fully appears from the opinion *In re Yano*, *supra*.

VI.

While the presumption does, as the district court of appeal holds, apply equally to all donees, it lays a burden of proof upon a Japanese subject exercising his legal right to make a gift which no citizen or eligible alien has to shoulder, and thus violates the Japanese-American treaty of 1911.

The treaty provision violated is the right of the Japanese father to enjoy the same rights and privileges as native citizens in respect to his person and property, guaranteed by article I of the Japanese-American treaty of 1911.

Article I of the treaty reads, in part, as follows:

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

The argument that section 9 contravenes the treaty differs from the argument that it infringes the Constitution, in the main only so far as the phrase "the same rights and privileges" differs from the phrase "equal protection of the laws."

It would seem that the power to make a gift to one's child is both a right and a privilege, as it should be. Certainly counsel despairs of finding authority to support such an axiomatic truth.

If this be true, and if also the power is a right and privilege possessed by native-born Americans, then section 9 prevents a Japanese making a gift to his children direct or through a trustee, free of burden, although all others may do so, and so violates his treaty right.

For while other citizens and other aliens may trustee property for their children or give it direct, it is impossible for a Japanese to do it without raising the ogre of escheat and undertaking to disprove a *prima facie* presumption to a jury where unfortunately prejudice and passion are sometimes factors.

It is clear that a law which subjects a Japanese to certain rules of evidence not applicable to citizens generally does not accord to him the same rights and privileges as are enjoyed by native citizens.

We repeat here, as in the constitutional argument, that in the instant case no question is involved of the right of the state to forbid the acquisition of agricultural land by Japanese. The treaty gives such aliens no such privilege. But the right of a Japanese to make a gift to his child, an American citizen, who as such is entitled to take and hold it, has been strongly upheld by the Supreme Court, and this right, of course, cannot be burdened with presumptions not laid on other nationalities or citizens.

VII.

The evidence does not show any conspiracy to violate the Alien Land Law.

Under the rules of this court your petitioners are bound by the statement of facts made by the district court of appeal and may not add to or question any of them.

These are severe terms and yet assuming them in full, your petitioners make bold to assert not only that the evidence adduced by the prosecution falls far short of that legally required before men may be deprived of liberty, but that no evidence of any crime exists at all.

First taking the statement of facts made in the appellate court's decision, your petitioners submit that not a single act there set forth is indicative of guilt or in the least incompatible with the defendants' constant plea that their only object was to buy the land for the children and that Cockrill should hold it temporarily as trustee in their behalf.

Naturally your petitioners cannot here take the statement of facts and rehearse it here, sentence by sentence, to prove the truth of their assertion, but they ask respectfully that your honorable court read the statement of facts in the appellate court's decision.

If, as petitioners confidently believe, nothing appears therein inconsistent with their theory of innocence, it will remain to consider only the force of such additional evidence as the appellate court further on adduces as proof of guilt. This is marshalled on page 100 of 41 C. A. D.

Piece by piece we take each fact alleged to indicate that the defendants planned that Cockrill should hold as trustee for Akada and not for the American-born children.

"Akada furnished the money," says the opinion. True, but so would he in making a gift to the children. He could do nothing else. That is no evidence of a guilty intent. The Yano decision expressly states that a Japanese father may furnish the money and buy land for his child.

"Cockrill took the contract of sale in his own name." So he did, but if he were to act as trustee for the children he had to. It is entirely consistent with innocence.

"Prior to the time at which Cockrill appeared in the transaction Akada undertook to negotiate the purchase of the property for himself." The defendants, of course, assert that Akada was seeking to buy the property himself for the children, but accepting with scrupulous exactitude the facts as stated by the court, petitioners urge that such an act prior to the alleged conspiracy is no evidence of a conspiracy. And certainly none against Cockrill who was not present. Suppose Akada did, the opinion proceeds to say that the Souzas told him he could not buy it himself and advised him to consult an attorney. It does not contradict the theory of innocence that Akada should have desired to buy land, should have found out that he could not, and should have abandoned the idea. Certainly the conspiracy, if any there was, took place after that, and a desire to possess land in America is scarcely evidence of a conspiracy, in which two must be concerned, to violate the law. In fact, the stated facts here show a firm desire to keep it.

"Upon the execution of the contract of sale, Akada himself took possession of the property, although the contract was still in Cockrill's name," says the appellate court. That certainly is no evidence of guilt. Akada as the natural guardian of his children, had the right, if not the duty, to do so. His possession and control would be only the possession and control of the children. (*In re Yano*, 636 C. D. 515.) The infant children surely could not take possession. It must be admitted that if the defendants were, as was within their legal rights, passing title to Cockrill as trustee for the children, the property could and probably would be run by the father for the children until they attained the age of majority, the father, of course, being answerable to them for the profits. *His possession or control could not in any way affect the title.* It is not illegal for a father to run his child's property, and in this particular case it would be the natural result of the defendants' asserted and legal intent, quite as consistent with innocence as with guilt, and thus cannot be taken as evidence of a conspiracy against either defendant.

Further, one thing seems legally certain. Akada's acts after the transaction cannot be used as evidence that Cockrill conspired with Akada to violate the law, and moreover, as appears from the appellate court's statement of facts at the beginning of the opinion, this evidence was limited to Akada. *It is not evidence against Cockrill under any circumstances, and the court will remember that the charge is conspiracy which makes it necessary that sufficient evidence be adduced against each defendant.*

"No steps had been taken by Cockrill or Akada after the execution of the agreement and Akada took possession of the property, to secure the appointment of a guardian for the latter's children." This scarcely is evidence of a conspiracy no matter from what angle viewed. A guardian was not necessary in the first place. An infant may take and hold land in California. (22 Cyc. 527, 529; *In re Yano*, 3 C. D. 515.) In the second place, as appears from the record, there was barely time. And under no circumstances could Akada's failure to have himself or another appointed promptly

a guardian for his children, be held as evidence of conspiracy against Cockrill.

"Akada * * * declared that the money with which certain payments were made on the purchase price, belonged to his children, but could not make a satisfactory explanation of how or where they kept the money." It will be noted that this was the extra-judicial statement referred to in the preliminary statement of facts. As Akada had the clear right to furnish the money with which to buy the land for his children, it can make no difference whatever who owned the money and it is difficult to imagine the whereabouts or ownership of the money being evidence of a conspiracy against Cockrill. The most unfavorable situation for the money would be that Akada owned it. That he did is freely admitted by defendants. It is entirely consistent with their earnestly repeated plea that Akada bought the property for his children and that the land was, in his attorney's advice, because of a defect in title, to be held by the attorney as trustee till cleared.

"He (Akada) also stated he was going to live on the land with the boy and run it." This the defendants have always admitted. No legal objection to it exists and to claim it is evidence that Cockrill conspired with Akada to effect a transfer of farming land to Akada seems to be straining testimony. The children being all under seven years, as appears from the appellate court's opinion (p. 100), it is not conceivable that any father in such circumstance would not "live on the land with the boy and run it." To intend doing so is not evidence of a guilty intent, and under no circumstances evidence of a conspiracy against Cockrill.

Finally, says the appellate court, "Cockrill said to them (the Souza's) that he had consulted the district attorney about that particular case, and that that official told him that it was a valid transaction and as seen, the denial of the district attorney that he ever gave such advice to Cockrill."

The cross-examination of the district attorney on this point does not appear in the appellate court's opinion, so let us assume the worst which would be that Mr. Cockrill told a deliberate lie in this connection. It does not prove or tend to prove a conspiracy between himself and Akada to violate the law in any way.

And that is all the evidence. Your petitioners submit that their original statement is correct. Not only does the evidence fail to measure up to that degree of proof necessary to convict men of crime but, except for the presumption whose validity is questioned, there is none.

However the matter may be finally resolved, your petitioners submit that the questions involved are of such importance and the points of law open to such serious difference of opinion, that the entire matter as originally submitted should be heard and decided by the court of last resort in California.

We have here the spectacle of two men, attempting to perform a perfectly legal act, viz: the giving of a farm by a Japanese to his American-born children to be held by a trustee, met in the middle of the transaction by a charge that they intended to do an illegal act. The charge is supported by a presumption held to be indicative of a criminal intent.

Yet no act or word of these defendants is inconsistent with their innocence. Nay, your petitioners submit, that naught they did should have been omitted by persons seeking to accomplish the legal purpose they sought.

The decision of the District Court of Appeal makes it impossible for a Japanese to exercise with safety the rights which your honorable court has decided are his. And your petitioners, therefore, pray that your honorable court hear and determine the matter.

NOTE—The petition was denied without giving any reason.

CHAPTER VIII.—SO-CALLED WHITE POINT CASE.

THE STATE OF CALIFORNIA, Plaintiff, vs. TOJUERO TAGAMI and
RAMON D. SEPULVEDA, Defendants.

IN THE SUPERIOR COURT OF LOS ANGELES COUNTY.

No. 11443. DEPT. 9.

1. COMPLAINT.

Now comes the plaintiff, the State of California, and for cause of action against the above-named defendants, alleges:

I.

That during all the times mentioned in this complaint the defendant, Tojuero Tagami, was and he now is a Japanese person and native citizen and subject of the Empire of Japan, and was and is not eligible to citizenship under the laws of the United States.

II.

That at no time mentioned in said complaint was there, nor is there now, any treaty existing between the Government of the United States and the Government of the Empire of Japan, under which a native-born Japanese citizen and subject of the Empire of Japan could acquire possession of, enjoy or transfer real property, or any interest therein, in the State of California or elsewhere in the United States, for either of the uses or purposes hereinafter set forth.

III.

That U. S. Webb is the duly elected, qualified and acting attorney-general of the State of California, and Thomas Lee Woolwine is the duly elected, qualified and acting district attorney of the county of Los Angeles in the State of California; and they and each of them have been informed and verily believe that the property hereinafter described has escheated to the State of California, through and by reason of the facts in this complaint alleged.

IV.

That on and prior to the 1st day of September, 1918, Ramon D. Sepulveda, defendant herein, was the owner in fee and in possession of and entitled to the possession of all that certain real property situate in the said county of Los Angeles, State of California, and described particularly as follows, to-wit:

"That certain parcel of land of the Sepulveda Ranch at White's Point, known as Fish Camp.

"Beginning at a point at the intersection of the line of ordinary high tide and the line of the present bulkhead; thence easterly along said bulkhead a distance of two hundred (200) feet; thence northerly at right angles to said bulkhead to a point distant ninety-eight (98) feet to a point; thence westerly in a line parallel to said bulkhead a distance approximately two

hundred (200) feet to the before mentioned line of ordinary high tide; then along said line of ordinary high tide to the point of beginning."

V.

That on the above said 1st day of September, 1918, said defendants, Ramon D. Sepulveda, as lessor, and the said Tojuero Tagami, as lessee, entered into and executed a certain lease in writing of the parcel of land and premises hereinbefore described, a copy of which lease is hereunto attached, marked Exhibit "A" and made a part hereof, and reference to which is made for greater certainty.

That the said defendant, Tojuero Tagami, under and in pursuance of said lease, entered into possession of said parcel of land and premises, and the said lease, from time to time thereafter, has been continued and kept in force, according to its terms between the said defendants, and the said Tojuero Tagami, defendant herein, has been and now is in possession of said parcel of land and premises and has kept and maintained the terms and conditions thereof and has used and occupied the said parcel of land and premises for the purpose of a health resort and sanitarium, and no other, as provided in said lease.

VI.

That plaintiff is informed and believes and on such information and belief alleges that the value of the leasehold and interest in said real property hereinbefore described is twenty thousand dollars (\$20,000).

VII.

That by reason of the facts hereinbefore alleged, the said leasehold and interest in said real property has been acquired and is now held in violation of the provisions of an act of the legislature of the State of California, entitled "An act relating to the rights, powers and disabilities of aliens and certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein and repealing all acts or parts of acts inconsistent or in conflict herewith", approved May 19, and found in the Statutes of 1913 at pages 206, 207 and 208 thereof; and in violation of the provisions of a certain other act of the legislature of the State of California, an amendment thereof and supplement thereto, entitled "An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith."

And all of said leasehold and interest in said property, hereinbefore described, has escheated and is escheated to the State of California.

Wherefore, the plaintiff prays that it be adjudged and decreed:

1. That the said leasehold and interest in said real property, in this complaint described, and the whole thereof, has escheated to the State of California; that the court shall determine and adjudge the value of such leasehold interest in said real property and enter judgment for the state for the amount thereof, together with costs.

2. That said leasehold and interest in and to said real property be ordered sold in conformity with the provisions of section 1271 of the Code of Civil Procedure of the State of California.

3. That the plaintiff have and recover its costs herein.

4. That the plaintiff have such other and further relief as the facts may warrant.

U. S. WEBB,

Attorney-General of the State of California,

THOS. LEE WOOLWINE,

District Attorney of the County of Los Angeles, State of California,

Attorneys for the Plaintiff.

T. C. BECKER, of Counsel.

EXHIBIT "A."

This indenture, made the first day of September, in the year of our Lord nineteen hundred and eighteen.

Witnesseth: That R. D. Sepulveda of the County of Los Angeles, State of California, lessor, and hereinafter known as the party of the first part, does hereby lease, demise and let unto Tojuero Tagami of said county, lessee, and hereinafter known as the party of the second part, that certain parcel of land of the Sepulveda Ranch, more fully described as follows: "At White's Point (known as Fish Camp).

"Beginning at a point at the intersection of the line of ordinary high tide and the line of the present bulkhead; thence easterly along said bulkhead a distance of two hundred (200) feet, thence northerly at right angles to said bulkhead to a point distant ninety-eight (98) feet to a point; thence westerly in a line parallel to said bulkhead a distance approximately two hundred (200) feet to the before mentioned line of ordinary high tide; then along said line of ordinary high tide to the point of beginning."

To have and to hold, for the term of three years from the date of this indenture, with options for additional periods as hereinafter more fully set forth, yielding and paying therefor the rent in such amounts and at such times as hereafter more fully set forth.

The party of the first part agrees to permit the party of the second part to improve such land for the purposes of a health resort or sanatorium; to construct such necessary buildings; to have the use of such sulphur springs as are or may be developed on such land hereinbefore described.

In consideration of which the party of the second part agrees to expend the sum of three thousand (3,000) dollars during the period of his lease for the developing and improving of the land and construction of buildings thereon, one thousand five hundred (1,500) dollars of said sum to be expended during the first six months' period of this lease.

The party of the second part agrees to pay in addition to the foregoing the sum of ninety (90.00) dollars per month during the life of this lease, such sums to be paid to the party of the first part on the first day of each and every month.

The party of the second part further agrees to permit the party of the first part to enter such premises during the period of this lease for the making of any such improvements as the party of the first part may desire to make at his own expense.

The party of the second part further agrees that all improvements made by him during the life of this lease are to become the property of the party of the first part at the expiration of this lease.

It is further agreed by and between the party of the second part and the party of the first part that should the party of the second part wish to exercise this option that at the expiration of the period of this lease the party of the second part is privileged to renew this lease for a period of three more years at a rental of a sum per month to be agreed upon by the

two parties together with a third party selected jointly by them, and should the party of the second part, during the second period of three years expend three thousand (3,000) dollars in additional improvements of said land, the party of the first part agrees to give him an option of an additional three years subject to the same conditions as required for the second period of three years, and that the entire life of this lease shall not exceed the period of nine (9) years from the aforementioned date.

The party of the second part agrees that he shall use this land for the purpose of a health resort or sanitarium and no other.

Further, it is agreed between the party of the first part and the party of the second part as supplementary to the foregoing, that that certain parcel of land known as Sepulveda Park is to be used by the party of the second part during the life of the foregoing lease, and in consideration of such use the party of the second part agrees to keep said park clean and free from rubbish and weeds and to keep the water tank on said property full of water at all times and to make all necessary repairs of the pump and equipment.

The party of the first part agrees to furnish all necessary material for such repairs.

At the expiration of this lease the party of the second part agrees to quit and deliver up the premises to the party of the first part or his agent or attorney peaceably and quietly, in as good order and condition (reasonable use and wear thereof and damage by the elements excepted), as the same are now or may be put into, and to pay the rent as above stated for such further time as the party of the second part may hold the same, not to make or suffer any waste thereof nor lease, nor underlet, nor permit any other person or persons to occupy or improve the same, or to make or suffer to be made, any alteration therein but with the approval of the party of the first part thereto, in writing, having been obtained, and that the party of the first part may enter as hereinbefore set forth, and expel the party of the second part if he shall fail to pay the rent as aforesaid, or fail to make the aforesaid improvements as set forth.

And should default be made in the payment of any portion of said rent, when due, and for thirty days thereafter, the said party of the first part, agent or attorney, may re-enter and take full possession and at his option terminate this lease.

If this agreement becomes recorded it is null and void.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

R. D. SEPULVEDA, (Seal)
Party of the First Part.

TOJUERO TAGAMI, (Seal)
Party of the Second Part.

2. BRIEF OF DEFENDANTS ON DEMURRER TO COMPLAINT,
BY ALBERT H. ELLIOT.

STATEMENT OF THE CASE.

Plaintiff brings escheat proceedings against defendants under the so-called Alien Land Act of 1920 for the purpose of escheating the leasehold interest of defendant Tagami, lessee, in certain real property belonging to the defendant, Sepulveda, lessor, situated in Los Angeles County, at White's Point and known as Fish Camp. The lease was in writing executed and dated the 1st day of September, 1918, for a term of three (3) years from the date of the lease with option contained in the lease for two (2) addi-

tional three (3) year periods under certain terms and conditions set forth in the lease. It was provided specifically in the lease that the party of the second part should use the leased land for the purpose of a health resort or sanatorium and no other purpose, and it is alleged in the complaint that the defendant lessee Tagami has kept and maintained the terms and conditions of the lease and has used and occupied the said land for the purpose of a health resort and sanatorium and no other purpose.

It is further alleged in the complaint that the defendant lessee Tagami is and was at the time of the execution of the lease a native-born Japanese citizen and subject of the Empire of Japan. The plaintiff, through its attorney-general, is seeking to escheat to the state a leasehold in said property, the value of which is alleged to be twenty thousand (\$20,000.00) dollars and the prayer of the complaint is that the court shall determine and adjudge the value of the said leasehold interest in said real property and shall order it sold in accordance with the provisions of section 1271 of the Code of Civil Procedure.

To this complaint defendants have entered a general demurrer that the complaint does not set forth facts sufficient to constitute a cause of action against defendants.

QUESTIONS OF LAW RAISED BY THE DEMURRER OF DEFENDANTS.

There is annexed to the complaint as "Exhibit A" a copy of the lease executed between defendant lessor Sepulveda and defendant lessee Tagami. The demurrer admits the fact that defendant lessee Tagami is not a citizen of the United States and is ineligible to citizenship. Since the complaint alleges that the ineligible alien lessee has kept and maintained the terms and conditions of the lease, and has used the premises for the purpose of a health resort or sanatorium and no other, it would appear that aside from the demurrer there cannot be any very serious questions of fact to be litigated in the case. The demurrer presents to the court two main propositions of law:

First: The defendant, Tagami, an alien ineligible to citizenship in the United States, may lease land in the State of California and operate said land and the buildings thereon for the purpose of a health resort and sanatorium, under the terms of the so-called Alien Land Act of 1920 and under the terms of the treaty between the United States and Japan of 1911.

Second: If the so-called Alien Land Act of 1920 prohibits a Japanese alien from leasing land in California and using said land and the buildings thereon for the purpose of a health resort and sanatorium, said act is contrary to the Fourteenth Amendment to the Constitution of the United States and hence unconstitutional.

The Alien Land Act of California (approved by the electors November 2, 1920; in effect December 9, 1920). Sections 1 and 2 of said act read as follows:

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United

States and the nation or country of which such alien is a citizen or subject, and not otherwise."

The Treaty of Commerce and Navigation between the United States and Japan (proclaimed April 5, 1911). Article I of said treaty reads as follows:

"Article I.

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects. The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

"They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions."

Conceding *arguendo* that under the treaty between the United States and Japan a Japanese is not given the right to lease the land for agricultural purposes, and conceding *arguendo* that the State of California may prevent an alien Japanese from acquiring, possessing, enjoying, transmitting and inheriting real property or any interest therein, for any other purpose than that specified in the treaty between Japan and the United States, the question presented to the court by this part of our argument is one of construction by this court of the treaty between the United States and Japan, and especially article I thereof.

A treaty is the supreme law of the land and binding upon this court and it is therefore necessary to determine in the instant case as to just what the treaty means. "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." (Sec. 10, Art 1, U. S. Constitution.)

As the supreme court of California said in a very recent case in the *Matter of Heikichi Terui*, 62 C. A. D., p. 311 (September 12, 1922):

"From the first decision of the Supreme Court of the United States upon this subject rendered in 1796 (*Ware vs. Hylton*, 3 Dall. 198), to the present day, it is uniformly declared, as the express language of the Federal Constitution unequivocally requires, that as to all matters within the treaty-making power conferred by the Federal Constitution, a treaty entered into on the part of the United States by the President with the concurrence of two-thirds of the United States Senate, is a part of the supreme law of the land, binding on all states and to which all state enactments in conflict

therewith must yield. (See *Geofray vs. Riggs*, 133 U. S. 258, 266; *Hauenstein vs. Lynham*, 100 U. S. 483.) As was said in *Ware vs. Hylton*, *supra*: 'It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state, and their will alone is to decide. If a law of a state contrary to a treaty, is not void, but voidable only by a repeal or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole.' As was said in *Hauenstein vs. Lynham*, *supra*, 'it must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution.' The learned attorney-general of course does not dispute these well-settled propositions."

CONSTRUCTION OF THE TREATY.

The treaty is called a Treaty of Commerce and Navigation. We wish to say that investigation will show that treaties are classified under several very general classifications and there does not seem to be any significance whatever so far as private rights are concerned in the way that the various treaties are denominated. We have found the following designations of treaties:

1. Treaty of Friendship, Commerce and Navigation (Argentine).
2. Treaty of Peace, Amity and Commerce (Chile).
3. Treaty of Peace, Amity and Commerce (China).
4. Treaty of Peace, Amity and Commerce (Colombia).
5. Commercial Convention (Cuba).
6. Treaty of Friendship, Commerce and Navigation (Denmark).
7. Treaty of Amity and Commerce (Dominican Rep.).
8. Treaties of Amity and Commerce and Alliance (France).
9. Treaty of Commerce and Navigation (Hanover).
10. Treaty of Friendship, Commerce and Navigation (Hanseatic Republics).
11. Treaty of Amity and Commerce (Prussia).
12. Treaty of Amity, Commerce and Navigation (Great Britain).
13. Treaty of Commerce and Navigation (Greece).
14. Treaty of Commerce and Navigation (Italy).
15. Treaty of Amity, Commerce and Navigation (Mexico).
16. Treaty of Peace and Commerce (Netherlands).
17. Treaty of Commerce and Navigation (Ottoman Empire).
18. Treaty of Commerce and Navigation (Paraguay).
19. Treaty of Friendship and Commerce (Peru).
20. Treaty of Commerce and Navigation (Portugal).
21. Treaty of Commerce and Navigation (Russia).
22. Treaty of Friendship, Boundaries, Commerce and Navigation (Spain).
23. Treaty of Amity and Commerce (Sweden and Norway).
24. Treaty of Friendship, Commerce, Extradition (Switzerland).

We have not attempted in the above summary to give the official titles of all the treaties in existence between the United States and foreign governments, but we have tried by the above list to show that no significance particularly attaches to the designation given to the treaty between Japan and the United States.

We shall now examine some principles which may aid the court in interpreting the treaty under consideration. A treaty is construed in the same way in which contracts are construed between parties thereto. "The inten-

tion, sufficiently known, furnished the true measure of the convention." (Vattel, book 2, chap. xvii, sec. 274.)

(a)

Treaties are construed like contracts.

"Treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties." (*Rocca vs. Thompson*, 223 U. S. 317, 332.)

"Undoubtedly the intention of the two governments as gathered from the words of the treaty, must control; and the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained." (*Treaties, Their Making and Enforcement*, Crandall, p. 376.)

"It is generally stated that the words of a treaty are to be taken as used with their plain and natural meaning * * * This rule is subject to the qualification that words with a customary meaning in international usage or in the public law of each of the contracting parties are to be understood as used in this customary or technical sense, unless a contrary intention clearly appears from the context. Treaties are viewed as having been prepared with care and deliberation by those versed in international law and familiar with the legal signification of words. * * * If terms used in a treaty have definite but different legal meanings in the contracting states, and there is no common and generally received meaning in the public law of nations, that meaning which obtains within the state to which the provision specifically applies at the time of the conclusion of the treaty is, it seems, to prevail." (38 Cyc., p. 970).

"Various rules have, however, been laid down expressly with reference to the construction of treaties. * * * The treaty should also be given such a construction as tends to the common advantage of the contracting parties and tends to place them upon an equality. * * * Treaties should ordinarily be construed liberally, and so where the treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred."

(R. C. L., 26, p. 926):

"* * * A treaty is to be construed on principles similar to those applied to other contracts and statutes. * * *"

Moore International Law Digest, vol. 5 (p. 249):

"Treaties should be interpreted 'in a spirit of *uberrima fides*,' and in a manner to carry out their manifest purpose."

"A treaty is not only a law, but also a contract between two nations, and, under familiar rules, it must, if possible, be so construed as to give full force and effect to all its parts."

"There is no rule of construction better settled either in relation to covenants between individuals or treaties between nations than that the whole instrument containing the stipulation is to be taken together, and that all articles *in pari materia* should be considered as parts of the same stipulations."

(Page 251):

"In doubtful cases that construction is to be adopted which will work the least injustice—which will put the contract on the foundation of justice and equity rather than of inequality."

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they

are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. (*Hauenstein vs. Lynham*, 100 U. S. 483, 487)."

"In the construction of treaties, the general doctrine is that any special advantage conceded by a party under any one article is in consideration of all the advantages enjoyed by the same party under that and all other articles of the treaty."

(P. 252):

"(3) Construction of treaties is a matter of law, to be governed by the same rules *mutatis mutandis*, as prevail in the construction of contracts and statutes."

"(6) Construction is to be distinguished from 'interpretation.' 'Construction' gives the general sense of a treaty and is applied by rules of logic; 'interpretation' gives the meaning of particular terms, to be explained by local circumstances and by the idioms the framers of the treaty had in mind.

"(7) If two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by the party accepting it."

Vol. 38, Cyc., p. 969:

"* * * But if the treaty is open to construction they should endeavor to ascertain and give effect to the intention of the parties, and in so doing will adopt the same general rules which are applicable in the construction of statutes, contracts, and written instruments generally, and particularly those applicable in the construction of contracts between individuals. * * * Treaties should ordinarily be construed liberally, and so where the treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred. * * *"

(P. 970):

"* * * But see *The Neck*, 138 Fed. 144, 147, where the court said: 'International treaties are usually, if not invariably, prepared with great care by men of learning and experience, accustomed to select words apt to express precisely and fully the intention of the contracting parties. Therefore a reasonable rather than a liberal construction must be given to agreements solemnly entered into by nations; and there is no authority for reading into an international treaty, under the guise of construction, extraordinary provisions not necessary to give full effect to the intention expressed.'"

(b)

Treaties are prepared by those skilled in legal phraseology and the words used should be given their customary meaning in national, municipal and international law.

"It is generally stated that the words of a treaty are to be taken as used with their plain and natural meaning. * * * This rule is subject to the qualification that words with a customary meaning in international usage or in the public law of each of the contracting parties are to be understood as used in this customary or technical sense, unless a contrary intention clearly appears from the context. Treaties are viewed as having been prepared with care and deliberation by those versed in international law and familiar with the legal signification of words. * * * If terms used in a

treaty have definite but different legal meanings in the contracting states, and there is no common and generally received meaning in the public law of nations, that meaning which obtains with the state to which the provision specifically applies at the time of the conclusion of the treaty is, it seems, to prevail." (Crandall, *Treaties, Their Making and Enforcement*, pp. 396-397.)

"* * * But if the words of a treaty have a common and accepted meaning in international usage, they are to be taken as used with this meaning and not in any artificial or special sense impressed by local law, unless it clearly appears that this special and restricted meaning was intended by the parties. * * *" (Crandall, *Treaties, Their Making and Enforcement*, p. 398.)

(Page 400):

"In general, words should be given the meaning which will tend to give efficacy to the treaty and to secure equality and reciprocity in the benefits to be received by the parties."

"In the construction of treaties, the general doctrine is that any special advantage conceded by a party under any one article is in consideration of all the advantages enjoyed by the same party under that and all other articles of the treaty." (P. 251.)

"(7) If two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by the party accepting it. (P. 252.)

(c)

Treaties should be construed in good faith to carry out the intention of the parties.

"Undoubtedly the intention of the two governments as gathered from the words of the treaty, must control; and the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained." (*Treaties, Their Making and Enforcement*, Crandall, p. 376).

(Pages 401-402):

"* * * So far as a treaty comes before a domestic court of one of the contracting parties as a municipal law, it should be construed with the utmost good faith and with a view to carry out the apparent intention of the parties. It is primarily a compact between the two nations. 'This court would not readily lean to favor a restricted construction of language, as applied to the provisions of a treaty, which always combines the characteristics of a contract, as well as a law. Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is preferred. (*Shanks vs. Dupont*, 3 Pet. 242.) Such is the settled rule in this court.' No words, clause, or provision is presumably redundant; and effect is, if possible, to be given to each of them. Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations and cannot be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion."

"* * * The right to reside in the country with the same privileges as the subject of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subject of these powers. Therefore, the provisions in the mining regulations of Poorman creek, which, in effect, forbid Chinamen from working in a mining claim for themselves or others, as well as the clause of the State constitution to the same effect, seem to be in direct conflict with this article of the treaty; and if so, are therefore void." * * *

"Treaties should be interpreted 'in a spirit of *uberrima fides*,' and in a manner to carry out their manifest purpose."

(d)

A liberal construction rather than one restrictive of rights should be favored.

(38 Cyc., p. 970):

"Various rules have, however, been laid down expressly with reference to the construction of treaties. * * * The treaty should also be given such a construction as tends to the common advantage of the contracting parties and tends to place them upon an equality. * * * Treaties should ordinarily be construed liberally, and so where the treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred."

Hauenstein vs. Lynham, 100 U. S. 483 (Oct., 1879):

"* * * Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred. (*Shanks vs. Dupont*, 3 Pet. 242.) Such is the settled rule in this court. * * *"

(e)

Each provision of a treaty should be construed pari materia with all the others.

Moore, International Law Digest, vol. 5.

"There is no rule of construction better settled either in relation to covenants between individuals or treaties between nations than that the whole instrument containing the stipulations is to be taken together, and that all articles *in pari materia* should be considered as parts of the same stipulations."

"* * * No priority is attached to the numerical order of the provisions in the same treaty. Each provision is supposed to be drawn with due regard to all of the provisions *pari materia* in the same instrument. * * *"

(f)

A construction should be adopted which placed the parties to a treaty on an equality.

Crandall, Treaties, Their Making and Enforcement, p. 400 *et seq.*:

"In general, words should be given the meaning which will tend to give efficacy to the treaty and to secure equality and reciprocity in the benefits to be received by the parties."

Moore's International Law Digest, vol. 5:

"In doubtful cases that construction is to be adopted which will work the least injustice—which will put the contract on the foundation of justice and equity rather than of inequality."

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties, to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. (*Hauenstein vs. Lynham*, 111 U. S. 483, 487.)"

A FEW EXAMPLES OF LIBERAL CONSTRUCTION OF TREATIES IN ACTUAL CASES.

Geofray et al. vs. Riggs et al. (February 3, 1890), 10 Sup. Ct. 295.

In this case the words "states of the Union" in the treaty of 1853 between the United States and France were construed broadly enough to include the District of Columbia, the court saying:

"It is a general principle of construction, with respect to treaties, that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction, words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. * * *"

In the recent case of *Banforth vs. Ihmsen*, 204 Pac. 354 (February 10, 1922), the supreme court of Wyoming, in construing the treaty between the United States and Great Britain, held that the word "territories" as used in the treaty was broad enough to include states, the court saying:

"* * * It is contended that the term 'territories' above mentioned must be construed as applying only to one of the territories of the United States, as distinguished from a state. The rule laid down by the Supreme Court of the United States is that:

"Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred.' (*Hauenstein vs. Lynham*, 100 U. S. 483, 25 L. Ed. 628.)

"We accordingly think that the term 'territories' as used in the above treaty, is to be construed in its broader sense as meaning and including an area or locality under the dominion of the United States. While we have no authority direct on that point, yet it has always, so far as we have found, been given that meaning by the courts in discussing the above treaty or one similar to it. (*Schultze vs. Schultze*, 144 Ill. 290, 33 N. E. 201, 19 L. R. A. 90, 36 Am. St. Rep. 432; *Ahrens vs. Ahrens*, 144 Iowa 486, 123 N. W. 164, Ann. Cas. 1912A, 1098; *Pierson vs. Lawler*, 100 Neb. 783, 161 N. W. 419.) This treaty will control and suspend the rule of the common law in force in this state during such time as the rights conferred thereby are in force or extended by the courts pursuant thereto. (2 C. J. 1065.) * * *"

In the case of *In re Ross*, 140 U. S. 453, 475, Mr. Justice Field construed the word "Americans" appearing in the treaty with Japan of June 17, 1857, as broad enough to include an English subject who was an enlisted seaman on board an American vessel, flying the American flag, the learned judge saying:

"* * * It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. * * * The inquiry in all such cases is as to what was intended in the law by the legislature, and in the treaty by the contracting parties. * * * And in the present case, to carry out the intention of the treaty and statute in question, they will be construed to apply to all parties who are by public law, or the law of the country, entitled to be treated for the time, from their employment and service, as citizens."

In construing article 10 of the treaty with Great Britain, of August 9, 1842, in the case of *United States vs. Roucher*, 119 U. S. 407, the court said

in substance that the treaty must be construed in respect of its "manifest scope and object."

In construing the treaty between the United States and Mexico with respect to the boundaries of the State of Texas, the Supreme Court said:

"* * * Undoubtedly the intention of the two Governments, as gathered from the words of the treaty, must control; and the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained. * * *"

The Supreme Court of the United States held in the old case of *Delamou vs. United States*, 6 Peters (U. S.) 117, that inviolability and security of persons and property are included in the words "rights, advantages and immunities of citizens of the United States", as used in a treaty.

In the case of *University vs. Miller*, 14 N. S. 188, the word "effects" as used in the treaty, was construed to include land, on the principle of broad construction. (See also *Adams vs. Ackerland*, 168 Ill. 632, 48 N. E. 454.)

In the case of *Hamilton vs. Erie R. R. Co.*, (November 28, 1916), 219 N. Y. 343, in defining the rights of consuls and consular agents, the court said that it was a part of their duties "to conserve the property within their territorial jurisdiction, of their countrymen dying therein." "And to protect the commercial interests of these citizens or subjects in the country in which they are accredited."

Mr. Chief Justice Fuller, acting as a member of the tribunal of arbitration at The Hague Convention and construing an agreement between Great Britain and France said:

"In default of a definition of the term 'protege' in the General Act of the Brussels Conference (of July 2, 1890) this term must be understood in the sense which corresponds best as well to the elevated aims of the conference and its final act, as to the principles of the law of nations, as they have been expressed in treaties existing at that time, in internationally recognized legislation and in international practice."

In the case of *In re Adutt* (1893), 55 Fed. 376, the court, in construing the treaty between the United States and Austria-Hungary, held that the word "forgery" as used in the treaty should have its common-law definition which includes forgery of commercial paper as well as the falsification of public obligations. The court referred on page 368 of the opinion to "the spirit of that treaty."

In construing the treaty with France it is held that the term "property" as applied to lands, "comprehends every species of title inchoate or complete, legal or equitable, and embraces those rights which lie in contract, executory as well as executed." (Crandall, *Treaties, Their Making and Enforcement*, p. 492.)

And also that in "the term 'laws' is included custom and usage, when once settled."

The word "representatives" in the treaty with the Hanseatic Republic has been construed by the supreme court of Illinois (*Schultz vs. Schultz*, 144 Ill. 290) broadly as including all who take by will or descent, heirs and devisees, as well as executors and administrators.

The Supreme Court of the United States has said that corporations, as well as individuals, are within the purpose and purview of the treaty with Great Britain. (*Gospel etc. vs. Wheeler et al.* (1814), 2 Gall. 105, 136.)

A splendid example of liberal interpretation of treaties is found in the case of *Jackson vs. Lund*, 3 John. Cases, 109, where the court says:

"These words ought to have a very liberal interpretation, in advancement of their beneficial end. They ought to apply, in furtherance of the amicable

intention of the two nations, to every British subject who, at the time of the treaty, was in the enjoyment of lands within the United States, and whose title thereto would be valid, independent of the plea of alienism. In all such cases the treaty may be considered as doing away with the plea."

In the case of *Ex parte Charlton* (1911), 185 Fed. 880, the word "persons" in the treaty with Italy was considered as a matter of interpretation sufficiently broad to embrace citizens and subjects of the contracting parties.

In construing a treaty with Spain, the court in the old case of the Pizzaro, 1817, 2 Wheat. 227, construed the word "subjects" very broadly as used in the treaty, as applying to all persons domiciled in the Spanish Dominion, in the same sense as the term citizens or inhabitants was used when applicable to persons owing allegiance to the United States.

In the old case of *Chirac vs. Chirac* (1817), 2 Wheat. 259, the court in construing the Treaty with France of February 6, 1778, as giving to a French citizen the right to purchase and hold lands in the United States said: "Upon every principle and fair construction, this article gave to the subjects of France a right to purchase and hold lands in the United States."

CONSTRUCTION OF THE TREATY BETWEEN THE UNITED STATES AND JAPAN IN THE INSTANT CASE.

With the principles of liberal construction in mind to which we have called the court's attention, there should be no difficulty in construing the treaty between the United States and Japan of 1911 in such a way as to include within its scope the right of a Japanese to lease land for commercial purposes. It is fair to assume from the complaint in the instant case and from an examination of the terms of the lease, that the lessee intended to use and is in fact using the leased premises for a commercial purpose. It is difficult to conceive of words of wider scope than the words "commercial purpose." Under the terms of the lease, the lessee is bound to pay to the lessor the sum of ninety (\$90.00) dollars per month for the use of the premises and in addition thereto he is obligated to expend the sum of three thousand (\$3000.00) dollars during the three years of the original term of his lease. It is a fair inference from the pleadings that the lessee intended to and does in fact operate the property for the purpose of profit and gain. We think it a proper inference from the pleadings and lease to say that the lessee is operating his health resort and sanatorium by charging a price to those who resort to the premises for either their health or the comfort which a hotel sanatorium or health resort can give. For these accommodations the persons resorting to the premises would expect to pay and probably in fact do pay. The only question of fact which might be involved in the argument is as to whether or not the health resort or sanatorium in question is run for the purpose of profit. Should this not sufficiently appear from the complaint and lease itself, we hasten to advise the court that it will be set up in the answer and proved at the trial, if a trial is necessary. We are assuming, however, for the purpose of the argument that the health resort and sanatorium operated by the defendant, lessee, is run for profit and therefore we contend that the lessee is operating his property for a commercial purpose as those words are used in article I of the treaty.

Possibly the best method of definition of the expression "commercial purpose" would be by a process of elimination. For example, a commercial purpose is certainly not an agricultural purpose or a political purpose. We may add also in this connection that if any attempt is made to deprive an

alien Japanese of the right to carry on a commercial business, and as a part of his business to use real property for that purpose, then such an attempt would result in depriving a Japanese of the right to "follow any of the lawful, ordinary trades and pursuits of life without let or hindrance of the state or any of its subordinate municipal bodies, except such as may arise from the enforcement of equal and impartial laws." (*In re Quong Woo* [1882], 13 Fed. 229, 233; *Truax vs. Raich* [Nov., 1915], 239 U. S. 33.)

It should be the purpose of the court so to construe the treaty under consideration as that there will be no conflict between it and the Alien Land Act of 1920. Should such a conflict arise there can be no question but that the Alien Land Act must give way. But as Mr. Justice Chase, in a leading opinion said:

"A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state and paramount to its legislature) must give way to a treaty, and fall before it, can it be questioned, whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but avoidable only by a repeal, or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole." (*Ware vs. Hilton*, *supra*.)

It is our contention, however, that there is no such conflict provided a liberal construction is given to article I of the treaty. We may add further that if any vitality is to be given to the words "the most constant protection and security for either persons and property" as contained in the treaty and if these words so well known in the municipal law of the United States are to be construed as meaning anything, it is impossible for us to understand how Japan, in the treaty before us, could have contracted more clearly for the protection of her nationals, resident in the United States, in the matter of the protection of their right to earn a living in the various occupations of the country. If we can say that the running of a hotel or a hospital or a health resort or a sanatorium is not a commercial purpose, then it would be interesting to know how far a state may go in restricting the rights of a Japanese under the treaty.

A lease of property may be for a term of years, or one year or a week or one day. If the State of California can prevent a Japanese from entering into a one month's lease of land necessary in the operation of his business, we should like to inquire as to how a Japanese could carry on any business whatever? If he occupies a building under any kind of arrangement with the owner thereof for any limited period whatever, he is a lessee of that building and therefore of the land on which the building stands. How can he continue to do business in the building by using the building, unless he has some sort of a leasehold interest in the property? We are referring now, of course, strictly to those lines of business which may be considered commercial, as distinguished from agricultural or eleemosynary in character.

It should be said that the whole aim and purpose of the Alien Land Act of 1920 was to prevent aliens ineligible to citizenship from occupying the agricultural lands of the state. We concede that the language of the act carries it far beyond its original aims and purposes, but it is a matter of

general information and knowledge that the aims and purposes of the act were as we have stated. We are making no argument, however, based on such aims and purposes as are not found in the language of the act itself, except to ask the court to construe the act in view of the obvious aims and purposes of the treaty. As is well said by Hoffman, district judge in the *Tiburcio Parrott* case, 5 Sawyer 566 (1880):

"* * * If it has any authority to stipulate that aliens residing in a state may acquire and hold property, and on their death transmit it to alien heirs who do not reside in the state, against the provisions of the laws of the state, otherwise valid—and so the authorities already cited hold—then it, certainly, must be competent for the treaty-making power to stipulate that aliens residing in a state in pursuance of the treaty may labor in order that they may live and acquire property that may be so held, enjoyed, and thus transmitted to alien heirs. * * *"

And as also said by Mr. Root, then secretary of state, in an address to the annual meeting of the American Society of International Law, April 19, 1907:

"No state can say a treaty may grant to alien residents equality of treatment as to property but not as to education, or as to the exercise of religion and as to burial but not as to education, or as to education but not as to property or religion. That would be substituting the mere will of the state for the judgment of the President and Senate in exercising a power committed to them and prohibited to the states by the Constitution."

THE LEGAL DEFINITION OF THE WORDS "COMMERCE," "COMMERCIAL" AND "TRADE", SHOWS THAT THEY ARE WORDS OF WIDE AND COMPREHENSIVE MEANING.

The suggestion that these words connote by their definition transactions carried on for the purposes of gain and profit, is found in the very old case of *Fleckner vs. U. S. Bank* (1823), 8 Wheat. p. 338, in which the question under review was the power of the United States Bank, under its charter legally to purchase notes in the ordinary course of business, when all its articles declare "the said corporation shall not, directly or indirectly, deal or trade in anything except bills of exchange, etc."

The court held, in deciding the case that true interpretation of the words "deal or trade" was that the bank was interdicted "from doing the ordinary business of a trader or merchant in buying and selling goods, etc., for profit and uses the word "deal" and "trade" in contradistinction to purchases made for the accommodation or use of the bank or resulting from its ordinary banking operations.

As illustrating the scope of the word "commercial" we quote from the old case of *Watson vs. Tarpley*, 18 How. U. S. 517, 521:

"The general commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the Constitution and laws of the United States having conferred upon the citizens of the several states, and upon aliens, the power or privilege of litigating and enforcing their rights acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must follow by regular consequence, that any state law or regulation, the effect of which would be to impair the rights thus secured, or to deprive the federal courts of cognizance thereof * * * must be nugatory and unavailing."

Commercial property is defined as "property leased out for revenue" (12 C. J. 142, *Female Orphan Society vs. Board of Assessors*, 109 La. 537-33, S. 592.)

A commercial venture is defined as "Wherever capital is to be laid out

on any work and a risk run of profit or loss, it is a commercial venture." (12 C. J., p. 141.)

Commercial domicile is defined as "A domicile acquired by maintenance of a commercial establishment in a country, in relation to transactions connected with such establishments." (12 C. J., p. 142.)

Commerce is defined as "Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce. The subject, the vehicle, the agent, and the various operations become the objects of commercial regulation. *Riverside Mills vs. Atlantic Coast Line R. Co.*, 168 Fed. 987, 989, 990 (citing *Gibbons vs. Ogden*, 9 Wheat. [22 U. S.] 230, 6 L. Ed. 78); *Northern Securities Co. vs. United States*, 24 Sup. Ct. 436, 478, 193 U. S. 197, 48 L. Ed. 679." (Words and Phrases, p. 788.)

"The word 'commerce' is not susceptible to exact and comprehensive definition, though a fairly accurate conception of its meaning can be arrived at from the judicial inclusive and exclusive definitions which have been given from time to time. It has been said that the word is a term of the largest import—of very large significance." (5 R. C. L., p. 690.)

We conclude, therefore, this branch of the argument by saying that if the treaty between Japan and the United States is construed by the court as a contract binding upon the State of California, for protection of the nationals of each country, resident in the other, then surely a broad and liberal construction of the treaty would require the court in the instant case to hold that the alien Japanese lessee, in the lease in question, is protected so far as his rights are concerned as against the contemplated escheat proceedings.

The Alien Land Act of 1920 is unconstitutional because: (a) it forbids aliens ineligible to citizenship under the laws of the United States to lease real property in the state although the right to do so has been conferred on all other aliens. The aliens ineligible to citizenship are thus deprived of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States;

(b) The act is likewise unconstitutional because it deprives defendant, lessor, Sepulveda, who is a citizen of the United States, of the right to enter into a contract for the leasing of his realty;

(c) The act is likewise unconstitutional because it deprives defendant, lessee, Tagami, of his liberty and property by barring him from entering into a contract for the purpose of earning a livelihood in a lawful occupation.

In view of the fact that the constitutionality of the Alien Land Act of California of 1920 is now under consideration in the Supreme Court of the United States in the case entitled *U. I. Porterfield and Y. Mizuno vs. U. S. Webb*, as Attorney-General of the State of California, and *Thomas Lee Woolwine*, as District Attorney of the County of Los Angeles, No. 299, we shall refrain from arguing these questions further than the citation of the authorities upon which we have relied:

Under (a) above, we cited Civil Code of California, secs. 671 and 672 Stats. of California, 1913, p. 206, U. S. Revised Statutes, sec. 2169; sec. 1, art. 17, Constitution of California; *Mc Turner Estate*, 196 Pac. Rep. 807; *In re Warn*, 189 Fed. 450; *Chylung vs. Freeman*, 92 U. S. 275; *People vs. Campagnie, etc.*, 107 U. S. 59; *Fong Yeu Ling vs. United States*, 149 U. S. 698; *Yick Wo vs. Hopkins*, 118 U. S. 368; *Truax vs. Raich*, 239 U. S. 39; *Ex parte Kotta*, 62 C. A. D. 315; *Ex parte Terui*, 200 Pac. 594; *In re Yano Estate*, 63 C. A. D. 515, 206 Pac. Rep. 995; *Ah Kow vs. Numan* (1879), 5 Sawy. 562; *Tiburcio Parrott*, 1 Fed. 481; *In re Ah Chong* (1880), 2 Fed. Rep. 733; *Re Opinion of The Justice*, 207 Mass. 601; *Frasier vs. McConucay &*

Torley, 82 Fed. 257; *Juniata Limestone Co. vs. Fagley*, 187 Penn. 193; *State vs. Montgomery*, 94 Me. 192; *Templar vs. Board of Examiners*, 131 Mich. 254; *Vietti vs. Geo. K. Mackey Company*, 197 Pac. 881; *Slaughter House Cases*, 16 Wall. 36; *Buchanan vs. Warley*, 245 U. S. 76; *R. R. Tax Cases*, 13 Fed. 722; *County of Santa Clara vs. S. P.*, 18 Fed. Rep. 385; *Gulf, Colo. & Santa Fe R. R. Co. vs. Ellis*, 165 U. S. 150; *Atchison, Topeka, etc. vs. Matthews* (1898), 174 U. S. 96; *Truax vs. Corrigan*, 257 U. S. 312.

Under (b), in addition to the cases cited above, we cite the cases as follows: *Butchers Union etc. vs. Crescent City Co.*, 111 U. S. 746; *Allgeyer vs. La.* 165 U. S. 578; *Smith vs. Texas*, 233 U. S. 630; *Coppage vs. Kansas*, 236 U. S. 1.

It is respectfully submitted that the demurrer should be sustained without leave to amend.

3. DECISION OF THE COURT.

The complaint in this action, and the demurrer thereto, present the question primarily whether a lease to a citizen and subject of the Empire of Japan of a parcel of land for the purpose of maintaining therein "a health resort and sanatorium" is valid under the laws of the State of California. But there is an underlying question suggested by the demurrer inferentially, and advanced by counsel for the defendants directly in argument, which should be here referred to. If the court be of the opinion that the lease involved here is invalid as repugnant to the laws of this state, the further contention on the part of the defendants is that such laws are contrary to the Constitution of the United States.

The "Alien Land Law" (so called) of California must be considered together with the treaty now in force between the United States and Japan, in determining whether the lease in question is forbidden by that law. Hence I will address myself to the issue of law first mentioned, for the answer to be given to it logically takes precedence over the second.

From the statements of facts contained in the complaint, it appears that by the terms of an instrument dated September 1, 1918, the defendant, Ramon D. Sepulveda, leased to the defendant Tojuero Tagami, a parcel of land along the sea-coast of Los Angeles County, situated in a place known as White's Point, a short distance northerly of Point Firmin, "for the purpose of a health resort and sanatorium; to construct such necessary buildings; and to have the use of such sulphur springs as are or may be developed" thereon. The lease ran for three years, with options for renewals for additional periods. The lessee is described in the complaint as a "Japanese person," who was and is now a citizen and subject of the Empire of Japan and not eligible to citizenship under the laws of the United States. The complaint alleges, in substance, that defendant Tagami, entered into possession of the parcel of land referred to under the lease mentioned; that the lease has been continued in force; that Tagami is now in possession of the premises and has kept and performed the terms and conditions of the lease; that he has used and occupied the same "for the purpose of a health resort and sanatorium and no other," as provided in the lease.

The complaint further alleges that the leasehold and interest in the real property referred to, which is of the value of \$20,000, has been acquired and is now held by Tagami in violation of the statute of California, known as the "Alien Land Law," originally enacted in 1913, and amended and supplemented by the "Alien Land Act of 1920," wherefore the claim is made that this leasehold interest has escheated to the state. The prayer of the plaintiff is that the court adjudge such leasehold interest has so escheated, that it determine its value, and that it order the sale thereof as provided by law.

The "Alien Land Law" provides, in effect, and so far as material to this inquiry, that any alien who is ineligible to citizenship under the laws of the United States "may acquire, possess, enjoy, and transfer real property or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States, and the nation or country of which such alien is a citizen or subject, and not otherwise."

For many years there may have been some uncertainty whether natives of Japan, resident in the United States, were eligible to citizenship; but if so, the matter has finally been set at rest by the Supreme Court of the United States in recent decisions. Under these rulings a native of Japan may not become a citizen of the United States—he is "ineligible" within the meaning of the federal statutes and therefore within the meaning of the Alien Land Law. It follows that a native of Japan cannot, in the State of California, acquire or possess any real property or interest therein, other than as may be permitted by some treaty between the Empire of Japan and the United States.

On April 4, 1911, "ratifications" as the diplomatic term runs, were exchanged at Tokyo, Japan, of the present treaty between these two nations. It is entitled, "A Treaty of Commerce and Navigation Between the United States of America and the Empire of Japan." The preamble to this compact recites that it has been concluded in the belief on the part of the high contracting parties, "that the fixation, in a manner clear and positive, of the rules which are hereafter to govern the commercial intercourse between their respective countries" will strengthen the relation of amity and good understanding which happily exist between them, and will contribute to the realization of this most desirable result.

The first article of this treaty relating to the rights of domicile and trade contains a provision reading as follows:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel, and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade, upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

Article I of the treaty also contains a further clause to the effect that the citizens or subjects of each country shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects. And in article II we read that "the dwellings, warehouses, manufactories and shops of the citizens or subjects of each of the high contracting parties in the territories of the other, and all premises appertaining thereto and used for purposes of residence or commerce, shall be respected."

This document contains eighteen articles, and without here attempting a full résumé of their contents, it is sufficient to say that the treaty throughout is in harmony with its title as a "Treaty of Commerce and Navigation." It deals with such matters as the rights regarding property of the citizens or subjects of each country in the other, with consular officers and their credentials, the freedom of commerce and navigation, the equality of import duties, port privileges and dues, and the like. But in addition to those items, which are purely commercial, the treaty contains provisions, particu-

larly in article I, which may properly be regarded as relating to rights and privileges of a personal character. The treaty is indeed a compact regulating the carrying on of commerce and navigation between the two nations, but it is something more, as I shall hereafter take occasion to advert to more fully.

As indicated above the case comes before the court on a demurrer, based on the general ground that the complaint does not state facts sufficient to constitute a cause of action. There is another ground stated in the demurrer to the effect that the complaint raises a question of treaty interpretation, and also a constitutional question affecting the construction of provisions of the Constitution of the United States. But since these objections to the complaint are not being pressed here, as particulars wherein the complaint is claimed to be defective, and indeed could not be, they serve no useful purpose except to direct attention to the claim of the defendants that matters concerning alleged treaty and constitutional rights are involved.

The defendants, admitting the truth of the allegation of the complaint by their demurrer, contend that the plaintiff is not entitled to have this lease escheated to the state, because Tagami, although he conducts a sanatorium yet, even so, he leased and now occupies and operates the premises in question for "residential and commercial purposes," and therefore that he is within the terms of the treaty, which protect him in so doing. In other words, they urge the view that conducting a sanatorium for profit is carrying on business and is engaging in commerce in the fair meaning of the terms of the treaty; that the leasing, occupancy and improving of this property as a place where persons are permitted to stay and be treated and their health attended to for compensation, is wholly consistent with the permission granted by the treaty to "nationals" of Japan to occupy land for the purposes above mentioned and to do anything incident to or necessary for trade or commerce. But should the above position not be upheld, then they urge that if the "Alien Land Act" of 1920 prohibits a citizen of the United States from leasing land to a Japanese alien in California, and the latter from using the same and the buildings thereon, for the purpose of a health resort and sanatorium, said act to that extent is contrary to the Fourteenth Amendment to the Constitution of the United States.

The supreme court of this state, commenting on the provisions of section 2 of the Alien Land Act, recently said:

"Section 2 provides that all aliens other than those mentioned in section 1 may acquire, possess, enjoy and transfer real property 'in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.' This, in effect, declares that no alien who is not eligible to citizenship under the laws of the United States may acquire real property, except as provided by the treaty existing between the United States and the country of which such alien is a citizen or subject. Persons of the Japanese race who are native-born subjects of Japan cannot become citizens of the United States. The result is that the acquisition by such an alien of land situated in the states is unlawful, unless the treaty between his Government and the United States allows such acquisition. The treaty between the United States and Japan provides that citizens of Japan residing in the United States may lease land for residential and commercial purposes, but it contains no provision authorizing an alien of the Japanese race to lease or acquire land for agricultural purposes. Consequently the initiative alien law aforesaid

prohibits the acquisition by such alien of any agricultural land situated in this state." (*In re Akado*, 63 Cal. Dec. 577.)

In that case, as well as in others that might be cited, the validity of the Alien Land Act, at least in so far as it forbids the acquisition and leasing of agricultural lands in California by Japanese, was assumed. If valid in that respect, I see no sufficient reason for denying its validity in any other respect wherein it limits the purposes for which all or any aliens ineligible to citizenship may acquire or lease lands to such purposes as are permitted by treaty.

The court in the *Akado* case further remarked:

"It is not claimed that the Alien Land Act is contrary to the state or Federal Constitution, in respect to the provision forbidding the acquisition of agricultural land. It is well settled that, in the absence of a treaty to the contrary, a state may forbid the taking or holding of property within its limits by aliens (*Blythe vs. Hinckley*, 127 Cal. 436). Our constitution leaves to the legislature this power with regard to all aliens ineligible to citizenship (art. I, sec. 17)."

This construction of our state constitution, even if the power to legislate regarding the right of aliens ineligible to citizenship with respect to lands were not otherwise regarded as within the sphere of state action, would seem to settle the law, so far as our state courts are concerned, to the effect that the state may prohibit such ineligible aliens from acquiring or leasing lands, if no treaty forbids such legislation.

The Constitution of the United States (sec. 2, art. VI.) provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Therefore, if there were a conflict between the Alien Land Act and the Japanese treaty, the latter would prevail. That there is any such conflict between them in specific terms is not claimed, and indeed could not well be, when it is remembered that the Alien Land Act expressly provides that aliens ineligible to citizenship (including Japanese in that category) may acquire, possess and enjoy property in California, "in the manner, to the extent and for the purposes" provided for by the treaty between the United States and the nation or country of which such alien is a citizen or subject. But the point is made that if the Alien Land Act be so construed as to forbid the lease and occupancy of lands in the state by a citizen of Japan for the purpose of conducting a health resort; then it is to that extent at least, in violation of the treaty between Japan and the United States, and therefore, to that extent, inoperative and void.

This brings us to the question at issue, namely, can a native and citizen of Japan, resident in California, lease, occupy and enjoy lands for the purpose of maintaining a health resort? The answer to this question depends upon the meaning of the words of the treaty wherein it permits a subject of Japan to lease land "for residential and commercial purposes" in the United States, and vice versa.

The word "commerce" occurs several times in this treaty, as in article II where it is provided that "premises used for purposes of residence or commerce shall be respected"; again in article IV where it is stipulated that there shall be, between the territories (of the contracting powers) "reciprocal freedom of commerce and navigation." In article XIV where the "most favored nation clause" occurs, we read that "in all that concerns commerce and navigation" any privilege or immunity granted to the citizens of any

other state shall extend to the citizens of each contracting party reciprocally. The derivative "commercial" is found twice in the treaty, once in article I as hereinbefore quoted, and again in article VII where it is provided that "commercial, industrial and financial" companies and associations shall have authority to exercise the rights therein specified.

Plaintiff's counsel contend that "when the word 'commercial' is used in article I of the treaty, giving to the nationals of the two countries the right to 'lease lands for residential and commercial purposes' it shall be regarded as dealing with 'commerce' in its elementary sense of trade and barter in goods, wares and merchandise, either wholesale or retail."

In support of this view, your attention is invited to the fact that article I of this treaty as first proposed by the Japanese negotiators underwent an important change in the United States Senate. In the original draft of this treaty article I recited among other things that the citizens and subjects of each state residing in the territories of the other should "be permitted to own or hire and occupy the houses, manufactories, warehouses, shops *and premises which may be necessary for them*, and to lease land for residential, commercial, industrial, manufacturing *and other lawful purposes*." As revised in the Senate, and as contained in the ratified treaty, the clause was modified, and, as it now reads, it grants liberty to the nationals of the respective powers "to own or lease and occupy houses, manufactories, warehouses and shops * * * to lease land for residential and commercial purposes, etc." That there is here a very material change is manifest, and it was the subject of discussion in diplomatic correspondence in 1913 between Mr. Bryan, then the American secretary of state and the Japanese ambassador at Washington, about the time the first California Alien Land Law was pending in the state legislature. The former, in his letter to the latter (dated July 16, 1913) referred to this particular matter and said: "It thus appears that the reciprocal right to lease land was confined to residential and commercial purposes, and that the phrases 'industrial' and 'other lawful purposes' which would have included the leasing of *agricultural lands* were omitted." As to the exclusion of the leasing of lands for agricultural purposes, the effect of these verbal changes is clear. Does it also follow that the omission of the phrases referred to has also excluded occupations like that here under consideration, which, it is arguable, were just as clearly permitted under the original draft? If so, a long and very interesting list of occupations and enterprises are banned by the treaty, although we are here concerned with but one. It is therefore well to take note of the implications involved in a proper decision of the questions here presented. The statement was made in argument, and of the fact the court will take note, the Japanese are engaging in many occupations and professions that do not fall within our conception of trade or barter, or the exchange of goods as implied in the elemental or primary meaning of the word "commerce." They conduct lodging houses, their priests of religion maintain temples for Buddhist worship. They operate pool rooms and other places of amusement, and practice medicine, surgery and dentistry, and operate employment agencies. Their interpreters certainly interpret in our courts, but if they lease offices where they make engagements for their services with signs posted on their doors, their right so to do is open to question. This list is not exhaustive, but none of the things mentioned pertain to the carrying on of "trade, wholesale or retail." Nor do they involve the "sale of goods, wares or merchandise." Was it really intended to exclude Japanese from engaging in such occupations or callings as here suggested? Yet, it must be conceded, if a close and strictly etymological definition of the words "commerce" and

"commercial" used in treaty and as ordinarily employed in the English language is to be followed, such a conclusion would logically follow.

It is important, therefore, to determine, if we can, what is meant by the language of the treaty which permits citizens of Japan (aliens ineligible to citizenship) "to lease lands for residential and commercial purposes." At the outset, the word "commerce," as has so often been said, is a "term of the largest import." As used in the Constitution of the United States, the word "commerce" has been defined on many occasions by the federal courts, beginning with the famous decision in *Gibbons vs. Ogden* rendered by Chief Justice Marshall. There it was said that "commerce undoubtedly is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." The court was discussing the question whether the exclusive power of our Congress under the Constitution "to regulate commerce with foreign nations, and among the several states and with the Indian tribes," included the power to regulate navigation. Further, the opinion proceeds: "The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter." (9 Wheat. U. S. 188.)

No useful purpose would be served by quoting from subsequent decisions—where this broad definition has been repeated and applied in particular cases and under the many varying circumstances that have come before the courts. But we can discern from the beginning, that "commerce" as used in the Federal Constitution includes all the instruments and agencies by which it is carried on. As illustrative of the definition of "commerce" as there used, in line with the first declaration above quoted, and typical of all decisions to which my attention has been directed, we need only refer to one, where it has been held that a newspaper is a subject of "commercial intercourse." (*Preston vs. Finley*, 78 Fed.)

"Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of this country and the citizens or subjects of a foreign country, and between citizens of the different states. It is said that commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in those terms navigation and the transportation of persons and property, as well as the purchase, sale and exchange of commodities. Commerce is undoubtedly traffic, but is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribed rules."

But of more recent years, as life and society have become vastly more complex on one side and specialized on the other than in former times, we note a tendency to enlarge the definition of "commerce" in judicial decisions, for example:

"Commerce in its simplest signification means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care and various mediums of exchange become commodities, and enter into commerce. The subject, the vehicle, the agent, and the various operations become the object of commercial regulation." (*Riverside Mills vs. Atlantic Coast Line R. Co.*, 168 Fed. 987. See also *Northern Securities Co. vs. United States*, 193 U. S. 197.)

So much for "commerce" in the constitutional sense, as we ourselves use the term when dealing with the subject of federal and state regulations of

commerce. "Commercial," the derivative of commerce, means primarily anything of or pertaining to commerce. The phrase "commercial corporations" occurs here and there in our laws, and a case which may be referred to as having a certain value for purposes of definition, is found in 193 Fed. Reports. There it was held that a corporation engaged in leasing its own property and collecting rents therefrom is a moneyed, business or commercial corporation, within the meaning of the Federal Bankruptcy Laws. (*In re Radke Co.*, 193 Fed. 735.)

I quite agree with counsel for plaintiff when they argue that the question here to be determined is the sense in which the framers of the treaty used the words "residential and commercial purposes" and what they had in mind, as evidenced by a fair and reasonable construction of the term they employed to express their intentions.

Granting that this treaty is essentially a treaty of commerce and navigation, it does not necessarily follow that it is exclusively such. Nor is it also a necessary conclusion that its words, where they mention commerce and commercial purposes, are to be taken exclusively in the "elemental" or primary sense as signifying traffic in goods, wares or merchandise, and that only. The rules applied generally to the interpretation of treaties, as announced by our federal courts, where such questions more commonly arise, and likewise by writers on international law, alike unite to caution us against a too rigid construction of the terms of a treaty, unless the narrow rather than the liberal meaning is clearly indicated.

By the terms of the first paragraph of article I, Japanese subjects residing in the United States may do the following things: (1) They may carry on trade, wholesale and retail; (2) they may own or lease and occupy houses, manufactories, warehouses and shops; (3) they may employ agents of their choice; (4) they may lease land for residential and commercial purposes; (5) and they may generally do anything incident to or necessary for trade. Of course all these matters are reciprocal, and Americans residing in Japan may do the same things there. As plaintiff would construe those provisions, they would mean that Japanese may here only carry on wholesale and retail trade or traffic in goods, wares and merchandise, and for that purpose they may lease and occupy houses in which to live, and factories, shops and warehouses, together with only such lands as may be necessary or convenient for living, and the making, storage and sale of the articles in which they deal. That such a conclusion is literally possible may be admitted, but if it does violence to the real purposes of the treaty, otherwise reasonably obvious, and works an unnecessary restriction on the Japanese residing here, as well as Americans residing in Japan, apparently not specifically contemplated by the authors of the treaty, the disposition of the courts would be to examine a little closer into the purposes of the treaty in the light of the attending circumstances so far as they may be reasonably shown or inferred. All the more would this be the case where the literal or close construction deprives the nationals of one country residing in the other, of some privilege from which if denied the citizens thereof can reap no tangible advantage at best, and which construction too requires us to say that both countries have intentionally and mutually imposed a restriction on the privileges of their own citizens residing in the other which they cannot reasonably be said to have contemplated in the nature of the case.

But from my examination of this treaty, I am not prepared to say that the strictly literal interpretation above referred to is the only one that should be permitted. It seems to me these several things which Japanese

residing here, and Americans residing in Japan, may do are distributively stated in the treaty as separate things, so far as their relation to each other is concerned, and are not to be regarded as merely and only different parts or phases of one and the same thing, namely, the buying and selling of goods, wares and merchandise; when article I of the treaty gives Japanese the right to own or lease and occupy houses, factories, warehouses and shops, and to lease land for residential and commercial purposes, it would seem to me that phrase "commercial purposes" is a somewhat broader and more general phrase than "to carry on trade" in the sense of dealing in merchandise only.

I am not unmindful of the fact that our courts and text writers have enunciated certain rules for the construction of treaties.

In *Geofrey vs. Riggs*, 133 U. S. 258, 271, Mr. Justice Field made a declaration to the effect that in the construction of treaties, "words are to be used in their ordinary meaning, as understood by the public law of nations, and not in any artificial or special sense imposed upon them by local law, unless such restricted sense is clearly intended."

Professor Hyde in his recent work on International Law (sec. 531) says: "The ascertaining of the sense in which terms have been employed in a treaty involves a search for sources of information. Those may be found in what is extrinsic to the agreement. The use of whatever sheds light on the question involved is not restricted by prohibitive rules such as those in which the common law abounds. As Professor Westlake has well said, 'The important point is to get at the real intention of the parties, and that inquiry is not to be shackled by any rule of interpretation which may exist in any particular national jurisprudence, but is not generally accepted by the civilized world.'"

Another authority, Wigmore on Evidence, thus expresses the principle of treaty interpretation:

"Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore all the circumstances must be considered which go to make clear the sense of the words—that is, their association with things." (Wigmore on Evidence, IV, p. 2470.)

In summing up his discussion of the so-called "rules of construction of treaties," Professor Hyde gives expression to the following statement (sec. 535):

"That the courts of a contracting state, such as those of the United States, act on the assumption that it was the design of the contracting parties not to contravene principles of morality and fairness, and not to provide the means for perpetrating or protecting frauds, that their agreement should be interpreted in a spirit of the utmost good faith, and in a manner to carry out its manifest purpose, and that its terms should be liberally construed, manifests simply an imputation of good faith and high purpose to the executive branch of the government and to that of other contracting powers. It is recognition of the only intelligible theory in which enlightened states could be deemed to conclude treaties with each other.

"The court may wisely hesitate to indulge in the presumption that the terms of a treaty were given a significance such as to entail a peculiar sacrifice by one party, and involving undertakings beyond the requirements of international law. Such reluctance indicates, however, nothing more than a demand for convincing proof that those terms were used in such

a sense. It does not imply any denial of the right of the parties to agree; nor does it concern the nature of the evidence which may be competent to establish the fact. Such a judicial attitude may be regarded as more salutary than one evincing readiness to presume that the contracting parties did not attach to the terms of the treaty a significance which they might not unreasonably have adopted."

Once more from Justice Field: "It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them." (*Geofrey vs. Riggs, supra.*)

A brief, but comprehensive, summary of the attitude of the United States Supreme Court toward the construction of the treaties is thus expressed: "It is a general principle of construction, with respect to treaties, that they shall be liberally construed, so as to carry out the apparent intention of the parties, to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense imposed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that when a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." (*Hauenstein vs. Lynham*, 111 U. S. 483.)

Counsel for the state, in their oral argument and brief, have made an analysis of this treaty and therefrom they conclude that such *resume* "clearly shows that judging from its context, the framers thereof had in mind actual trade, such as is conducted in shops, factories, etc. The purpose was to facilitate trade and shipping between the two countries and to permit the occupation of lands by the 'nationals' of each of the two countries in the territories of the other only to the extent that it was necessary to carry on such trade."

That the treaty does indeed subserve the purpose here stated will be conceded, but, while it does that, it does something more. Herein lies a distinction not unlike that which we have above observed between the definitions of commerce as comprising dealing in goods and business intercourse as well.

But there is another deduction to be drawn from a reading of this treaty, which to my mind indicates that it is not confined to actual trade only, and rights incidental thereto exclusively. An examination of the treaty provisions will show that it deals with rights of two quite distinct and severable classes, namely: first, the personal rights of the citizens of each country residing in the other, which may be generally described as rights of aliens as individuals, and secondly, the regulations of trade, commerce and navigation and the rights pertaining thereto. In support of this view, it may suffice to state that under the terms of the treaty, the citizens of either country may enter, live and travel in the other, own houses and lease lands for residential purposes; they shall enjoy complete equality of taxes with native citizens; they are entitled to the most constant protection and security of their persons and property; they are exempt from military and naval service; their dwellings, factories and shops, and the premises pertaining thereto, shall be respected; they are entitled to the protection of the safeguards of the local laws in the matter of domiciliary visitation and search under legal process; they have the same protection with regard to patents, trademarks and designs as our own subjects enjoy. On the other

hand, the treaty deals with another class of regulations of a purely commercial or mercantile character, wherein it treats of consular officers and their credentials, the freedom of commerce and navigation, the regulation of import and export duties, the exemption from transit duties, the right of limited liability companies, the privileges of vessels in the postal service, the discharge of cargoes of vessels at ports, and the like.

I cannot, therefore, bring myself to the conclusion that the treaty is *purely a commercial treaty* in the narrow or strict sense. It is indeed that, but it is much more, as the above general reference to some of the subjects with which it deals ought to make manifest. The regulation of the status of the Japanese as residents in this country and of Americans as residents in Japan is as clearly one of the purposes of this treaty as its office in prescribing the rules that shall govern commercial intercourse between the two nations whose representatives signed it. Let it not be understood that the two aspects of the treaty are mutually exclusive at all points—for in serving its twofold purpose it is not divided into articles that are separated from each other, like water-tight compartments. With respect to the particular point here under consideration, namely, what things the Japanese may do and what they may not do in this country, partakes of the nature of both aspects of the treaty. The very act of limiting their business or economic activity is to that extent a limitation upon their status or rights as persons residing in the community.

For the most part, the public and judicial discussions heretofore of the Japanese treaty and the California Alien Land Laws have been concerned with the leasing of agricultural land in the raising of products of the soil. But no such question is even remotely involved in this case.

As we have seen, if the phrase "commercial purposes" appearing in the treaty must be construed in the same manner as "commerce" is defined in our Federal Constitution and laws, and if the treaty itself, as an entirety, is to be regarded as a Treaty of Commerce and Navigation only and construed in that light alone, there is plausible ground to hold that "commercial purposes" means only purposes relating to trade in goods, and the agencies and instruments by which it is carried on. And the same is doubtless true, if we are under the necessity of construing "commerce" as it is defined in the dictionaries of our language. But there were two parties to the treaty, of diverse race and speech, and it represents the contract both parties made to cover a present situation and to provide for future conditions affecting persons belonging to these dissimilar races. Looking at the problem from the common standpoint of both the United States and Japan, each was concerned about the safety and with the rights and well-being of its own citizens residing in the territories of the other, within certain limitations of course, but in terms of perfect equality, quite as much as with establishing rules under which commerce and navigation between the two countries should be carried on. Likewise, each country, in so doing, was necessarily considering what rights and privileges it was willing to extend to the "nationals" of the other residing in its own territories.

The balance between these two considerations is the resultant as expressed in the treaty. There were and are Americans in Japan, just as there were and are Japanese residing in the United States. We are not concerned with any question of immigration here, nor with the relative numbers of the citizens of either country residing in the other; but only in determining, if we may, what the treaty negotiators of both countries meant when they stipulated that the citizens of either residing in the other might lease lands for residential, and particularly, commercial purposes.

I am not aware of any definition of commerce, or commercial purposes laid down in our law books, or contained in the dictionaries of the English language that includes the rendering of personal or professional services for a consideration as being within their meaning. Certainly these terms, as ordinarily applied by us, do not include such services.

Tested by the hard and fast definition of commerce commonly accepted among our own people, the lawyer, dentist, surgeon, physician, priest, or pastor, teacher, interpreter, engineer, or indeed any professional man, in following his calling, is not engaged in commerce; and his office or dwelling is not owned or leased for a "commercial purpose." Neither is such a person carrying on "trade, wholesale or retail," nor is his office a "factory, warehouse or shop."

By the same token, the barber, the cobbler, who repairs but does not sell shoes, the bootblack, who shines but does not sell brushes or polish, the proprietor of a place of amusement or recreation, who provides a diversion, be it pool or billiards, a movie show, or newspapers or books to read, but sells neither billiard balls, cinema films or books or papers, is not engaged in commerce. Likewise the Buddhist priest who performs the ministrations of that faith, either by religious service or teaching, or by the instruction of Japanese youth for a fee or contribution, is not engaged in commerce, and the premises where he so ministers, if leased or owned, is not so owned or leased for a commercial purpose. Yet again the lodging house keeper, who lets rooms to guests for hire and thus provides a place for them to rest and sleep, sells no "goods, wares or merchandise"—he himself carries on no wholesale nor retail *trade* in the ordinary sense of the term as we use it.

A ready answer to all this might be that persons employed in all these various occupations, and others that might be named, are really engaged in commerce because they *sell* their services, which, if it be a true answer, likewise answers the question here to be decided without further argument. But such an answer begs the question entirely and is equally at variance with the dictionary definition of commerce. There is indeed a certain school of political economists which holds to the theory that labor is a "commodity" which may be bought and sold like any other, and that brain and brawn are the "goods, wares and merchandise" (so to speak) which one man hires or sells just as another sells collars or needles. I am not prepared to accept that dogma on general principles, for it is of the hardness of the coarsest materialism. But what of the teacher, priest, doctor, dentist, lawyer, interpreter and the rest of the professional catalogue? Are their services also a commodity of the class of goods, wares and merchandise to be sold and purchased the same as any other article of trade or commerce?

These questions have occurred to me as I have considered this case, not for the purpose of indulging in refinements of casuistry, but to enable me to read, if I may, *in this treaty*, the fair, reasonable and just meaning of its terms. Do they really mean that no Japanese may rent an office and there teach or contract to teach the language here, or act or contract to act as an interpreter for a fee? Do they mean that no Japanese may operate a place of amusement or recreation where he sells nothing that the patron can carry away in his pocket or in a basket? Do they mean that no Japanese can conduct a lodging house for hire? Do they mean that no Buddhist priest can perform a Japanese burial service for a contribution? Do they mean that no Japanese physician, surgeon, dentist, or other professional man can follow his profession here? If so, they mean that no American professional man can do any of these things in Japan, and that no American clergyman can bury our dead there for any sort of compensation notwithstanding the payment of a contribution for that sacred service is not unknown among us here at home, yet, we do not call that commerce.

I would rather say that in providing for the security, livelihood and well-being of our own "nationals" in Japan, as well as the "nationals" of Japan here residing, the framers of this treaty did not intend, nor should we here say they intended to deprive them of the right when sick and in ill health to be advised and prescribed for by physicians of their own race, to be attended by nurses of their own race, to be cared for in a place maintained by persons of their own race, and with other congenial surroundings if they so desire. One wholesome way to look at a question of this sort is to turn it around and look at the other side. Suppose an American physician in Japan, finding the need of such an institution in Tokyo or Kobe, should conceive the idea of establishing a sanatorium for the treatment of Americans in ill health sojourning in Japan. Suppose, further, the Japanese Government, through its duly constituted officers of the law, should put him out of business and declare his lease and "all the appurtenances thereto belonging" forfeit to the Empire because this same treaty so being violated—his place not being leased or occupied for a "commercial purpose." It would probably seem to us that the Japanese Government was sticking in the bark, and that it was doing violence to the spirit of the treaty contract, while apparently zealously observing its technically correct letter. I am rather inclined to the belief that in drawing up this treaty its authors had no intention of excluding the citizens of either country who reside in the other from following any of the occupations herein mentioned, even though none of them, strictly considered, fall within any definition of engaging in "commerce" tested by the rigid standard of trade in goods, wares and merchandise.

It must be apparent that, in so far as the decision to be made in this case now or hereafter by other tribunals of higher jurisdiction, turns upon the question of leasing or use of premises for "commercial purposes" (ignoring "residential purposes" for the moment), such decision will itself turn upon the point whether a strictly literal or liberal construction of this treaty is to be adopted. As I understand it, one of the accepted methods sometimes resorted to in the interpretation of a treaty is to compare it with previous treaties between the same countries, dealing with the same general subject matter. There was from 1894 to 1911 a treaty of "Commerce and Navigation" in force between the United States and Japan, which was superseded by the treaty here involved. Among other things the former treaty provided that the citizens of each country residing in the other "shall have free access to the courts of justice in pursuit and defense of their rights; they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects." Again, the treaty of 1894 provided that "the citizens or subjects of each of the contracting parties shall enjoy in the territories of the other entire liberty of conscience, and subject to the laws, ordinances, and regulations, shall enjoy the right of private and public exercise of their worship, and also the right of burying their respective countrymen according to their religious customs, in such suitable and convenient places as may be established and maintained for that purpose."

Now, the fact is the treaty of 1911 contains no such provisions as the two above quoted from the treaty of 1894 at all. The present treaty is entirely silent on the subject of resort to the courts for redress of wrongs or the protection of rights, and it says nothing about the exercise of worship, either public or private. Are we to deduce from this circumstance that the framers of the present treaty really intended to deprive the nationals of each

country residing in the other of such fundamental rights as these? Were the matter of sufficient importance, it might be interesting to know the reasons for those omissions from the treaty of 1911. Probably the explanation is that such rights being so "elemental," it was considered that no country claiming to be civilized would deny them, and therefore that their retention in the compacts between these nations was superfluous. But, however that may be, the fact remains that these rights of resort to the courts and freedom of worship were omitted, intentionally, we must assume, from the treaty now in force. What rule of interpretation are we to apply to this situation—a strictly literal rule or a liberal one? Are we really to say, since this treaty deals with "commerce and navigation" only, and these words being used in the "elemental sense," that therefore Japanese in America, and Americans in Japan, are not protected in the enjoyment of these rights by the treaty, because forsooth the treaty says nothing about them, and they have actually been dropped from a new treaty which superseded a former treaty which contained them? To answer such a question in the affirmative is simply unthinkable, for reasons which, in part at least, although obvious, would take us outside of a dry question of treaty interpretation. The point I would make, however, is that in the particular just referred to, every consideration of public policy and common sense requires that a liberal attitude towards this treaty, as well as of others where our courts have construed them, should be taken. If this attitude is appropriate towards the treaty as a whole, I see no good reason why it should not be taken with regard to any particular provision, whose language, as in the case before us, is open to a difference of opinion with regard to its proper interpretation. And I would take it that this position is justified, as to the matters just referred to notwithstanding that the right to the exercise of religious worship has naught to do with trade in goods, wares and merchandise, and resort to the courts may, but oftentimes does not. Surely a Japanese who is injured in an automobile accident by a fellow countryman, or perchance by a native citizen, if he sues in our courts for his personal injuries, is not resorting to them for a "commercial purpose."

While reference has been made above to the keeper of a lodging or rooming house, it was there made only for the purpose of calling attention to the fact that a person so employed is not engaged in "commerce" or "trade" in the ordinary acceptance of the terms as we use them, and further, to the logical conclusion; if the treaty is to be given a construction so close as contended for by the plaintiff, the Japanese lodging house keeper can neither own nor lease his establishment here, nor can an American conduct a hotel, on the so-called "European" plan in Yokohama. But those aliens ineligible to citizenship can, so the treaty provides, lease land for *residential*, as well as commercial purposes. Looking at the lodging house or hotel keeper's occupation a little closer, however, the view is entirely permissible that people engaged in "trade" and "commerce" need places in which to rest and sleep, and, like other "strangers in a strange land" aliens are most apt, for a variety of obvious reasons, to seek such accommodations in places conducted by persons of their own nationality. No one should be heard to say that it is unlawful for the individual alien to rent and occupy an entire house for a residence, but that he cannot rent a room in a lodging house for a week, a month, or a year for "residential purposes," because, indeed, the person who conducts the lodging house is himself not engaged in "commerce." Such a proposition is unreasonable on its face. Rather should it be said that lodging houses, rooming houses, hotels (we exclude hotels where meals are "sold") are really instrumentalities by which commerce is facilitated, even though indirectly, for the very good and sufficient reason that

commerce cannot be conveniently carried on without them. But aside from that, the lodging house keeper occupies his house himself, and lets rooms to others for residential purposes, and to hold otherwise is futile.

Let us carry this rooming or lodging house inquiry a little further. Aliens "engaged in trade" do not always enjoy good health; like other people they get sick, or need rest and recreation, and if not actually sick, persons so engaged oftentimes, like native citizens, are afflicted with impaired health. Hence, we have sanatoriums—health resorts. Wherein does the occupation of the Japanese lodging house keeper differ in any essential particular from that of the proprietor of the sanatorium? The latter provides and equips a place, let us say, favorable in location and with agreeable surroundings for the accommodation of guests who are in ill health, furnishes them with rooms, supplies them with a pleasant environment for their betterment, with competent physicians to advise and prescribe for them, or with nurses to attend them, with improved grounds or other conveniences where they may enjoy recreation, rest or amusement—all this and possibly more. The proprietor of such a place is not engaged in commerce, as we have seen it defined, but he certainly does provide a place of residence, temporary though it be, for a certain class of persons who are in poor health and in need of just such a resort. I cannot believe otherwise but that, both as to the proprietor of such an establishment and as to his guests or patients, the leasing of lands for the purpose of a health resort is essentially the leasing thereof for residential purposes even though other service be provided. If we concede, for the sake of the argument, that Japanese residing here can only be engaged in trade, or the actual buying and selling of goods, wares and merchandise, or in occupations incidental thereto, certainly the citizen of Japan who provides a "residential" place for and therein takes care of his fellow "nationals" who may be afflicted, physically or mentally, serves a very useful if not "commercial" purpose in restoring them in mind and body so that they may pursue their several callings here allowed under the treaty. So long as Japanese are permitted to come to our shores at all, which is a matter entirely outside of the question here presented, we should not and cannot deny them the privilege and health restoration at the hands of their fellow countrymen, no more than we can refuse them access to our courts or freedom of religious worship. On the ground, therefore, that the maintenance of a sanatorium is, in the last analysis, both a residential and commercial purpose, I find myself unable to agree with counsel for plaintiffs in the deduction they draw from their literal interpretation of this treaty.

In conclusion, I will say that the disposition here made of the point to which this memorandum has been principally addressed, renders unnecessary to discuss the question of the constitutionality of the California Alien Land Act of 1920, while considerable attention was given that subject in argument. It is my understanding that the validity of that act is involved in actions now pending before the Supreme Court of the United States. If that be so, there is no occasion for a ruling upon that matter in this case, and much less so, since my opinion is that a proper construction of the treaty itself settles the issue here, regardless of the ultimate fate of the land act from a constitutional standpoint.

I prefer to rest the ruling here made upon the treaty itself, and in this firm conviction that such reliance is sufficient for the purpose of this litigation. I will leave the constitutional question to be answered in other and more appropriate tribunals, who can and will speak with authority.

The order is that the demurrer to the complaint be and the same is hereby sustained on the ground that the complaint does not state the cause of action, for the reasons herein stated.

Dated July 9, 1923.

LESLIE R. HEWITT, Judge.

IN THE CALIFORNIA SUPREME COURT.

L. A. No. 7881. APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY.

4. APPELLANT'S OPENING BRIEF.

The state filed a complaint in the superior court of Los Angeles County for the escheat of the interest of defendants in a lease of certain lands located in that county.

The defendants demurred to this complaint. The demurrer was sustained. The state refused to amend its complaint.

The superior court rendered judgment in favor of defendants, dismissing plaintiff's complaint.

Plaintiff appeals to the supreme court from this judgment of the superior court.

STATEMENT OF FACTS.

The complaint (Tr., fols. 3-30) alleges that the defendant Tagami was and is a Japanese person, a native citizen and subject of the Empire of Japan, and not eligible to citizenship under the laws of the United States;

That at no time mentioned in the complaint was there, nor is there now, any treaty between the United States and the Empire of Japan, under which such alien "could acquire possession of, enjoy or transfer real property, or any interest therein, in the State of California, or elsewhere in the United States, for either of the uses or purposes set forth in the complaint;"

That U. S. Webb is attorney-general of the State of California, and Thomas Lee Woolwine is district attorney for the county of Los Angeles, and that they have been informed and verily believe that the property described in the complaint has escheated to the State of California through and by reason of the facts alleged in the complaint;

That on and prior to September 1, 1918, the defendant, Sepulveda, was the owner in fee and in possession of certain real property, described as the Sepulveda ranch at White's Point in Los Angeles County, the particular description of which discloses that it is a strip of land running along the shore line about two hundred feet and then back at right angles about ninety-eight feet;

That on the first of September, 1918, the defendant, Sepulveda, as lessor, and Tagami, as lessee, executed a lease in writing of this parcel of land—copy of which is attached to the complaint and marked Exhibit "A"—reference to which is made for greater certainty;

That defendant, Tagami, entered into possession of this land and his lease has been continued and kept in force according to its terms, and he is now in possession of said land and has kept and maintained the terms and conditions of the lease and "has used and occupied the said parcel of land and premises for the purpose of a health resort and sanatorium, and no other, as provided in said lease;"

The lease contains a provision that "the party of the first part agrees to permit the party of the second part to improve such land for the purposes of a health resort or sanatorium; to construct such necessary buildings; to have the use of such sulphur springs as are or may be developed on such land hereinabove described" (Tr., fol. 21);

That the value of this leasehold interest in said real property is twenty thousand dollars (\$20,000);

That by reason of the foregoing facts, this leasehold and interest in real property has been acquired and is now held in violation of the provisions of the act of the legislature of the State of California, approved May 19,

1913, and found in the Statutes of 1913, at pages 206, 207 and 208 thereof, and in violation of the provisions of a certain other act approved by the electors, and amendments thereof and supplemental thereto, entitled, "An act relating to the rights, powers and disabilities of aliens," etc. (This is the act of 1920, which will be hereinafter referred to as the California Alien Land Law, and will be found in the Statutes of California for 1921, page lxxxiii; and as amended, Statutes of California, 1923, p. 1020.)

The complaint then prays judgment in the usual form, that the leasehold interest be escheated to the state and ordered sold in conformity with the provisions of section 1271 of the Code of Civil Procedure.

The demurrer to the complaint (Tr., fols. 32-33) is on the general ground that the complaint does not state facts sufficient to constitute a cause of action. It further sets forth that by the complaint there is raised and presented a question involving the treaty of the United States with the Empire of Japan, and the interpretation and construction thereof, and there is also raised a constitutional question involving the Constitution of the United States and the interpretation and construction thereof.

QUESTION TO BE ARGUED ON THIS APPEAL.

All the material questions arising under the Constitutions of the United States and of the State of California have been finally determined in the cases of *Terrace vs. Thompson*, 274 Fed. 841; *Porterfield vs. Webb*, 279 Fed. 114; *O'Brien vs. Webb*, 279 Fed. 117, and *Frick vs. Webb*, 281 Fed. 407.

The decisions of the United States district court in the Terrace, Porterfield and Frick cases were affirmed by the United States Supreme Court, each of the said cases being reported respectively in 44 Supreme Court Reporter, page 15; 44 Supreme Court Reporter, page 21, and 44 Supreme Court Reporter, page 115. The decision of the United States district court in the O'Brien case was reversed by the United States Supreme Court on the point of the proper construction of the California Alien Land Law, with reference to cropping contracts, 44 Supreme Court Reporter, page 112.

Also, see the decision by this court in *Ex parte Akado*, 207 Pac. 245.

We shall not discuss these constitutional questions in this brief. The sole question to be determined is whether the trial court was right in its conclusion that the lease involved in this case was such a "lease of land for commercial purposes," or for "residential purposes," as is authorized by the existing treaty between the United States and Japan, executed February 21, 1911.

ARGUMENT.

We shall proceed with our argument in the following order: First, an analysis of the United States-Japan Treaty of 1911; second, an analysis of the diplomatic history of the treaty; third, the history of the several treaties between the United States and Japan; fourth, some judicial and textbook definitions of the words "commercial" and "commerce"; and, finally, we shall give some attention to the arguments advanced by the learned trial judge in his opinion which we have included in our transcript on appeal, and attempt to show that the conclusions reached are based on fundamental misconceptions of the purposes of the diplomatic representatives of Japan and the United States and the unquestioned powers of these respective countries in dealing with the subject matter of the leasing, use and enjoyment of land in either country by the nationals of the other.

I.

ANALYSIS OF UNITED STATES-JAPAN TREATY OF 1911 SHOWS THAT "COMMERCE" AND "COMMERCIAL" IN THE TREATY REFER TO "TRADE" AND BARTERING AND SELLING OF GOODS, ARTICLES AND COMMODITIES.

We shall attempt to show that when the term "commercial" is used in article I of the treaty giving to the nationals of the two countries the right "to lease land for residential and commercial purposes," it was intended that "commercial purposes" should be regarded as dealing with "commerce" in its elementary sense of trade and barter in goods, wares and merchandise, either wholesale or retail.

The treaty is annexed hereto as an appendix to this brief.* We shall indicate only the parts thereof which throw light on this subject matter, without quoting extensively therefrom. Our primary object is to apply a well grounded rule that treaty provisions are to be construed in the light of their general context. An examination of the context of this treaty is most illuminating in leading to a correct conclusion as to the intention of the high contracting parties in their use of the expression "commercial purposes," in article I. We shall also urge that particularly in this character of commercial treaty is the meaning of such a word "commercial" to be determined in the light of the various words, phrases and sentences found in the treaty dealing with the subject matter of commerce or trade.

The title of the treaty is "Treaty of Commerce and Navigation with Japan." The first paragraph of the general introductory language refers to the President of the United States and the Emperor of Japan, and their believing in the fixation in a clear manner of the rules "which are hereafter to govern the commercial intercourse between their respective countries," and their resolve "to conclude a treaty of commerce and navigation for that purpose."

Article I states that the citizens of each of the high contracting parties shall have liberty to enter into the territories of the other "*to carry on trade, wholesale and retail, to own or occupy houses, manufactories, warehouses and shops, * * * to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade* * * *."

The United States Supreme Court, in the case of *Terrace vs. Thompson et al.*, vol. 44, Sup. Court Rep., page 15, decided that this language does not give Japanese a right to own or lease land for agricultural purposes.

Article II provides that "*the dwellings, warehouses, manufactories and shops of the citizens or subjects of each of the high contracting parties in the territories of the other, * * * used for purposes of residence or commerce, shall be respected.*"

Article IV provides that "there shall be between the territories of the two high contracting parties reciprocal freedom of commerce and navigation. The citizens or subjects of each of the contracting parties, equally with the citizens or subjects of the most favored nation, *shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the other which are or may be opened to foreign commerce* * * *."

Article VI provides that the citizens or subjects of each of the high contracting parties shall enjoy in the territories of the other a perfect equality of treatment with native citizens or subjects "*in all that relates to warehousing, bounties, facilities, and drawbacks.*"

*Omitted.

Article VII gives to certain "*limited liability and other companies and associations, commercial, industrial, and financial,*" lawfully created and domiciled in the territories of either party, authority in the territories of the other to exercise certain rights.

Article IX provides that "*in all that regards the stationing, loading and unloading, of vessels in the ports of the territories of the high contracting parties,*" there shall be equality of treatment, etc.

Article XI provides that "*no duties of tonnage, harbor, pilotage, light-house, quarantine,*" etc., shall be imposed in the ports of the territories of either country upon the vessels of the other, so as to work inequality.

Article XIII provides that "*the coasting trade*" of the parties is excepted from the provisions of the treaty.

Article XIV provides that except as otherwise provided in the treaty the parties agree that "*in all that concerns commerce and navigation,*" there shall be a favored nation clause.

Article XV provides that the citizens of each of the high contracting parties shall have equal rights in the territories of the other "*in regard to patents, trade-marks and designs,*" etc.

It is respectfully submitted that the above analysis clearly shows that, judging from its context, the treaty framers had in mind actual trade such as is conducted in shops, factories, etc. The purpose was to facilitate trade and shipping between the two countries and permit of the occupation of lands by the nationals of each of the countries in the territories of the other only to the extent that it was necessary to so carry on trade.

II.

THE DIPLOMATIC HISTORY OF THE PRESENT TREATY BETWEEN THE UNITED STATES AND JAPAN SHOWS THAT THE TREATY WAS CHANGED FROM ITS ORIGINAL DRAFT SO AS TO EXCLUDE RIGHTS WHICH CLEARLY WOULD HAVE BEEN INCLUDED UNDER THE ORIGINAL LANGUAGE AND WHICH RIGHTS WOULD HAVE INCLUDED THE PRIVILEGE OF CONDUCTING SUCH A SANITARIUM AS IS PROVIDED IN THIS CASE.

The United States Supreme Court in *Terrace vs. Thompson, supra*, refers to the circumstances of the making of the treaty as set forth in the opinion of the United States district court in the same case, 274 Fed. at pages 844 and 845, and remarks that these circumstances will resolve all doubts against the appellants' contention in the Terrace case. At pages 844 and 845 the United States district court refers to the controversy which arose concerning the validity, under the treaty, of the earlier California Alien Land Law passed in 1913. (Statutes of California, 1913, p. 206.) The court states that in the progress of the exchange of views between the department of foreign affairs for the Empire of Japan and the secretary of state of the United States, the secretary of state found that the California act did not violate the treaty. The court refers to a communication addressed by the secretary of state, dated July 16, 1912, to the Japanese ambassador. This communication is described as "Annex No. 7, pages 17 and 18," Controversy—United States and Japan—Congressional Library J. V. 6888 C. 2 J 4. This letter is also to be found in "Papers Relating to Foreign Relations of the United States"—1913, at pages 643 and 644.

The court's quotation from the letter of Secretary Bryan is as follows (pp. 844-45: italics and capitalization are the court's):

"This treaty was based upon a draft presented by the Imperial Government. In article I of this draft there is found the following clause:

"'3. They (the citizens or subjects of the contracting parties) shall be permitted to own or hire and occupy the houses, manufactories, warehouses,

shops and premises which may be necessary for them, and to lease land for RESIDENTIAL, COMMERCIAL, INDUSTRIAL, MANUFACTURING and other lawful purposes.'

"It will be observed that in this clause, which was intended to deal with the subject of real property, there is no reference to the ownership of land.

"The reason of this omission is understood to be that the Imperial Government desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation.

"In the treaty as signed the rights of the citizens and subjects of the contracting parties with reference to real property were specifically dealt with (art. I) in the stipulation that they should have liberty 'to own or lease and occupy houses, manufactories, warehouses and shops' and 'to lease land for residential and commercial purposes.' IT THUS APPEARS THAT THE RECIPROCAL RIGHT TO LEASE LAND WAS CONFINED TO 'RESIDENTIAL AND COMMERCIAL PURPOSES,' AND THAT THE PHRASES 'INDUSTRIAL' AND 'OTHER LAWFUL PURPOSES,' *which would have included the leasing of AGRICULTURAL LANDS, WERE OMITTED.*"

It is equally true that this language, "other lawful purposes," which was eliminated from the treaty, would have permitted a lease of land for sanitarium purposes.

III.

THE HISTORY OF THE DIFFERENT TREATIES SHOWS THE INTENT TO LIMIT THE RIGHTS OF THE NATIONALS STRICTLY TO TRADE PURPOSES.

1. The treaty of 1854. (I Malloy's Treaties, etc., p. 996.) This was a commercial treaty, which for the first time opened the ports of Japan to the ships of the United States. It was negotiated by the celebrated U. S. Commodore Matthew Calbraith Perry, and is his chief title to fame.

It contains no reference whatever to the extraterritorial rights of either party.

2. The Treaty of 1857. (I Malloy's Treaties, etc., p. 998.) This was a commercial and consular treaty, and does not refer to any extraterritorial rights.

3. The Treaty of 1858. (I Malloy's Treaties, etc., p. 1000.) This was also a commercial and consular treaty. It opened certain specified ports and settlements to Americans and closed others. In article III thereof this appears:

"In all the foregoing ports and towns American citizens may permanently reside; they shall have the right to lease grounds and purchase the buildings thereon and may erect dwellings and warehouses."

It contained no provisions granting to Japanese citizens any right to reside in America or purchase or lease land there for any purpose. As will be seen below, this treaty and all others were superseded and repealed by the treaties of 1894 and 1911.

4. Treaty of 1864. (I Malloy's Treaties, p. 1010.) This was called "Convention for the reduction of import duties," and it deals with that subject only.

5. Second treaty of 1864. (I Malloy's Treaties, p. 1011.) This settled the payment of the so-called "Shimonoseki Indemnities," and did not cover anything else.

6. Treaty of 1866. (I Malloy's Treaties, p. 1012.) This was a treaty between Japan, the United States, Great Britain, France and the Netherlands, and was designed to establish certain tariff duties between these nations. There was nothing in it concerning territorial rights.

7. Treaty of 1878. (I Malloy's Treaties, p. 1021.) This was called a "Commercial Convention." It related to tariff and export duties. It

opened two additional ports which it declared should "be open to citizens and vessels of the United States for the purpose of residences and trade."

8. Treaty of 1880. (I Malloy's Treaties, p. 1024.) This covered the reimbursement of expenses incurred by either country in consequence of the shipwreck, on the coast, of the vessels of the other country.

9. Treaty of 1886. (I Malloy's Treaties, p. 1025.) This was an extradition treaty only.

10. Treaty of 1894. (I Malloy's Treaties, p. 1028 *et seq.*) This was a broad and comprehensive treaty relating to commerce and navigation. For the first time it touched the subject of extraterritorial rights. It remained in force until the adoption of the treaty of 1911 under consideration in the case at bar.

Article I of this treaty, for which article I of the treaty of 1911 became substituted, reads as follows:

"Article I.

"The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property.

"They shall have free access to the courts of justice in pursuit and defense of their rights; they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects.

"In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects of the most favored nation. The citizens or subjects of each of the contracting parties shall enjoy in the territories of the other entire liberty of conscience, and, subject to the laws, ordinances and regulations, shall enjoy the right of private or public exercise of the worship, and also the right of burying their respective countrymen, according to the religious customs, in such suitable and convenient places as may be established and maintained for that purpose.

"They shall not be compelled, under any pretext whatsoever, to pay any charges or taxes other or higher than those that are, or may be paid by native citizens or subjects, or citizens or subjects of the most favored nation.

"The citizens or subjects of either of the contracting parties residing in the territories of the other shall be exempt from all compulsory military service whatsoever, whether in the army, navy, national guard, or militia; from all contributions imposed in lieu of personal service; and from all forced loans or military exactions or contributions."

Article II provided:

"Article II.

"There shall be reciprocal freedom of commerce and navigation between the territories of the two high contracting parties.

"The citizens or subjects of each of the high contracting parties may

trade in any part of the territories of the other by wholesale or retail in all kinds of produce, manufactures, and merchandise of lawful commerce, either in person or by agents, singly or in partnership with foreigners or native citizens or subjects; and they may there own or hire and occupy houses, manufactories, warehouses, shops and premises which may be necessary for them, and lease land for residential and commercial purposes, conforming themselves to the laws, police and customs regulations of the country like native citizens or subjects.

"They shall have liberty freely to come with their ships and cargoes to all places, ports, and rivers in the territories of the other, which are or may be opened to foreign commerce, and shall enjoy, respectively, the same treatment in matters of commerce and navigation as native citizens or subjects of the most favored nation, without having to pay taxes, imposts or duties, of whatever nature or under whatever denomination levied in the name or for the profit of the government, public functionaries, private individuals, corporations, or establishments of any kind, other or greater than those paid by native citizens or subjects, or citizens or subjects of the most favored nation.

"It is, however, understood that the stipulations contained in this and the preceding article do not in any way affect the laws, ordinances and regulations with regard to trade, immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two countries."

Article III of this treaty provided:

"Article III.

"The dwellings, manufactories, warehouses, and shops of the citizens or subjects of each of the high contracting parties in the territories of the other, and all premises appertaining thereto destined for purposes of residence or commerce, shall be respected.

"It shall not be allowable to proceed to make a search of, or a domiciliary visit to such dwellings and premises, or to examine or inspect books, papers, or accounts, except under the conditions and with the forms prescribed by the laws, ordinances and regulations for citizens or subjects of the country."

In article XIV of this treaty is set forth "the most favored nation" clause, which here for the first time appears in any treaty between Japan and the United States. It is as follows:

"Article XIV.

"The high contracting parties agree that, in all that concerns commerce and navigation, any privilege, favor or immunity which either high contracting party has actually granted, or may hereafter grant, to the government, ships, citizens or subjects of any other state, shall be extended to the government, ships, citizens, or subjects of the other high contracting party gratuitously, if the concession in favor of that other state shall have been gratuitous, and on the same or equivalent conditions if the concession shall have been conditional; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other upon the footing of the most favored nation."

Article XVII contained the significant provision that the several "foreign settlements in Japan should be incorporated with the respective Japanese communes, and that when such incorporation takes place, existing leases in perpetuity, upon which property is now held *in such settlements*, shall

be confirmed, and no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property."

11. The Treaty of 1897. (I Malloy's Treaties, p. 1037.) This was a convention as to patents, trade-marks and designs.

12. The Treaty of 1905. (I Malloy's Treaties, p. 1037.) This was a copyright convention.

13. The Treaty of 1906. (I Malloy's Treaties, p. 1039.) This was a supplementary extradition treaty.

14. The Treaty of 1908. (I Malloy's Treaties, p. 1040.) This was a treaty by which the parties agreed to submit to the arbitration of the permanent Court of Arbitration at The Hague "differences which may arise of a legal nature or relating to the interpretation of treaties between the two contracting parties."

15. Second Treaty of 1908. (I Malloy's Treaties, p. 1041.) This relates to protection of trade-marks in Korea.

16. Third Treaty of 1908. (I Malloy's Treaties, p. 1043.) This related to the protection of trade-marks in China.

Thus it will be seen from this chronological review of the various treaties between the two powers, beginning with the celebrated Commodore Perry Treaty of 1854, that when these powers negotiated the treaty of 1911 they were aware that all their previous conventions had related, almost without exception, solely to matters connected with trade and commerce; and that any extraterritorial claims or rights of the Japanese were hardly considered at all.

As to personal property their rights were limited "to the succession of personal property by will or otherwise"; and as to acquiring and holding real property their rights were so limited that at the places where they should trade and carry on commerce either alone or with foreigners or native citizens they might "*there own or hire or occupy houses, manufactories, warehouses, shops and premises which may be necessary for them, and lease land for residential and commercial purposes.*" (Treaty of 1894.)

Thus we see a clear distinction was made by this treaty as to owning, hiring or occupying erections upon the land for trade purposes; but when it came to the question of leasing land this right was strictly and definitely limited to leasing land for *residential and commercial purposes*.

Clearly then this treaty as to extraterritorial rights in land covered only those persons who were engaged in trade and commerce at wholesale and retail, and the only lands they could own or hire were lands necessary for them for those purposes and located "there" (art. II); *i. e.*, where they carried on such strictly trade operations.

IV.

SOME DEFINITIONS OF "COMMERCIAL" AND "COMMERCE."

We shall here give a few definitions of the words "commercial" and "commerce" which are to be found in the decisions and also in different dictionaries. We realize that these definitions are of value only if taken in connection with the context of the subject matter being particularly discussed. Our main reliance is upon the context of the United States-Japan Treaty and the association of words and terms as found therein. However, it is of interest to note that the definition which we give to the word "commercial" as used in the treaty is the identical definition found in many other instances where there was no consideration of such a particular treaty as we now have before us.

"Commercial partnerships" are such as are formed for the buying and selling of personal property and the carrying of such property for hire by

ships or other vessels. *Shreveport Ice & Brewing Co. vs. Mandel Bros.*, 54 So. 831, 832.)

"Commercial or trading partnerships" are such as engage in trading in merchandise or in financial operations. (*Spotswood vs. Morris*, 85 Pac. 1094, 1103.)

The United States Constitution, article I, section 8, provides that Congress shall have power to regulate commerce with foreign nations, and among the several states, etc.

It has been held that "'commerce' in its simplest signification, means an exchange of goods." (*Snead vs. Central etc. Railroad Co.*, 151 Fed. 608, 613.)

"'Commerce' is traffic, the buying, selling, and exchanging of commodities * * *." (*Plummer vs. N. P. Ry. Co.*, 152 Fed. 206, 208.)

The business of insurance is not commerce in any proper sense, within the meaning of the United States Constitution. (*Fisher vs. Traders' Mut. Life Ins. Co.*, 48 S. E. 667, 669.)

The owning, controlling, and leasing of theaters and the producing of plays and entertainments, and the booking of contracts for the production of plays, is not "trade or commerce" within a Penal Code section prohibiting a conspiracy to commit any act injurious to "trade or commerce." (*People vs. Klaw*, 106 N. Y. S. 341, 350.)

Webster's International Dictionary defines "commerce" as business intercourse; especially the exchange or buying and selling of commodities. It defines "commercial" as of or pertaining to commerce; carrying on or occupied with commerce or trade.

The Standard Dictionary defines "commerce" as the exchange of goods, or property of any kind. It defines "commercial" as being employed in or devoted to trade or commerce; as, commercial travelers.

The Century Dictionary defines "commerce" as the interchange of goods, merchandise or property of any kind; trade; traffic. It defines "commercial" as proceeding or accruing from trade.

The Oxford Dictionary defines "commerce" as the exchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise. It defines "commercial" as being engaged in commerce; trading. Having reference to or bearing on commerce. Of or pertaining to commerce or trade.

V.

ANALYSIS OF THE TRIAL COURT'S WRITTEN OPINION IN THIS CASE.

We have included in our transcript on appeal the written opinion of the trial court. (Tr., fols. 46-165.) We here pause to express an appreciation of the industry and ability shown by the learned trial judge in the preparation of this opinion. The matter was very thoroughly argued before the trial court and that court in the argument showed an interest and consideration such as led to no surprise on the part of counsel in reading the splendidly prepared opinion which was finally rendered. We do, however, respectfully submit that a careful examination of this opinion will show such a fundamental misconception as to the purposes of the treaty makers and as to the undoubted powers of the respective countries in controlling this subject matter as will emphasize our thesis in this litigation which, we believe, is based upon a correct understanding of these purposes and of these powers.

We believe that it will serve the purpose of reaching a proper solution in this matter to conclude our brief with such an examination of certain portions of the trial court's opinion, for such a study will permit us to again present to the court views which we have attempted to make clear.

The trial court refers to the use of the word "commerce" in the United States Constitution, giving Congress control in the matter of commerce with

foreign nations and the several states, etc. (Tr., fols. 89, 90.) The court refers to the definition which has on many occasions been given by federal courts, such as where it is said by Chief Justice Marshall in *Gibbons vs. Ogden* (9 Wheat. 188) that "commerce undoubtedly is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." And, again quoting from that decision, "The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter."

It would appear obvious that the language so quoted by the trial court is in no way applicable to the question which was before the court for solution. In order to make effective the provisions of the United States Constitution giving absolute control over commerce, interstate and otherwise, to Congress, it was necessary to construe this word "commerce" very liberally and broadly, so as to include all of the necessary incidents thereto. If this were not done, the control intended to be reposed in Congress would be taken from that body.

This is entirely removed, however, from our question of the proper construction of the words "commerce" and "commercial" in the United States-Japan Treaty where these words are included in defining rights of the nationals of each country residing in the other, in the matter of leasing lands.

The purpose of the United States Constitution is easily understood and such a purpose must result in the construction to the language given by the United States Supreme Court.

The purpose of the United States-Japan Treaty, it appears to us, is equally easy to understand, and, so understanding, are we justified in insisting on the construction which we give to the words "commerce" and "commercial"?

The court states that in addition to the items contained in the treaty dealing essentially with commerce, it also contains provisions, particularly in article I, which may properly be regarded as rights and privileges of a personal character. "The treaty is indeed a compact regulating the carrying on of commerce and navigation between the two nations, but it is something more, as I shall hereafter take occasion to advert to more fully." (Tr., fols. 61-62.) And again the court states that the treaty "is not confined to actual trade only, and rights incidental thereto exclusively. An examination of the treaty provisions will show that it deals with rights of two quite distinct and severable classes, namely: first, the personal rights of the citizens of each country residing in the other, which may be generally described as rights of aliens as individuals, and secondly, the regulations of trade, commerce and navigation and the rights pertaining thereto." (Tr., fol. 119.) The court then refers to the terms of the treaty providing that the citizens of either country may enter, live and travel in the other; own houses and lease lands for residential purposes; they shall enjoy complete equality of taxes with native citizens; they are entitled to the most constant protection and security of their persons and property; they are exempt from military and naval service; their dwellings, factories and shops, and the premises pertaining thereto, shall be respected; they are entitled to the protection of the safeguards of the local laws in the matter of domiciliary visitation and search under legal process, etc. (Tr., fols. 120 and following.) The court continues, "with respect to the particular point here under consideration, namely, what things the Japanese may do and what they may not do in this country, partakes

of the nature of both aspects of the treaty. The very act of limiting their business or economic activity is to that extent a limitation upon their status or rights as persons residing in the community." (Tr., fol. 124.)

There are of course certain fundamental rights of protection of the persons and security of the property of the nationals of each of these governments residing in the other. So far as such property rights are concerned, they refer only to property which may lawfully be acquired by these nationals. In determining what property rights may be so lawfully acquired, we must look to any limitations which we find in the treaty; for instance, the trial court would agree that this language guaranteeing security of property rights in no way would give to the Japanese in America or to Americans in Japan the right to acquire an interest in agricultural lands. The right to acquire an interest in land for sanitarium purposes is no more sacred or inviolable than the right to acquire lands for agricultural purposes. Indeed, if it were left to the Japanese in this country to determine which right they would prefer to enjoy, the answer, we submit, would be made without any hesitation in favor of the privilege of holding agricultural lands. It is therefore no answer to our argument to say that it would be convenient and conducive to personal enjoyment of these nationals to permit of their leasing lands for sanitarium purposes. In article I of the treaty the leasing of land is particularly referred to and where so described it is definitely and specifically limited to the leasing of land "for residential and commercial purposes." As we saw above, this language in the first draft of the treaty refers to their right to "lease land for residential, commercial, industrial, manufacturing and other lawful purposes."

The elimination of the phrase "other lawful purposes" has been adverted to in the diplomatic exchange of notes between this country and Japan at the time of the 1913 California Alien Land Act, as well as in the different federal court decisions above cited. We respectfully insist that we are justified in looking to that portion of the treaty which particularly deals with the subject of "leasing land" when we are asked to answer the question as to the purpose for which land may be so "leased;" and again do we insist that when we see in a part of the treaty that land may be leased among other things for "commercial purposes," we are justified in noting how the word "commercial" is used throughout the treaty as being identified most clearly and particularly with trade, barter, purchase and sale of goods, wares and merchandise.

The trial court says, "I can not, therefore, bring myself to the conclusion that the treaty is *purely* a *commercial* treaty in the narrow or strict sense. It is indeed that, but it is much more, as the above general reference to some of the subjects with which it deals ought to make manifest." (Tr., fol. 123.)

This leads us to a consideration of another point urged by the trial court in the matter of the personal rights which undoubtedly are guaranteed to the nationals of Japan residing in this country not only by the treaty but, indeed, by the Constitution of the United States.

The court states that "one of the accepted methods sometimes resorted to in the interpretation of a treaty is to compare it with previous treaties between the same countries, dealing with the same general subject matter." The court then adverts to the Treaty of 1894 which was superseded by the present treaty. The court states that among other things the 1894 treaty provided the citizens of each country residing in the other "shall have free access to the courts of justice in pursuit and defense of their rights;

they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects." Again, that "the citizens or subjects of each of the contracting parties shall enjoy in the territories of the other entire liberty of conscience, and subject to the laws, ordinances, and regulations, shall enjoy the right of private and public exercise of their worship, and also the right of burying their respective countrymen according to their religious customs, in such suitable and convenient places as may be established and maintained for that purpose." (Tr., fols. 144-146.)

The court then says that the present treaty contains no such provisions. That it is entirely silent on these subject matters, and asks whether we are "to deduce from this circumstance that the framers of the present treaty really intended to deprive the nationals of each country residing in the other of such fundamental rights as these?" (Tr., fol. 147.) The court continues that were it a matter of sufficient importance "it might be interesting to know the reasons for those omissions from the treaty of 1911. Probably the explanation is that such rights being so 'elemental,' it was considered that no country claiming to be civilized would deny them, and therefore that their retention in the compacts between these nations was superfluous." (Tr., fol. 148.)

The court then suggests that our argument would lead to the conclusion that since the present treaty deals with "commerce and navigation" only, therefore, Japanese in America and Americans in Japan are not protected in the enjoyment of these rights by the present treaty "because forsooth the treaty says nothing about them, and they have actually been dropped from a new treaty which superseded a former treaty which contained them." (Tr., fol. 150.) The court states that to give such an answer "is simply unthinkable, for reasons which, in part at least, although obvious, would take us outside of a dry question of treaty interpretation. The point I would make, however, is that in the particular just referred to, every consideration of public policy and common sense requires that a liberal attitude towards this treaty, as well as of others where our courts have construed them, should be taken. If this attitude is appropriate towards the treaty as a whole, I see no good reason why it should not be taken with regard to any particular provision, whose language, as in the case before us, is open to a difference of opinion with regard to its proper interpretation. And I would take it that this position is justified, as to the matters just referred to, notwithstanding that the right to the exercise of religious worship has naught to do with trade in goods, wares and merchandise, and resort to the courts may, but oftentimes does not. Surely a Japanese who is injured in an automobile accident by a fellow countryman, or perchance by a native citizen, if he sues in our courts for his personal injuries, is not resorting to them for a 'commercial purpose.'" (Tr., fols. 150-152.)

We, of course, agree with the court that it would be unthinkable to construe the present treaty as denying to Japanese living in this country the right of resorting to our courts or of enjoying religious freedom in the matter of their worship and the burying of their dead. It is to be noted that in article I of the treaty it is specifically provided that "the citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same

rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects." Here we have a guarantee of the protection of our courts.

Again, it is not necessary to include such fundamental rights that must be enjoyed by the nationals of Japan, residing in this country, in a formal treaty. The United States Constitution guarantees these rights to all aliens and they can not be taken from any alien whether he be eligible or ineligible to citizenship in this country. The Fourteenth Amendment to the United States Constitution provides that "no state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This protects all aliens, whether eligible or ineligible to citizenship. Article I of our state constitution provides in the Declaration of Rights that "all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness." Section 4 of this article provides that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this state; * * *."

It is not necessary for any two countries claiming the attributes of civilized nations to include in a treaty the formal guarantee to their respective nationals of the right to religious freedom and to security of their persons and of property which they may lawfully acquire in the other country. But this by no means answers the question which is now before the court as to what leasehold interest in land may be so lawfully acquired by Japanese residing in this country. That is a subject matter which we all clearly understand to be entirely within the power of this state to control, except as this power may be particularly limited by specific provisions in any existing treaty. Japanese in California may enjoy leasehold interests in land only so far as the law of this state or the treaty between this country and Japan permits them so to do. Our state law recognizes the provisions of the treaty. The treaty limits leasehold interest in land to residential or commercial purposes. The proper definition of a commercial purpose must necessarily be reached by a study of the context of the treaty, of the history of the diplomatic relations between the two countries, and of the undoubted right of the state under the United States Constitution and the constitution of this state to control absolutely all acquisition of rights in land in this state.

Japan has never tolerated the ownership of lands by foreigners for any purpose. The interest of foreigners in Japan is limited to what is described as becoming "superficiary holders." This right of superficiaries permits the use of land for the *purpose of owning thereon structures, trees and bamboos*. It appears that the use must be strictly for residential, trading or commercial occupation. (See "Commentary by J. E. De Becker on the Commercial Code of Japan," vol. 1, pp. vii and viii; also De Becker's "Civil Code of Japan," vol. 1, pp. 5, 238, 239 and 242.)

The trial court lays much stress on the theory that treaties should be liberally construed. But this principle of construction, as was said by Justice Field in *Geofrey vs. Riggs*, 133 U. S. 258, at 271, is followed "so as to carry out the apparent intention of the parties to secure equality and reciprocity between them." A liberal construction of language in a treaty, in order to carry out the purposes of the drafters thereof, may require the

"contracting" as well as "expanding" of particular language. The rule of liberal construction is grounded upon the necessity of getting at the real meaning of the parties. In one instance this purpose may be served by contracting and narrowing language and, in another, by expanding or broadening it.

In the important case of *Rocca vs. Thompson*, 223 U. S. 317, there was a writ of error to the supreme court of this state. It was there reported as *Estate of Ghio*, 157 Cal. 572. This case involved the question whether, by virtue of the more favored nation clause in the treaty with Italy, the Italian consul general was entitled, in preference to the public administrator, to administer the estate of deceased Italian aliens as, it was claimed, such right was granted to consul generals of the Argentine Republic by the treaty with that nation. Mr. Justice Day, at page 331, said:

"But it is urged that treaties are to be liberally construed. Like other contracts, they are to be read in the light of conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the states thereby contracting."

The opinion further proceeds, at page 332:

"It is to be further observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of the estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms."

See also the chapter in volume 2, paragraph 535, "So-called Rules of Construction" of Treaties, in Hyde's International Law, and textbooks and authorities there quoted and cited. In the case at bar we find that Japan never has permitted citizens of the United States to lease in Japan lands for any but strictly residential and trading and commercial purposes. Both parties to the treaty, in drawing and ratifying it, struck from the original draft words which would have enlarged the limitation of the right to lease lands for any other than trading and commercial purposes. These considerations should be a conclusive argument against any "liberal" construction of this treaty which would even tend to defeat the evident intent of the parties.

The trial court refers to many different occupations of Japanese in this country which, it is urged, do not come within our conception of trade or barter, or the exchange of goods as implied in the construction of the word "commercial" as used in the treaty. Among these occupations so referred to are the conducting of lodging houses, the maintenance of temples for Buddhist worship, the operating of pool rooms and other places of amusement, such as moving picture houses; the practice of law, medicine, surgery and dentistry; the occupation of employment agencies; the occupation of interpreters for courts; the teaching profession; the engineering profession; the occupation of a barber, cobbler, bootblack; and the publication of newspapers. (Tr., fols. 85-86, 131-143.)

In the first place, it should always be borne in mind that none of these occupations are prohibited to the Japanese. Our state is not interested in the occupation or vocation of these people as such. It is interested in denying to them and to all other aliens ineligible to citizenship the right to lease lands in this state, except as permitted by the treaty for residential or commercial purposes. It may be that it would be convenient in the carrying on of occupations that are permitted by law, to lease lands as incidental to the following of any particular vocation. The state is not interested in these vocations as such. It is interested in the control of its lands. It is more interested in the control of its lands than it is in the convenience of

ineligible aliens in the following of their professions or occupations. It is not incumbent upon us at this time to answer the question as to the right of these aliens to lease lands as an incident to their following of each of these vocations referred to by the trial court. These ineligible aliens may in this state do only what they are expressly permitted to do. It is not necessary to find reasons for the prohibition. All that is needed is to find the prohibition. The convenience of these people is not by any means the determining factor. The will of the state is the determining factor, whether it be exercised wisely or unwisely.

More can be said in support of the thought that such aliens should be permitted to absolutely own their own homes, when they are permitted to engage in so many occupations in this country, than in support of the argument advanced by the trial court. It is of interest to the state that any persons here residing lawfully, following professions such as engineering, medicine, dentistry and teaching be permitted to own their homes. Such ownership leads to their becoming more really a part of the community and more genuinely interested in its life. The law, however, says that this cannot be. Are we to question the validity of the statute, or the power of the state, merely because as a matter of convenience and, in some respects, as a matter of state policy, arguments can be advanced in favor of their being permitted to own their homes?

The Japanese at White's Point, in Los Angeles County, where this sanitarium is located, might very well prefer, for many reasons, to have a "Little Japan" with a number of privileges, which may easily be imagined, conducive to their happiness and contentment at that locality. But the law says otherwise.

All that the trial judge tries to do for these people, the treaty-making powers did not see fit to do.

The Governments not having so protected them, it is now neither the duty, privilege nor power of the trial court to do for them what their Government failed to do.

The court in fact has written a treaty giving the Japanese far greater rights than their own representatives secured for them.

The courts have declared and it is the undoubted law that the raising of potatoes by ineligible aliens and the selling of the same to their own people, or to others, and the leasing of land in connection with the growing of these potatoes is not "commerce" as that word is used in the United States-Japan Treaty. This no longer is open to question. In *Terrace vs. Thompson*, 44 Sup. Court Rep., at page 20, the U. S. Supreme Court said:

"The state act, in our opinion, is not in conflict with the treaty between the United States and Japan. The preamble declares it to be 'a treaty of commerce and navigation,' and indicates that *it was entered into for the purpose of establishing the rules to govern commercial intercourse between the countries.*

"* * * The right to 'carry on trade,' or 'to own or lease and occupy houses, manufactories, warehouses, and shops,' or 'to lease land for residential and commercial purposes,' or 'to do anything incident to or necessary for trade,' cannot be said to include the right to own or lease, or to have any title to or interest in, land for agricultural purposes. *The enumeration of rights to own or lease for other specified purposes impliedly negatives the right to own or lease land for these purposes.* A careful reading of the treaty suffices, in our opinion, to negative the claim asserted by appellants that it conflicts with the state act." (*Italics ours.*)

We are asked, however, because of the argument of convenience, to admit

that the running of a sanitarium is engaging in commerce and that therefore these Japanese should be permitted to lease lands in connection with such an occupation. It would seem that the mere statement of these two cases, the one the growing of potatoes and the selling of the same, and the other the running of a sanitarium, will indicate the failure of the trial court to grasp the fundamentals of our question in analyzing the purpose of the treaty framers in the use of the expression "commercial purposes" in the treaty.

If it were necessary for us to closely analyze the different occupations suggested by the trial court and other vocations which might be added we would doubtless find two extremes, one the case where the vocation would undoubtedly be engaging in "commerce" and the other a case where it would undoubtedly not come within that expression. Then there would be a division line on one side of which would fall occupations in connection with which the leasing of land would be permitted and on the other side occupations where such leasing would not be permitted; but, in any event, the convenience of the person engaged in the occupation is not the controlling factor. If these people cannot conduct a sanitarium without leasing of lands then they will have to care for their sick by some means other than their being treated in sanitariums conducted by their own race. There is no prohibition against the operation of a sanitarium by these or any other people. There is a prohibition, however, against any ineligible alien leasing land in this state for that purpose.

It might be well at this point to indicate that there undoubtedly is a reserved police power in the state and in its political subdivisions, to exercise a certain control over sanitariums and hospitals. This control is commonly illustrated in the requirement of legislative bodies, such as the board of supervisors of San Francisco, that a permit be obtained prior to the conducting of a sanitarium. If we assume that the treaty does not protect the Japanese in the leasing of land for sanitarium purposes we then would have a situation where they must look only to privileges granted by the state or by the Federal Constitution. The state has, on such an assumption, prohibited the leasing of lands by these people for this purpose.

Let us for a moment look at this subject from the standpoint of the Japanese desiring to follow a certain vocation, rather than from that of the state desiring to control interests in its lands. If we again assume that a sanitarium cannot possibly be conducted without the leasing or purchasing of land, our law in fact says that an ineligible alien cannot conduct a sanitarium. It would appear that in the exercise of its reserved police power the state might well, and on good and sufficient reasons, lay down such a rule.

It would appear to us that the trial court's suggestion that the renting of an office by a lawyer or a doctor or a court interpreter, is the leasing of land, is, to use the language of the trial court, "sticking in the bark." We are entitled to the same reasonable construction of the language used in the California Alien Land Act as the trial court insists should be given to the language used in the treaty. It is a new thought to us that the monthly rental of an office, in an office building in order to follow a profession, is the leasing of land by the occupant of the office as contemplated in our Alien Land Act. If the physician or the lawyer actually does lease a house and lot, this undoubtedly would be the leasing of land and it may be that it is prohibited, as not being for residential or commercial purposes. But to rent an office in an office building appears to us as quite a different matter. If, however, the renting of such an

office is the leasing of land, for a purpose not residential or commercial, then it is prohibited no matter what the inconvenience to the particular individual might be. It is for the legislature and the people of this state to determine whether they will subject these people to such inconvenience. And so, answering the trial court's questions, we say that we do not really mean that no Japanese may teach or act as an interpreter, or operate a place of amusement, or operate a lodging house, or perform a Japanese burial service, or follow the practice or profession of a surgeon or dentist. (Tr., fols. 137, 138.) The state is interested only in their right to lease lands in connection therewith.

This leads us to another argument advanced by the trial court with reference to the lodging house or hotel keeper. (Tr., fols. 154 and following.) The court suggests that people engaged in trade and commerce need places in which to rest and sleep and "like other 'strangers in a strange land' aliens are most apt, for a variety of obvious reasons, to seek such accommodations in places conducted by persons of their own nationality." It is suggested that it would be unreasonable to assume that these persons could rent an entire house and lot for residential purposes and not be permitted to rent a single room at a lodging house. They may rent as many rooms as they please in a lodging house, which lodging house is lawfully maintained. If the lodging house happens to be maintained by an ineligible alien who is leasing land for that purpose then this maintenance is an unlawful use of this land, unless the running of a lodging house is the use of land for a commercial purpose.

The court goes on to urge that the proprietor of a sanitarium furnishes a place of residence for his patrons, just as much as does the lodging house keeper, the only difference being the sanitarium proprietor furnishes residence for sick people and the lodging house proprietor furnishes a residence for well people. (Tr., fols. 157, etc.) The court therefore suggests that the leasing of lands for a health resort "is essentially the leasing thereof for residential purposes, even though other service be provided." The court argues that this is serving a very useful purpose in that it is providing a residence for people who may undoubtedly be engaged in commerce and who must reside here and, if sick, should be permitted to so reside that they would be properly cared for. That is, it is argued that in fact a commercial purpose is being served in permitting residence of people engaged in commerce in such a manner as to be to their greatest convenience, particularly when ill. This, however, is looking at the question from the standpoint of the individual who is ill and desires a place for residence and treatment rather than from the standpoint of the person who is conducting the so-called place of residence. There is no such person sick or well now before the court asking for protection of his rights. If there were such a person, no official would argue that he was not entitled to a residence and to proper medical attention; but he must seek this residence and this proper medical attention at a place conducted according to law. Here again does the trial court consider the question solely from the standpoint of the convenience of individual Japanese rather than from the standpoint of the undoubted power of the state to dictate as to the control of its lands; and, again, the trial court, in effect, attacks the soundness of the judgment of the legislature and the people of this state, from the standpoint of public policy. That question, however, is not within the scope of any court's jurisdiction.

It is respectfully submitted that the judgment of the trial court should be reversed.

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5. RESPONDENTS' BRIEF, BY ALBERT H. ELLIOT.
STATEMENT OF THE CASE.

There is no disputed question of fact in this case and the statement of facts contained in appellants' opening brief is correct.

What is the question which the court is called upon to decide upon the admitted facts?

We agree with appellant that the only question which this court is asked to answer is:

Did the lower court err in its conclusion that the lease involved in the instant case is such a lease of land "for residential and commercial purposes" as is authorized by the existing treaty of 1911 between the United States and Japan?

Obviously, the above question cannot be answered without a judicial interpretation of the treaty, and, therefore, this case may be classified as a treaty interpretation case. We shall confine ourselves to the argument of only one proposition, which may be stated substantively as follows:

Applying to the United States-Japan treaty of 1911, the canons of construction properly applicable in the judicial interpretation of treaties, the words "residential and commercial purposes," used in article I of the treaty, are broad enough to connote every form of commercial business, including the operation of a health resort or sanitarium. (Tr., p. 11.)

We shall not argue the following propositions, but shall assume their existence for the purpose of this brief.

(a) The so-called Anti-Alien Act of 1920 is constitutional. *Terrace vs. Thompson*, 44 Sup. Ct. Rep. 15; *Porterfield vs. Webb*, 44 Sup. Ct. Rep. 21; *O'Brien vs. Webb*, 44 Sup. Ct. Rep. 112; *Frick vs. Webb*, 44 Sup. Ct. Rep. 115.)

(b) A Japanese alien is not eligible to citizenship. (*Ozawa vs. U. S.*, 43 Sup. Ct. Rep. 65.)

(c) A treaty is the supreme law of the land and binding on all courts. (Sec. 10, art. 1, U. S. Constitution; *Matter of Heikich Terui*, 187 Cal. 20; *Matter of Kotta*, 187 Cal. 27; *Matter of Francois Romaris*, 66 C. A. D. 259.)

(d) A Japanese alien may not "acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein" in California except so far as he is permitted so to do under the terms of the treaty of 1911 between Japan and the United States. (Stats. 1923, p. 1021.)

It is conceded by both appellant and respondents that unless the right of the alien Japanese, respondent, to lease land for the purpose of operating a sanitarium and health resort, can be spelled out of the treaty between Japan and the United States, with such light as is shed upon the subject matter by the Constitution of the United States and the decisions there-

under, then the respondent is without such right and his leasehold estate is escheatable to the State of California.

Since, then, the problem is one almost entirely of treaty construction, we should first determine, so far as we can, what are the established canons of construction employed in the interpretation of treaties, both in international law and in the municipal law of the United States.

THE CANONS OF TREATY CONSTRUCTION.

(a)

Treaties are construed like contracts.

"* * * Treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties." (*Rocca vs. Thompson*, 223 U. S. 317, 332.)

"Undoubtedly," said the court, "the intention of the two governments, as gathered from the words of the treaty, must control; and the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained." (*Treaties, Their Making and Enforcement*, Crandall, p. 376.)

"Various rules have, however, been laid down expressly with reference to the construction of treaties * * *. The treaty should also * * * be given such a construction as tends to the common advantage of the contracting parties and tends to place them upon an equality. * * *"

"Treaties should ordinarily be construed liberally, and so where the treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred." (38 Cyc., p. 970.)

(R. C. L., 26, p. 926):

"* * * A treaty is to be construed on principles similar to those applied to other contracts and statutes. * * *"

Moore, *International Law Digest*, vol. 5 (p. 249):

"Treaties should be interpreted 'in a spirit of *uberrima fides*,' and in a manner to carry out their manifest purpose."

"A treaty is not only a law, but also a contract between two nations, and, under familiar rules, it must, if possible, be so construed as to give full force and effect to all its parts."

"There is no rule of construction better settled either in relation to covenants between individuals or treaties between nations than that the whole instrument containing the stipulation is to be taken together, and that all articles in *pari materia* should be considered as parts of the same stipulations."

(P. 251, *supra*):

"In doubtful cases that construction is to be adopted which will work the least injustice—which will put the contract on the foundation of justice and equity rather than of inequality."

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable

to them, the latter is to be preferred. (*Hauenstein vs. Lynham*, 100 U. S. 483, 487.)"

"In the construction of treaties, the general doctrine is that any special advantage conceded by a party under any one article is in consideration of all the advantages enjoyed by the same party under that and all other articles of the treaty."

(P. 252, *supra*):

"(3) Construction of treaties is a matter of law, to be governed by the same rules *mutatis mutandis*, as prevail in the construction of contracts and statutes."

"(6) Construction is to be distinguished from 'Interpretation.' 'Construction' gives the general sense of a treaty and is applied by rules of logic; 'interpretation' gives the meaning of particular terms, to be explained by local circumstances and by the idioms the framers of the treaty had in mind."

Vol. 38, Cyc., page 969:

"* * * But if the treaty is open to construction they should endeavor to ascertain and give effect to the intention of the parties, and in so doing will adopt the same general rules which are applicable in the construction of statutes, contracts, and written instruments generally, and particularly those applicable in the construction of contracts between individuals.
* * * Treaties should ordinarily be construed liberally and so where the treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred.
* * *"

(b)

Treaties are prepared by those skilled in legal phraseology and the words used should be given their customary meaning in national, municipal and international law.

"It is generally stated that the words of a treaty are to be taken as used with their plain and natural meaning * * *. This rule is subject to the qualification that words with a customary meaning in international usage or in the public law of each of the contracting parties are to be understood as used in this customary or technical sense, unless a contrary intention clearly appears from the context. Treaties are viewed as having been prepared with care and deliberation by those versed in international law and familiar with the legal significance of words * * *. If terms used in a treaty have definite but different legal meanings in the contracting states, and there is no common and generally received meaning in the public law of nations, that meaning which obtains within the state to which the provision specifically applies at the time of the conclusion of the treaty is, it seems, to prevail." (Crandall—Treaties, Their Making and Enforcement, pp. 396-397.)

"* * * But if the words of a treaty have a common and accepted meaning in international usage, they are to be taken as used with this meaning, and not in any artificial or special sense impressed by local law, unless it clearly appears that this special and restricted meaning was intended by the parties * * *." (Crandall—Treaties, Their Making and Enforcement, p. 398.)

(Page 400, *supra*):

"In general, words should be given the meaning which will tend to give efficacy to the treaty and to secure equality and reciprocity in the benefits to be received by the parties."

(c)

Treaties should be construed in good faith to carry out the intention of the parties.

(Treaties, Their Making and Enforcement, Crandall, pp. 401, 402):

"* * * So far as a treaty comes before a domestic court of one of the contracting parties as a municipal law, it should be construed with the utmost good faith and with a view to carry out the apparent intention of the parties. It is primarily a compact between the two nations. 'This court would not readily lean to favor a restricted construction of language, as applied to the provisions of a treaty, which always combines the characteristics of a contract, as well as a law. Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is preferred. (*Shanks vs. Dupont*, 3 Pet. 242.) Such is the settled rule in this court.' No word, clause, or provision is presumably redundant; and effect is, if possible, to be given to each of them. Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations and cannot be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion."

(P. 418, *supra*):

"* * * The right to reside in the country with the same privilege as the subject of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subject of these powers. Therefore, the provisions in the mining regulations of Poorman Creek, which, in effect, forbid Chinamen from working in a mining claim for themselves or others, as well as the clause of the state constitution to the same effect, seem to be in direct conflict with this article of the treaty; and if so, are therefore void. * * *"

Moore, International Law Digest, vol. 5, p. 249:

"Treaties should be interpreted 'in a spirit of *uberrima fides*,' and in a manner to carry out their manifest purpose."

(d)

A liberal construction rather than one restrictive of rights should be favored.

(38 Cyc., p. 970):

"Various rules have, however, been laid down expressly with reference to the construction of treaties. * * * The treaty should also be given such a construction as tends to the common advantage of the contracting parties and tends to place them upon an equality. * * * Treaties should ordinarily be construed liberally, and so where the treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred."

Hauenstein vs. Lynham, 100 U. S. 483 (Oct., 1897):

"* * * Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred. (*Shanks vs. Dupont*, 3 Pet. 242.) Such is the settled rule in this court * * *."

Hyde, International Law (sec. 535):

"That the courts of a contracting state, such as those of the United States, act on the assumption that it was the design of the contracting parties not to contravene principles of morality and fairness, and not to provide the means for perpetrating or protecting frauds, that their

agreement should be interpreted in a spirit of the utmost good faith, and in a manner to carry out its manifest purpose, and that its terms should be liberally construed, manifests simply an imputation of good faith and high purpose to the executive branch of the government and to that of other contracting powers. It is recognition of the only intelligible theory in which enlightened states could be deemed to conclude treaties with each other.

"The court may wisely hesitate to indulge in the presumption that the terms of a treaty were given a significance such as to entail a peculiar sacrifice by one party, and involving undertakings beyond the requirements of international law. Such reluctance indicates, however, nothing more than a demand for convincing proof that those terms were used in such a sense. It does not imply any denial of the right of the parties to so agree; nor does it concern the nature of the evidence which may be competent to establish the fact. Such a judicial attitude may be regarded as more salutary than one evincing readiness to presume that the contracting parties did not attach to the terms of the treaty a significance which they might not unreasonably have adopted."

(e)

Each provision of a treaty should be construed pari materia with all the others.

Moore, International Law Digest, vol. 5, p. 249:

"There is no rule of construction better settled, either in relation to covenants between individuals or treaties between nations, than that the whole instrument containing the stipulations is to be taken together, and that all articles in *pari materia* should be considered as parts of the same stipulation."

"* * * No priority is attached to the numerical order of the provisions in the same treaty. Each provision is supposed to be drawn with due regard to all of the provisions *pari materia* in the same instrument. * * *

(f)

A construction should be adopted which places the parties to a treaty on an equality.

Crandall—Treaties, Their Making and Enforcement, p. 400:

"In general, words should be given the meaning which will tend to give efficacy to the treaty and to secure equality and reciprocity in the benefits to be received by the parties."

Moore, International Law Digest, vol. 5, p. 251:

"In doubtful cases that construction is to be adopted which will work the least injustice—which will put the contract on the foundation of justice and equity rather than of inequality. * * *

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties, to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. (*Hauenstein vs. Lynham*, 111 U. S. 483, 487.)"

THE NAME OF THE JAPANESE-UNITED STATES TREATY OF 1911.

As we are considering the question of the canons of construction applicable to treaties, it is interesting to inquire how far we shall be aided in the proper construction of the treaty before us, by examining its title and preamble. Appellant argues that the title of the Japanese-United States treaty is of importance as indicating the scope, aim and purpose of the treaty so far as it affects the rights of the nationals of the respective countries. It might be thought that the title and preamble of the treaty was an attempt in a few words properly to characterize it, and that therefore the words "Commerce and Navigation" describe fully the aims, objects and scope of the treaty. In fact, appellant has argued rather forcibly that the rights of the respective nationals under the treaty are only such as involve commerce and navigation as the words are used in a narrow, much restricted and technical way. It must be conceded by all those who have studied the numerous treaties between the United States and foreign countries, that there is scarcely a question involving the rights of persons and property which has not been made the subject matter of some treaty. If we could do so within the scope of this brief, it would be interesting to catalogue the different personal and property rights which have been necessarily adjudicated by the courts of this country, in cases involving construction of treaties. We can do no more, however, in passing than to call the court's attention to the very significant fact that the two words, "Commerce" and "Navigation," used often singly and often in conjunction, are well established and traditional words adopted by common international usage in the names of treaties. We submit a list of such treaties, with no attempt to make the list complete, but with the suggestion that in view of the wide scope of the treaties named, we can hardly conceive of English words of greater longitude and latitude than the words "Commerce" and "Navigation."

A LIST OF TREATIES BY NAME.

1. Treaty of Friendship, Commerce and Navigation (Argentina).
2. Treaty of Peace, Amity and Commerce (Chile).
3. Treaty of Peace, Amity and Commerce (China).
4. Treaty of Peace, Amity and Commerce (Colombia).
5. Commercial Convention (Cuba).
6. Treaty of Friendship, Commerce and Navigation (Denmark).
7. Treaty of Amity and Commerce (Dominican Rep.)
8. Treaties of Amity and Commerce and Alliance (France).
9. Treaty of Commerce and Navigation (Hanover).
10. Treaty of Friendship, Commerce and Navigation (Hanseatic Republics).
11. Treaty of Amity and Commerce (Prussia).
12. Treaty of Amity, Commerce and Navigation (Great Britain).
13. Treaty of Commerce and Navigation (Greece).
14. Treaty of Commerce and Navigation (Italy).
15. Treaty of Amity, Commerce and Navigation (Mexico).
16. Treaty of Peace and Commerce (Netherlands).
17. Treaty of Commerce and Navigation (Ottoman Empire).
18. Treaty of Commerce and Navigation (Paraguay).
19. Treaty of Friendship and Commerce (Peru).
20. Treaty of Commerce and Navigation (Portugal).
21. Treaty of Commerce and Navigation (Russia).
22. Treaty of Friendship, Boundaries, Commerce and Navigation (Spain).

23. Treaty of Amity and Commerce (Sweden and Norway).
24. Treaty of Friendship, Commerce, Extradition (Switzerland).

HOW HAVE TREATIES BEEN CONSTRUED IN DECIDED CASES BY THE COURTS OF THIS COUNTRY?

It is our contention that an examination of decided cases shows that in actual practice treaties have always been construed in a broad and liberal way, with the utmost good faith, and with a view to extending protection to both the personal and property rights of the nationals of all countries with whom we have treaties. An exhaustive study of many treaty cases has not resulted in our finding a single case where any words in a treaty have been given a narrow or restricted or technical meaning, and particularly do we believe that no case can be found where either the words "commerce" or "commercial purpose" are construed in a treaty as words of limited, narrow, or technical meaning. *Per contra*, we shall cite many cases where English words in treaties are stretched to the utmost limit in order that the broad purpose of a treaty may be preserved. It is our contention that our courts, both federal and state, have preserved the standard of *uberrima fides* in treaty construction to the end that our American ideal of public morality in international affairs may be maintained, despite the claims of those who would lower it to the level of an assumed political expediency. We note particularly that the learned attorney-general has not cited a single case in any of our courts which construes any word or group of words in any treaty in a narrow or technical sense. We wish now to give this court:

A FEW EXAMPLES OF LIBERAL CONSTRUCTION OF TREATIES IN ACTUAL CASES.

Geoffrey et al. vs. Riggs et al. (February 3, 1890), 10 Sup. Ct. 295.

In this case the words "states of the Union" in the treaty of 1853 between the United States and France was construed as broad enough to include the District of Columbia, the court saying:

"It is a general principle of construction, with respect to treaties, that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction, words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. * * *

In the recent case of *Bunforth vs. Ihmsen*, 204 Pac. 354 (February 10, 1922), the supreme court of Wyoming, in construing the treaty between the United States and Great Britain, held that the word "territories," as used in the treaty, was broad enough to include states, the court saying:

"* * * It is contended that the term 'territories,' above mentioned, must be construed as applying only to one of the territories of the United States, as distinguished from a state. The rule laid down by the Supreme Court of the United States is that:

"'Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred.' (*Hauenstein vs. Lynham*, 100 U. S. 483, 25 L. Ed. 628.)

"We accordingly think that the term 'territories,' used in the above treaty, is to be construed in its broader sense as meaning and including any area or locality under the dominion of the United States. While we have no authority direct on that point, yet it has always, so far as we have found, been given that meaning by the courts in discussing the above treaty or one similar to it. (*Schultze vs. Schultze*, 144 Ill. 290, 33 N. E. 201, 19 L. R. A. 90, 36 Am. St. Rep. 432; *Ahrens vs. Ahrens*, 144 Iowa 486, 123 N. W. 164, Ann. Cas. 1912A, 1098; *Pierson vs. Lawler*, 100 Neb. 783, 161 N. W. 419.)

This treaty will control and suspend the rule of the common law in force in this state during such time as the rights conferred thereby are in force or extended by the courts pursuant thereto. (2 C. J. 1065.) * * *."

In the case of *In re Ross*, 11 Sup. Ct. Rep. 897, Mr. Justice Field construed the word "Americans," appearing in the treaty with Japan of June 17, 1857, as broad enough to include an English subject who was an enlisted seaman on board an American vessel, flying the American flag, the learned judge saying:

"* * * It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. * * * The inquiry in all such cases is as to what was intended in the law by the legislature, and in the treaty by the contracting parties. * * * And in the present case, to carry out the intention of the treaty and statute in question, they will be construed to apply to all parties who are by public law, or the law of the country, entitled to be treated for the time, from their employment and service, as citizens."

In construing article 10 of the treaty with Great Britain of August 9, 1842, in the case of *United States vs. Roucher*, 119 U. S. 407, the court said in substance that the treaty must be construed in respect of its "manifest scope and object."

In construing the treaty between the United States and Mexico with respect to the boundaries of the State of Texas, the Supreme Court said:

"* * * Undoubtedly the intention of the two governments, as gathered from the words of the treaty, must control; and the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained. * * *"

The Supreme Court of the United States held in the old case of *Delamun vs. United States*, 6 Pet. U. S. 117, that inviolability and security of persons and property are included in the words "rights, advantages and immunities of citizens of the United States," as used in a treaty.

In the case of *University vs. Miller*, 14 N. C. 188, the word "effects," as used in the treaty, was construed to include land, on the principle of broad construction. (See, also, *Adams vs. Ackerland*, 168 Ill. 632, 48 N. E. 454.)

In the case of *Hamilton vs. Erie R. R. Co.* (November 28, 1916), 219 N. Y. 343, in defining the rights of consuls and consular agents, the court said that it was a part of their duties "to conserve the property within their territorial jurisdiction, of their countrymen dying therein." "And to protect the commercial interests of these citizens or subjects in the country in which they are accredited."

Mr. Chief Justice Fuller, acting as a member of the tribunal of arbitration at The Hague Convention, and construing an agreement between Great Britain and France, said:

"In default of a definition of the term 'protege' in the General Act of the Brussels Conference (of July 2, 1890), this term must be understood in the sense which corresponds best as well to the elevated aims of the conference and its final act, as to the principles of the law of nations, as they have been expressed in treaties existing at that time, in internationally recognized legislation and in international practice."

In the case of *In re Adutt* (1893), 55 Fed. 376, the court, in construing the treaty between the United States and Austria-Hungary, held that the word "forgery" as used in the treaty should have its common law definition, which includes forgery of commercial paper as well as the falsification of

public obligations. The court referred, on page 368 of the opinion, to "the spirit of that treaty."

In construing the treaty with France, it is held that "the term 'property,' as applied to lands, comprehends every species of title, inchoate or complete, legal or equitable, and embraces those rights which lie in contract, executory as well as executed." (Crandall—Treaties, Their Making and Enforcement, p. 492.)

And also that "in the term 'laws' is included custom and usage, when once settled." (Crandall, *supra*.)

The word "representatives" in the treaty with the Hanseatic Republic has been construed by the supreme court of Illinois in *Schultz vs. Schultz*, 144 Ill. 290, broadly as including all who take by will or descent, heirs and devisees, as well as executors and administrators.

The Supreme Court of the United States has said that corporations, as well as individuals, are within the purpose and purview of the treaty with Great Britain. (*Gospel etc. vs. Wheeler et al.* [1814], 2 Gall. 105, 135.)

A splendid example of liberal interpretation of treaties is found in the case of *Jackson vs. Lund*, 3 John. Cases, 109, where the court says:

"These words ought to have a very liberal interpretation, in advancement of their beneficial end. They ought to apply, in furtherance of the amicable intention of the two nations, to every British subject who, at the time of the treaty, was in the enjoyment of lands within the United States, and whose title thereto would be valid, independent of the plea of alienism. In all such cases the treaty may be considered as doing away the plea."

In the case of *Ex parte Charlton* (1911), 185 Fed. 880, the word "persons" in the treaty with Italy was considered as a matter of interpretation sufficiently broad to embrace citizens and subjects of the contracting parties.

In construing a treaty with Spain, the court in the old case of *Pizzaro* (1817), 2 Wheat. 227, construed the word "subjects" very broadly as used in the treaty, as applying to all persons domiciled in the Spanish Dominion, in the same sense as the term citizens or inhabitants was used when applicable to persons owing allegiance to the United States.

In the old case of *Chirac vs. Chirac* (1817), 2. Wheat. 259, the court in construing the treaty with France of February 6, 1778, as giving to a French citizen the right to purchase and hold lands in the United States, said:

"Upon every principle and fair construction, this article gave to the subjects of France a right to purchase and hold lands in the United States."

In the recent case of *U. S. & Cuban Allied Works Engineering Corporation vs. Lloyds* (March 20, 1923), 291 F. 889, the court says:

"Article 1 of the treaty of 1815 with Great Britain (8 Stat. 228; Malloy, vol. 1, p. 624), as extended indefinitely by that of 1827 (8 Stat. 360; Malloy, vol. 1, p. 645), provides that between the two powers there shall be 'a reciprocal liberty of commerce'; that the inhabitants of either 'shall have liberty freely and securely to come with their ships and cargoes to all such places * * * to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, * * * and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries.' The last words do not, of course, include 'laws and statutes' subjecting them to discrimination by reason of their alienage, and the treaty necessarily overrides any state statute to the contrary. (*Geofroy vs. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; *Yick Wo vs. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Truax vs. Raich*, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283.) These aliens

could neither be excluded from entry into the state of New York, nor from transacting business with her citizens."

In the very recent California case of *Estate of Romaris* (Sept. 7, 1923), 66 C. D. 259, not only is the doctrine firmly and positively restated that a treaty is the paramount law of the land, a statute of California to the contrary notwithstanding, but the treaty is designated as a "consular convention" and yet under the canon of broad and liberal construction, the words "right of possessing personal and real property, etc.," give to a Frenchman the same rights of ownership as citizens have. The court there answered the plea of the attorney-general for a narrow and limited construction of the French treaty of 1853:

"(1) Appellant argues that the state law and the treaty provision do not conflict for the following reasons: (a) Because the treaty does not grant equality in the matter of inheritance. The argument in support of this is that the treaty provides for equality only with respect to the right of possessing property, and that one possesses property by holding it, but only after it has come to him by inheritance, purchase, gift or otherwise, and that the treaty therefore does not apply to the situation here obtaining. This precise question was decided adversely to appellant's contention in *Geofroy vs. Riggs*, 133 U. S. 258, and *Bahuaud vs. Bize*, 105 Fed. 485."

The word "commerce" as it appears in the Constitution of the United States has been repeatedly construed by our courts as a word of the largest possible import.

We must remember that we are called upon to construe an English word of our own choosing, and one which had received judicial construction by our courts before it was used in the United States-Japanese treaty. In article I, section 8, of our Constitution, among the grant of powers to Congress appears that famous specification of powers "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." In view of the long line of decisions in which the word "commerce" has been developed by judicial definition to include almost every form of industrial activity, with the rights, duties, obligations, accessories and incidents thereof, how can we now ask this court to adopt a narrow and shallow definition of the adjective of the same noun when used in a treaty? The Japanese who negotiated and signed the treaty may well have believed that the expression "commercial purposes" was at least as broad in its scope as the noun "commerce." It may be presumed that they, as well as our President and Senate, were acquainted with the way our courts had construed the word commerce. We can conceive of no greater breach of international good faith than for these United States, or any state, to attempt now to confine the expression "commercial purpose" within the narrow limits of "barter" or "an exchange of goods" or "buying and selling of personal property," or "the exchange between men of the products of nature or art."

"From this it follows that a literal and narrow meaning of a clause may not be made to defeat the manifest purpose of the parties as gathered from the entire instrument. 'We are not at liberty to ascribe a meaning to the terms of a treaty which would frustrate the known and proved purpose of the instrument, unless the words used in the instrument are such as to permit of no other construction. Whoever asserts a construction which would produce such a result must show not merely that it is a possible construction, but that it is a necessary construction, and that any other is impossible.'"

"* * * 'The whole document will be taken together, and will be considered in connection with the attendant circumstances, the situation of the parties, and the object in view, and thus the literal meaning of an isolated clause is often shown not to be the meaning really understood or intended'

* * *

"* * * Many cases are cited in the early books of the avoidance of the plain purpose of the treaty by the adoption of a restricted literal meaning of the terms." (Crandall, *Treaties, Their Making and Enforcement*, pp. 371, 372.)

The great Chief Justice Marshall said in the case of *Gibbons vs. Ogden* (1824), 9 Wheaton 1:

"Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter."

Preston vs. Finley, 72 Fed. (1896), 850 (quoting from page 859 of the opinion):

"'Commerce,' says the Supreme Court, 'is a term of the largest import. It comprehends intercourse for the purposes of trade, in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of foreign countries, and between the citizens of different states.' (*Welton vs. Missouri*, 91 U. S. 280.) In *County of Mobile vs. Kimball*, it is said by the Supreme Court that 'commerce with foreign countries and among the states strictly considered, consists in intercourse and traffic, including in those terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.' (102 U. S. 702; *McCall vs. California*, 136 U. S. 108, 10 Sup. Ct. 881.) 'Commerce, undoubtedly, is traffic,' said Chief Justice Marshall, 'but it is something more. It is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' (*Gibbons vs. Ogden*, 9 Wheat. 1.) Within the comprehensive definition given the term 'commerce' by the Supreme Court, a newspaper is a subject of commercial intercourse and sale between state and state, like any other article in which a right of traffic exists.

* * *

In re R. L. Radke Co., 193 Fed. (1900) 735.

A moneyed, business or commercial corporation is defined in this opinion, as follows:

"We cannot do otherwise than follow the definition of the terms 'moneyed,' 'business' and 'commercial' which were adopted and approved by the federal courts when called upon to interpret the earlier statute.

"In *Rankin vs. Florida, A. & G. C. R. Co.*, 20 Fed. Cas. No. 11,567, in deciding that a railroad company is a 'business corporation' within the meaning of that term as used in the Bankruptcy Act, the court declared that a corporation created for the purpose of carrying on any lawful business defined by its charter and clothed with power so to do, for the sake of gain, is a 'business corporation,' and amenable to the provisions of the Bankruptcy Act." •

"* * * The attempt to limit the word 'business' so as to be merely synonymous with trading would deprive it of its meaning beyond that included in the other words 'money' and 'commercial.' * * *

5 Cal. Jur., Commerce, section 3, page 239:

"3. Definitions of Terms.—The word 'commerce' is a term of the largest import. It is not limited to an exchange of commodities only, but includes and is coextensive in its meaning with 'intercourse.' The term includes, says a high authority, 'the fact of intercourse and of traffic and the subject matter of intercourse and traffic. The fact of intercourse and traffic again embraces all the means, instruments and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons.' * * *

THE LEGAL DEFINITION OF THE WORDS, "COMMERCE", "COMMERCIAL", AND "TRADE", SHOWS THAT THEY ARE WORDS OF WIDE AND COMPREHENSIVE MEANING.

The suggestion that the words connote by their definition transactions carried on for the purposes of gain and profit, is found in the very old case of *Fleckner vs. U. S. Bank* (1823), 8 Wheat. p. 338, in which the question under review was the power of the United States Bank, under its charter, legally to purchase notes in the ordinary course of business, when all its articles declare "the said corporation shall not, directly or indirectly, deal or trade in anything except bills of exchange, etc."

The court held, in deciding the case that the true interpretation of the words "deal or trade" was that the bank was interdicted "from doing the ordinary business of a trader or merchant in buying and selling goods, etc., for profit and uses the words 'deal and trade' in contradistinction to purchases made for the accommodation or use of the bank or resulting from its ordinary banking operations."

As illustrating the scope of the word "commercial" we quote from the old case of *Watson vs. Tarpley*, 18 How. U. S. 517, 521:

"The general commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the Constitution and laws of the United States having conferred upon the citizens of the several states, and upon aliens, the power or privilege of litigation and enforcing their rights acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must follow by regular consequence, that any state law or regulation the effect of which would be to impair the rights thus secured, or to divest the federal courts of cognizance thereof * * * must be nugatory and unavailing."

Commercial property is defined as "property leased out for revenue." (12 C. J. 142; *Female Orphan Society vs. Board of Assessors*, 109 La. 537, 33 S. 592.)

A commercial venture is defined as "Wherever capital is to be laid out on any work and a risk run of profit or loss, it is a commercial venture." (12 C. J., p. 141.)

Commercial domicile is defined as "A domicile acquired by maintenance of a commercial establishment in a country, in relation to transactions connected with such establishments." (12 C. J., p. 142.)

Commerce is defined as:

"Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce. The subject, the vehicle, the agent, and the various operations become the objects of commercial regulation." *Riverside Mills vs. Atlantic Coast Line R. Co.*, 168 Fed. 987, 989, 990 (citing *Gibbons vs. Ogden*,

9 Wheat. [22 U. S.] 230, 6 L. Ed. 78); *Northern Security Co. vs. United States*, 24 Sup. Ct. 436, 478, 193 U. S. 197, 48 L. Ed. 679."

(Words and Phrases, vol. 1, p. 788.)

"The word 'commerce' is not susceptible to exact and comprehensive definition, though a fairly accurate conception of its meaning can be arrived at from the judicial inclusive and exclusive definitions which have been given from time to time. It has been said that the word is a term of the largest import—of very large significance." (5 R. C. L., p. 690.)

"The word 'commerce,' as employed by the framers of the Constitution, implies a means to a financial, pecuniary or other like remunerative end, traffic or trade for emolument or compensation. This meaning is basal. We unconsciously imply such meaning whenever we employ the word."

Bl. Com., pp. 273-278, subd. 5; 1 Kent, Com., pp. 32-34, 431-439; *U. S. vs. Hoke*, 187 Fed. 992; *Kellar vs. U. S.*, 213 U. S. 138, 53 L. Ed. 1066; Black, Const. Law, 3rd Ed., 391-392.

In concluding our review of cases where the canons of broad and liberal construction of treaties have been employed we seem to be justified in our previous premise that we can think of no questions involving the purely civil rights of nationals, both in respect of their persons and property, which have not been included in some of the many treaties now in existence. In this connection, however, a broad distinction must be drawn between civil rights and political rights. We know of no treaty which attempts to guarantee to nationals of any country political rights in any other country, that is, the rights of citizenship, such as voting and other rights of that character. But the so-called rights of person and property are included within the broad language of many treaties regardless of whether said treaties are designated treaties of commerce, of navigation, of peace, of amity, or howsoever they may be designated.

"To what extent it is thus limited has been considerably discussed without being definitely defined, no treaty having ever been declared by the courts to be void. It would seem clear, however, that the treaty power does not extend so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, and it has also been stated that it would not authorize a cession of any portion of the territory of a state without the consent of that state; but subject to the limitations mentioned it may be said generally to extend to all matters which are proper subjects of negotiation between our Government and the Governments of other nations, such as matters relating to extradition, property rights and disabilities of aliens, rights, powers, and duties of ambassadors and consuls, and the jurisdiction of consular courts, regulation of commercial relations with foreign countries, regulation and protection of trademarks, submission to arbitration of controversies with other governments in which public interests are concerned, and the acquisition of territory. The treaty-making power in the United States has been exercised with regard to a large variety of subjects, and at different times pursuant to resolutions of the senate compilations have been made of all the treaties between the United States and other powers." (38 Cyc., p. 966.)

CONSTRUCTION OF THE TREATY BETWEEN THE UNITED STATES AND JAPAN IN THE INSTANT CASE.

With the principles of liberal construction in mind to which we have

called the court's attention, there should be no difficulty in construing the treaty between the United States and Japan of 1911 in such a way as to include within its scope the right of a Japanese to lease land for commercial purposes. It is fair to assume from the complaint in the instant case and from an examination of the terms of the lease, that the lessee intended to use and is in fact using the leased premises for a commercial purpose. It is difficult to conceive of words of wider scope than the words "commercial purpose." Under the terms of the lease, the lessee is bound to pay to the lessor the sum of ninety (\$90.00) dollars per month for the use of the premises and in addition thereto he is obligated to expend the sum of three thousand (\$3000.00) dollars during the three years of the original term of his lease. It is a fair inference from the pleadings that the lessee intended to and does in fact operate the property for the purpose of profit and gain. The lessee is operating his health resort and sanitorium by charging a price to those who resort to the premises for either their health, or the comfort and service which a hotel or sanitorium or health resort can give. For these accommodations the guests pay. The health resort or sanitorium is run for the purposes of profit. Therefore, we contend that the lessee is operating his property for a commercial purpose as those words are used in article I of the treaty.

Possibly the best method of definition of the expression "commercial purpose" would be a process of elimination. For example, a commercial purpose is certainly not an agricultural purpose or a political purpose. We may add also in this connection that if any attempt is made to deprive an alien Japanese of the right to carry on a commercial business, and as a part of his business to use real property for that purpose, then such an attempt would result in depriving a Japanese of the right to "follow any of the lawful, ordinary trades and pursuits of life without let or hindrance of the state or any of its subordinate municipal bodies, except such as may arise from the enforcement of equal and impartial laws."

In re Quong Woo (1882), 13 Fed. 229, 233; *Truax vs. Raich* (Nov., 1915), 239 U. S. 33.

It should be the purpose of the court so to construe the treaty under consideration as that there will be no conflict between it and the Alien Land Act of 1920. Should such a conflict arise there can be no question but that the Alien Land Act must give way. As Mr. Justice Chase, in a leading opinion, said:

"A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state and paramount to its legislature) must give way to a treaty, and fall before it, can it be questioned, whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only by a repeal, or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole." (*Ware vs. Hilton*, *supra*.)

It is our contention, however, that there is no such conflict provided a liberal construction is given to article I of the treaty. We may add further that if any vitality is to be given to the words "the most constant protection and security for either persons and property" as contained in the treaty

(article I), and if these words so well known in the municipal law of the United States are to be construed as meaning anything, it is impossible for us to understand how Japan, in the treaty before us, could have contracted more clearly for the protection of her nationals, resident in the United States, in the matter of the protection of their right to earn a living in the various occupations of the country. If we can say that the running of a hotel or a hospital or a health resort or a sanatorium is not a commercial purpose, then it would be interesting to know how far a state may go in restricting the rights of a Japanese under the treaty. A lease of property may be for a term of years, or one year or a week or one day. If the State of California can prevent a Japanese from entering into a lease of land for any term necessary in the operation of his business, we should like to inquire as to how a Japanese could carry on any business whatever. If he occupies a building under any kind of an arrangement with the owner thereof for any limited period whatever, he is a lessee of that building and therefore of the land on which the building stands. How can he continue to do business in the building by using the building, unless he has some sort of a leasehold interest in the property? We are referring now, as of course, strictly to those lines of business which may be considered commercial, as distinguished from those agricultural in character.

It should be said that the whole aim and purpose of the Alien Land Act of 1920 was to prevent aliens ineligible to citizenship from occupying the agricultural lands of the state. We concede that the language of the act carries it far beyond its original aims and purposes but it is a matter of general information and knowledge that the aims and purposes of the act were as we have stated. We are making no argument, however, based on such aims and purposes as are not found in the language of the act itself, except to ask the court to construe the act in view of the obvious aims and purposes of the treaty. As is well said by Hoffman, district judge in the Tiburcio Parrott case, 5 Sawyer 566 (1880):

"* * * If it has authority to stipulate that aliens residing in a state may acquire and hold property, and on their death transmit it to alien heirs who do not reside in the state, against the provisions of the laws of the state, otherwise valid—and so the authorities already cited hold—then it, certainly must be competent for the treaty-making power to stipulate that aliens residing in a state in pursuance of the treaty may labor in order that they may live and acquire property that may be so held, enjoyed, and thus transmitted to alien heirs. * * *"

And as also said by Mr. Root, then secretary of state, in an address to the annual meeting of the American Society of International Law, April 19, 1907:

"No state can say a treaty may grant to alien residents equality of treatment as to property but not as to education, or as to the exercise of religion and as to burial but not as to education, or as to education but not as to property or religion. That would be substituting the mere will of the state for the judgment of the President and Senate in exercising a power committed to them and prohibited to the states by the Constitution."

REPLY TO THE BRIEF OF RESPONDENT.

We concede that the history of the various treaties between the United States and Japan, as well as the diplomatic correspondence between the respective countries leading up to the execution of the treaty of 1911, may be looked to in interpreting the said treaty.

So far as the diplomatic correspondence is concerned that seems to point to a studied effort not to grant to the nationals of either country the right

(a) to own land or any interest therein in the other; or (b) to lease land in the other except for "residential and commercial purposes." The Supreme Court of the United States has decided that question, and the writers of this brief have always been of that opinion. But the question involved in the instant case is a totally different one, and no decision rendered since this controversy arose except in the case at bar speaks upon the question.

On the other hand, however, the history of the treaties prior to the treaty now under consideration shows an equally studied effort of the countries to proceed from specific to general words and phrases in defining the rights of nationals. In the treaty of 1894 the following personal rights are guaranteed to nationals: (a) Free access to courts of justice and to employ lawyers, advocates and representatives to pursue and defend their rights before such courts, etc.; (b) liberty of conscience and the right of worship; (c) right of burial. (See art. I of the Treaty of 1894, Appellant's Brief, pp. 16, 17.)

Where are these specific rights and guaranties to be found in the treaty of 1911, unless we give to the language of article I of the treaty a broad and liberal interpretation? Shall we follow the logic of appellant's brief and say that since the 1911 treaty *ex industria* omits all mention of the above specified elemental rights, that therefore such rights are to be denied to the nationals of the respective countries? Or must we not on the other hand concede that the negotiators of the treaty of 1911 deemed the language of article I of that treaty broad enough in scope to connote all that was omitted from the treaty of 1894? In other words, we must ascribe to those who negotiated the treaty of 1911 either a studied purpose to deny to their nationals the fundamental and elemental rights which appertain to residents in civilized countries, or we must believe that they considered the language of the treaty broad enough to include such rights.

The only right granted to nationals in the treaty before us, to lease land, is found in the comprehensive language of article I, "lease land for residential and commercial purposes." So far as the leasing of land is absolutely necessary for a national of either country to be secure in the rights granted him under the treaty, such right to lease land must be found in the phrase "residential and commercial purposes." Therefore, we must assume that such occupational rights of nationals as involve primarily or incidentally the leasing of land, either are denied to nationals under the treaty, or must be found in the words "residential and commercial purposes." It is our contention that the history of the various treaties and the language used show clearly that the treaty of 1911 must be given a broad and liberal interpretation.

THE INTERPRETATION OF THE PHRASE "RESIDENTIAL AND COMMERCIAL PURPOSES" IN THE TREATY, INSISTED UPON BY APPELLANT WOULD DEPRIVE A JAPANESE NATIONAL OF HIS CONSTITUTIONAL AS WELL AS HIS TREATY RIGHTS.

The doctrine that aside from any grant in any treaty an alien has a right under the Constitution of the United States to engage in the common occupations of this country, is so well established that it cannot be questioned. The recent case of *Truax vs. Raich*, 36 Sup. Ct. 7, speaks decisively on this point as follows:

"* * * It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure. (*Butchers' Union S. H. & L. S. L. Co. vs. Crescent City L. S. L. & S. H. Co.*, 111 U. S. 746, 762, 28 L. Ed. 585, 588, 4 Sup. Ct. Rep. 652; *Barbier vs. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 924, 5 Sup.

Ct. Rep. 357; *Yick Wo vs. Hopkins*, *supra*; *Allgeyer vs. Louisiana*, 165 U. S. 578, 589, 590, 41 L. Ed. 832, 835, 836, 17 Sup. Ct. Rep. 427; *Coppage vs. Kansas*, 236 U. S. 1, 14, 59 L. Ed. 441, L. R. A. 1915C, 960, 35 Sup. Ct. Rep. 240.) If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. * * *

"* * * The assertion of an authority to deny the aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality."

It is obvious that a Japanese alien could not engage in any of the following "occupations of the community" unless he is given the right as incidental thereto to lease land. The learned judge of the court below summed up the matter as follows:

"Tested by the hard and fast definition of commerce commonly accepted among our own people, the lawyer, dentist, surgeon, physician, priest, or pastor, teacher, interpreter, engineer, or indeed any professional man in following his calling, is not engaged in commerce; and his office or dwelling is not owned or leased for a 'commercial purpose.' Neither is such a person carrying on 'trade, wholesale or retail,' nor is his office a 'factory, warehouse or shop.'

"By the same token, the barber, the cobbler who repairs but does not sell shoes, the bootblack who shines but does not sell brushes or polish, the proprietor of a place of amusement or recreation who provides a diversion, be it pool or billiards, a movie show, or newspapers or books to read, but sells neither billiard balls, cinema films or books or papers, is not engaged in commerce. Likewise the Buddhist priest, who performs the ministrations of that faith, either by religious service or teaching, or by the instruction of Japanese youth for a fee or contribution, is not engaged in commerce, and the premises where he so ministers, if leased or owned, is not so owned or leased for a commercial purpose. Yet again the lodging house keeper, who lets rooms to guests for hire and thus provides a place for them to rest and sleep, sells no 'goods, wares or merchandise'—he himself carries on no wholesale nor retail *trade* in the ordinary sense of the term as we use it." (Tr., pp. 48-49.)

Appellants make this very disingenuous answer to the above argument:

"* * * it should always be borne in mind that none of these occupations are prohibited to the Japanese." (Appellant's Opening Brief, p. 41.)

Appellant tells us in effect, "You may carry on your several occupations which require a habitat as is your constitutional right, but California, while not prohibiting these occupations, will see to it that you can have none of her sacred soil as a habitat for such occupation by lease or otherwise, not even for a single day." This exquisite refinement of casuistry is built upon the wording of a treaty, written in the English language and signed by the representatives of an enlightened country!

We assume that what is intended is that a Japanese alien is guaranteed by the California Alien Land Act his constitutional right to engage in the common occupations of the community, provided that he does not engage in them anywhere in California. Manifestly, practically all occupations re-

quire a business habitat, which means that a Japanese must necessarily "acquire, possess, enjoy, use, cultivate (or) occupy" land or some interest therein, in order that he may carry on the above specified occupations. It is suggested by appellant that the renting of an office in an office building (Appellant's Brief, p. 47) is not a lease of land. No authorities are cited in support of this novel proposition and in answer to the suggestion we submit that we cannot conceive of any occupational tenancy in a building affixed to land which is not a tenancy of the land itself. A tenancy of an office for a day is a lease of the property. While it would be theoretically possible to hire a building not fixed to the soil, as personal property, we have never heard of such a thing in connection with the ordinary occupations or professional activities of this country. A construction of the treaty which would deny to Japanese aliens here, or American aliens in Japan, the right to lease or occupy land in their various commercial occupations, would necessarily deprive them of the right to engage in such occupations. This reduction of the theory of narrow construction of the treaty to a *reductio ad absurdum*, argues eloquently for a broad and liberal construction such as will not by "a literal and narrow meaning," "defeat the manifest purpose of the parties as gathered from the entire instrument." (Opinion Elihu Root, Alaska Boundary Tribunal of 1903.)

"You take my house when you do take the prop
That doth sustain my house;
You take my life when you do take the means
Whereby I live." (Merchant of Venice.)

SOME INCIDENTAL QUESTIONS RAISED BY APPELLANT AND ANSWERED.

Appellant attempts to narrow down the word "there" as used in the treaty of 1894. (See pp. 18, 22 and 23 of his brief.) We call attention to this point as illustrating the difficulties which arise when we fail to interpret words in a treaty text in a broad and liberal way. Since the word "there" as it appears in article II of the treaty of 1894 follows the grant of the right to trade in "any part of the territories of the other," obviously there is a grant of the right to own and occupy houses, etc., for the purposes of trade in all parts of the country where nationals wish to trade. How is it possible to use English words of wider import? All nationals presumably "may trade" under the treaty and they may own and occupy houses wherever they wish to trade. Observe that the word "trade" is as broad in its scope as the word "territories." Does the right to trade in "territories" exclude nationals from trading in "states"? If we may narrowly construe one word in a treaty, why not another? Therefore, the word "there" as used in the treaty means when properly interpreted "in any part of the territories of the other" or, as applicable to the United States, in any part of the states and territories of the United States or the District of Columbia. We are fortunate in being able to cite authorities covering this point. (2 C. J. 1065, *supra*.)

It is asserted by appellant that Japan has never tolerated the ownership of land by foreigners for any purpose and technically the statement is correct—but only technically. Japan allows foreigners to lease land in Japan for such long periods as to make the question of ownership of the fee in such land a purely abstruse one, interesting only to the legal antiquarian. The theory of soil sovereignty takes us back to the feudalistic idea of government. Do we wonder that Japan clings to the shadow, if not the substance, of that theory? Since it is conceded that the treaty under discussion does not grant to the nationals of either country the right to *own* land for any purpose in the other, we fail to understand how this point bears upon

the question under discussion. We have heard it asserted so often, however, that Japan denies land ownership to foreigners, that we think it should be stated that foreigners may possess and control in Japan all the land which they need, can use and can pay for. They may do this through long leases and the organization of corporations composed exclusively of foreigners.

J. E. De Becker (Annotated Civil Code of Japan, vol. I, pp. 45-6-7, chap. one, with the sequilae thereof), speaks on this question as follows:

"Article 2.—Foreigners enjoy private rights with the exception of those forbidden by laws and ordinances or treaties.

"Explanation.—This article determines the capacity of rights of foreigners. The age in which foreigners were regarded as mere savages or brutes has long passed away like a dream. In the present day when international communication is frequent, and operations of trade and commerce are carried on so extensively that the development of national prosperity and the increase or decrease of the popular strength largely depend on them, the capacity of rights of foreigners necessarily demand recognition and their interests must therefore be protected as well as those of natives. The Japanese law therefore adopts the principle of international equality in accordance with most legislative precedents of modern times, and permits foreigners to enjoy the same private rights as natives. * * *

"1.—Foreigners cannot enjoy the ownership of land, and they do not enjoy the franchise even in purely local matters.

"Though foreigners cannot own land, they can take advantage of what are termed deeds of perpetual lease (*Eitai shakuchi-ken*) which were granted by the government in accordance with various treaties and confirmed by law No. 39, promulgated in the year 1901. This kind of right can be purchased, sold, and donated, and is almost equivalent to actual ownership in effect, so that the provisions of the law relating to ownership are correspondingly applicable to perpetual leases, and when a Japanese has acquired a perpetual lease over a given piece of land he is deemed to have become the actual owner thereof. The procedure of registration, etc., relating to perpetual leases is laid down in imperial ordinances. * * *

"Foreigners can, however, own '*superficies*' of land in any part of Japan, and this is a by no means despicable class of property. Moreover, while individual foreigners cannot own land, companies formed entirely by foreigners under the Japanese law can become landholders just as freely as native-born citizens."

It is further suggested that the principle of liberal construction may require the "'contracting' as well as 'expanding' of particular language." (Brief of Appellant, pp. 38, 39.) We regret that appellant does not cite authority for this rather novel and startling doctrine. In the great number of cases and text-books which we have examined, never once have we found such a suggestion made, and because of our confidence in the industry and learning of the attorney-general, we are bound to assume that the whole literature of treaties and treaty construction does not furnish an example of "contracting and narrowing language."

Appellant cites the case of *Rocca vs. Thompson* (223 U. S. 317) as suggesting a principle of treaty construction contrary to the main thesis of this brief. In this case, all that seems to be decided is that under a treaty giving a consul the right "to intervene in the possible administration and judicial liquidation of the estate of the deceased conformably with the laws of the country, for the benefit of the creditors and legal heirs," the proper judicial construction of such a treaty would not give the consul the

right to administer an estate in California as against the public administrator of the proper county. It is our contention that giving to the above specified words and more especially the word "intervene" as used in the treaty the most liberal possible construction, the consul under this said treaty is not given the right to administer an estate. We most cheerfully agree with the learned judge who wrote the opinion in the above case and cannot find in the opinion any suggestion that either any of the words or combination of words appearing in the treaty are to be given a literal, contracted or narrow meaning. When a consul is granted by the treaty the right to appear in the administration of the estate as the representative of non-resident heirs, it would seem to us obvious that he is granted a most valuable right and one calculated to carry out fully the aims and objects of the treaty. All that we ask in the case at bar following the thesis of *Rocca vs. Thompson* is that the treaty before us be so construed as to effect "the objects and purposes of the state thereby contracting."

SOME PRACTICAL RESULTS OF A SERIOUS NATURE WHICH WOULD FLOW FROM
A NARROW CONSTRUCTION OF THE TREATY.

In connection with the construction of a treaty, it is always important to consider the practical results which would flow from the construction contended for. What would be the practical results, both to the nationals of Japan as well as the nationals of the United States, if the narrow and literal construction contended for by the attorney-general should be adopted? What is the present situation and condition existing in both countries under the construction and interpretation now adopted by the nationals themselves, and what would be the effect if a narrow construction were adopted?

It must be remembered that the only treaty existing between Japan and the United States is the treaty of 1911, heretofore referred to. Under this treaty, Japanese in the United States carry on and conduct business, lease land for residential and commercial purposes, and engage in mercantile enterprises. Under the same treaty Americans in Japan likewise carry on and conduct business, lease land for residential and commercial purposes, and engage in all kinds of mercantile enterprises. In other words, the treaty is the basis on which Americans are conducting and have conducted and carried on business and commerce in Japan, and Japanese have done likewise in the United States.

Should a narrow and literal construction of this treaty be now adopted? If so, what would be the immediate effect on business conditions and business intercourse and on financial conditions in both countries? Millions of dollars are invested by Americans in Japan. Vast sums of money are invested in business enterprises carried on and conducted on land leased by Americans in Japan, and millions are now invested by Japanese in the United States, not alone in California, but in other states of the Union, in business enterprises conducted on land leased in the United States by Japanese subjects. It must be remembered that this treaty with Japan does not apply alone to California, but applies to all of the United States, as well as to all of Japan. In Japan at the present date land is leased by American citizens for the purposes of operating and conducting hotels, restaurants, hospitals, schools, churches, missions, manufacturing plants of all descriptions, life insurance companies, pool halls, barber shops, physicians' offices, lawyers' offices—in fact, practically every kind of business and trade carried on and conducted by Americans in the United States is conducted and carried on in Japan by Americans

on land leased by them, and there has never been a question during the existence of this treaty but that land may be leased in Japan by Americans under the terms of the treaty, and under the construction placed upon same by Japan, for any purposes of lawful business. Japan has never construed this treaty, nor has the United States ever thought of construing same until this present proceeding in any other light than that the provision in the treaty permitting land to be leased for commercial purposes by the subjects of each country in the territory of the other applied to any legitimate business desired to be conducted and carried on by the subject of that country. As has already been said, Japanese in the United States likewise lease land under the common-sense construction placed on this treaty by Japan, for the purposes of operating and conducting schools, churches, hotels, health resorts, pool halls, pawn shops, physicians' and surgeons' offices, hospitals, undertaking parlors, interpreters' offices, newspaper plants, dentists' offices, missions, manufactories, foundries, and the like. If the construction contended for by appellant should be adopted it would have the immediate effect of wiping out all of the aforementioned kinds of business; what then would become of the vast sums of money invested in such projects? It is true the learned attorney-general says that these occupations are not prohibited by any law or treaty and that Japanese here may engage in, conduct and carry on all or any of same, yet as has been previously stated in this brief, the argument is good in theory only, but not in practice, because these occupations and various business enterprises cannot be carried on or conducted without leasing land for such purposes. The lease of a hotel, of course, carries with it the lease of the land on which it is situated. The lease of a building for a mission, or a building for a church, or building for a school, or building for an office, or for a hospital, or pool room, or pawn shop, or a place of amusement, all carry with it the ground lease of the land.

The banks in America are now financing many Japanese in their various lines of business, such as conducting and operating hotels, hospitals, undertaking parlors, manufactories, and numerous other business enterprises. These banks have always construed the treaty in the same practical, common-sense way as have the nationals of both the United States and Japan. Many property owners and business concerns have leased, by ground leases, hotels, pool halls, manufactories, undertaking parlors, hospitals and many other places of business, to Japanese subjects in America. What will be the effect upon these property owners and business concerns if the narrow construction of the words "commercial purposes" is adopted by this court? Vast sums will be lost, and great hardships will be endured if such narrow and unreasonable construction should in fact be adopted.

What will be the effect on business and business conditions of Americans in Japan, and what loss will they sustain if such construction should be placed on the words "commercial purposes" by this court? If this court should adopt the narrow construction as contended for by the attorney-general, Japan would immediately put the same construction upon the treaty as applying to American citizens in Japan. This is not a one-sided affair, and if *our* courts construe a treaty in a narrow or literal sense without the broadness and fairness that should be given to the construction of a treaty, having in mind the purposes and objects and intents of the treaty-making powers at the time same was adopted, then the courts of Japan will do likewise, and place the same construction thereon. It

must not be forgotten that there is but one treaty under which nationals of America and nationals of Japan operate in the country of the other, in carrying on and conducting business and investing money.

A very practical suggestion for this court to consider in construing this provision of the treaty, is to look carefully for a moment on the natural and logical construction heretofore placed on same by the citizens and governments of the two nations here involved. The citizens of each nation have construed this treaty, and the powers given thereunder in regard to the words "commercial purposes," in the same light. Americans in Japan are now carrying on and conducting exactly the same lines of business under power conferred by the words "commercial purposes" as the Japanese are doing in America. Land is being leased, as it necessarily must be in each of the two countries, in order that these business enterprises may be carried on. The only authority for the leasing of said lands for these business enterprises in either country is the provisions of the treaty in question, and particularly the provision, "*lease land for commercial purposes.*"

All of the various lines of business suggested in this brief, and particularly suggested in the learned opinion of the trial judge (Tr., fol. 20, p. 46), will necessarily be prohibited if appellant's narrow view of this matter is adopted by this court. Practically the only business that will be permitted to be carried on and conducted by the nationals of each country in the territory of the other is the buying and selling of merchandise over the counter, as dry-goods merchants, or grocerymen. Any construction which would bring about this situation is absurd and ridiculous. Broad-minded treaty negotiators such as the representatives of each of the governments here involved, never dreamed in using the words, "commercial purposes," that any such narrow or literal construction would ever be contended for. *They had in mind that subjects of each of the countries in question could engage in any legitimate lines of business in the territory of the other, and make such leases of land as were necessary to legitimately and lawfully carry on and conduct said business.*

It is common knowledge that American citizens in Japan may lease land for various lengths of time and that long-term leases are very common. These leases are transferable and assignable, the same as conveyances, and for all intents and purposes have the same effect as ownership of the land. If a narrow construction of this treaty is permitted, practically all of the lines of business enumerated herein, together with many others, will be ruined. The millions invested in such business enterprises will be lost, and the loss will not be alone to the Japanese in America, but also to the Americans in America who contracted with the Japanese here. The loss will also bear heavily on the Americans who have invested in similar business enterprises in Japan, for it cannot be assumed that Japan will put a broad construction on the words "commercial purposes," when the United States adopts a narrow and literal construction thereof. In other words, the construction placed upon the treaty by this court will be adopted by the courts of Japan, and for this reason we have endeavored in every way to present the great importance of a liberal and broad construction of this treaty in accordance with the intention of the treaty negotiators of the two countries involved, in negotiating and concluding this treaty. The disastrous effect which will be caused by a narrow construction thereof to Japanese business men in America will also affect and have a like disastrous result upon American business men

in Japan, and American business enterprises of a similar nature conducted and carried on there.

This court should adopt the practical construction of this treaty heretofore accepted by the nationals of each of the countries here involved, which construction has been mutually accepted since 1911, and prior to that time, in fact, ever since the first treaty of commerce and navigation was adopted by these two countries. Why is it now necessary to attempt to overthrow the accepted and common-sense construction which has been adopted for years? Why is it now necessary to change the construction of the treaty from the construction mutually placed upon same from the enactment thereof to the present time? We again refer this court to the opinion of the learned trial judge and the reasons there given in construing the treaty as he did, and urge that there is no other conclusion to reach than was reached by him. We feel that the great importance of a liberal construction of this treaty will be recognized by this court, and the court will bear in mind the disastrous effect on business and business conditions of subjects of each of the countries involved should this court adopt a narrow and literal construction of same.

Our contention that a broad and liberal construction of this treaty should be adopted is borne out by a recent decision from the *Supreme Court of the United States*, rendered May 26, 1924, in the case of *R. Asakura, plaintiff in error, vs. City of Seattle et al.*, written by Mr. Justice Butler. The point there involved was the construction of the treaty between the United States and Japan, and the court there lays down the same rules as contended for here, in connection with the construction of treaties.

The court in determining whether the business of a *pawnbroker* is "trade" within the meaning of the treaty, says:

"The language of the treaty is comprehensive. The phrase 'to carry on trade' is broad. That it is not to be given a restricted meaning is plain. The clauses 'to * * * own or lease * * * shops, * * * to lease land * * * for * * * commercial purposes, and generally to do anything incident to or necessary for trade,' and 'shall receive * * * the most constant protection and security of their * * * property * * *,' all go to show the intention of the parties that the citizens or subjects of either shall have liberty in the territory of the other to engage in all kinds and classes of business that are or reasonably may be embraced within the meaning of the word 'trade' as used in the treaty."

We feel that the decision in the Asakura case comes so near determining the question here involved, that we set out the opinion of Justice Butler in full as follows:

"Supreme Court of the United States. No. 211—October term, 1923. *R. Asakura, plaintiff in error, vs. City of Seattle et al.*

"In error to the supreme court of Washington. (May 26, 1924.)

"Mr. Justice Butler delivered the opinion of the court.

"Plaintiff in error is a subject of the Emperor of Japan, and since 1904 has resided in Seattle, Washington. Since July, 1915, he has been engaged in business there as a pawnbroker. The city passed an ordinance, which took effect July 2, 1921, regulating the business of pawnbroker and repealing former ordinances on the same subject. It makes it unlawful for any person to engage in business unless he shall have a license,

and the ordinance provides "that no such license shall be granted unless the applicant be a citizen of the United States." Violations of the ordinance are punishable by fine or imprisonment or both. Plaintiff in error brought this suit in the superior court of King County, Washington, against the city, its comptroller and chief of police to restrain them from enforcing the ordinance against him. He attacked the ordinance on the ground that it violates the treaty between the United States and the Empire of Japan, proclaimed April 5, 1911, 37 Stats. 1504; violates the constitution of the State of Washington, and also the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. He declared his willingness to comply with any valid ordinance relating to the business of pawnbroker. It was shown that he had about \$5,000 invested in his business, which would be broken up and destroyed by the enforcement of the ordinance. The superior court granted the relief prayed. On appeal, the supreme court of the state held the ordinance valid and reversed the decree. The case is here on writ of error under section 237 of the Judicial Code.

"Does the ordinance violate the treaty? Plaintiff in error invokes and relies upon the following provisions: 'The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established * * *. The citizens or subjects of each * * * shall receive, in the territories of the other, the most consistent protection and security of their persons and property * * *.'

"A treaty made under the authority of the United States 'shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.' (Constitution, art. VI, sec. 2.)

"The treaty-making power of the United States is not limited by any express provisions of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations. (*Geofroy vs. Riggs*, 133 U. S. 258, 266, 267; *In re Ross*, 140 U. S. 453, 463; *Missouri vs. Holland*, 252 U. S. 416.) The treaty was made to strengthen friendly relations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations. The treaty is binding within the state of Washington. (*Baldwin vs. Franks*, 120 U. S. 678, 682, 683.) The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. (*Foster vs. Neilson*, 2 Pet. 253, 314; *Head Money Cases*, 112 U. S. 580, 598; *Chew Heony vs. United States*, 112 U. S. 536, 540; *Whitney vs. Robertson*, 124 U. S. 190, 194; *Majorano vs. Baltimore & Ohio R. R. Co.*, 213 U. S. 268, 272.)

"The purpose of the ordinance complained of is to regulate, not to prohibit, the business of pawnbroker. But it makes it impossible for aliens to carry on the business. It need not be considered whether the state, if it sees fit, may forbid and destroy the business generally. Such a law would apply equally to aliens and citizens; and no question of conflict with the treaty would arise. The grievance here alleged is that plaintiff in error, in violation of the treaty, is denied equal opportunity.

"It remains to be considered whether the business of pawnbroker is 'trade' within the meaning of the treaty. Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. (*Hauckstein vs. Lynham*, 100 U. S. 483; *Geofroy vs. Riggs*, *supra*, 271; *Tucker vs. Alexandroff*, 183 U. S. 424, 437.) The ordinance defines 'pawnbroker' to 'mean and include every person whose business or occupation it is to take and receive, by way of pledge, pawn or exchange, goods, wares or merchandise, or any kind of personal property whatever, for the repayment or security of any money loaned thereon, or to loan money on deposit of personal property'; and defines 'pawnshop' to 'mean and include every place at which the business of pawnbroker is carried on.' The language of the treaty is comprehensive. The phrase 'to carry on trade' is broad. That it is not to be given a restricted meaning is plain. The clauses 'to * * * own or lease * * * shops, * * * to lease land * * * for * * * commercial purposes, and generally to do anything incident to or necessary for trade,' and 'shall receive * * * the most constant protection and security of their * * * property * * *' all go to show the intention of the parties that the citizens or subjects of either shall have liberty in the territory of the other to engage in all kinds and classes of business that are or reasonably may be embraced within the meaning of the word 'trade' as used in the treaty.

"By definition contained in the ordinance, pawnbrokers are regarded as carrying on a 'business.' A feature of it is the lending of money upon the pledge or pawn of personal property, which, in case of default, may be sold to pay the debt. While the amounts of the loans made in that business are relatively small, and the character of the property pledged as security is different, the transactions are similar to loans made by banks on collateral security. The business of lending money on portable securities has been carried on for centuries. In most of the countries of Europe, the pledge system is carried on by governmental agencies; in some of them the business is also carried on by private parties. In England, as in the United States, the private pledge system prevails. In this country, the practice of pledging personal property for loans dates back to early colonial times, and pawnshops have been regulated by state laws for more than a century. We have found no state legislation abolishing or forbidding the business. Most, if not all, of the states provide for licensing pawnbrokers and authorize regulation by municipalities. While regulation has been found necessary in the public interest, the business is not on that account to be excluded from the trade and commerce referred to in the treaty. Many worthy occupations and lines of legitimate business are regulated by state and federal laws for the protection of the public against fraudulent and dishonest practices. There is nothing in the character of the business of pawnbroker which requires it to be excluded from the field covered by the above quoted provision, and it must be held that such business is 'trade' within the mean-

ing of the treaty. The ordinance violates the treaty. We need not consider other grounds upon which it is attacked.

"Decree reversed."

In this connection we also wish to call the court's attention to a very interesting article by Professor Thomas Reed Powell, appearing in the *California Law Review*, Volume 12, No. 4, May issue, and suggest that the views therein expressed may lend assistance to this court in disposing of the question before it.

IS A SANITARIUM A COMMERCIAL PURPOSE?

Since the particular business in the instant case (which the state is attempting to eliminate, as not being included within the term "Commercial purposes" as said term is interpreted by the state), is designated in plaintiff's complaint as a "health resort and sanitarium," it is only proper in passing to inquire as to the particular characteristics peculiar to the conduct of such a business, and the reasons, if any, which entitle such a business, to be differentiated and discriminated from other business or commercial enterprises.

The business here in question is "a health resort and sanitarium," and we feel that the court will take judicial notice of the fact that, as such, the owners must, to a very large extent, deal in the purchase and sale of goods, wares and merchandise. In fact, the greater portion, as well as the most profitable portion, of the business conducted at the premises here in question consists in the conducting of a grocery store, restaurant and soft drinks stand. This will be found to be the fact in a great number of health resorts and sanitariums, such as the one here, and so we feel that this fact should be appreciated and comprehended under the allegations of the complaint herein.

It would be impossible to conceive of a sanitarium or any business of like nature being carried on without, to a more or less degree, engaging in the barter and sale of goods, wares and merchandise. For instance, in the case of a hospital, the conducting of which would probably not be considered in the light of a trade purpose or the sale of goods, wares and merchandise, a certain portion of the business would, nevertheless, be the supplying of medicines, bandages, meals and even newspapers, tobacco, etc., which are all classified as goods, wares and merchandise.

Assuming the correctness of the above, and we feel the state will not dispute this premise, what percentage of a business must be the actual buying and selling of commodities, to bring such business within the purview of the term "commercial purposes" in its most narrow and restricted sense? Fully believing and still contending that the term "commercial purposes" in the treaty should be interpreted in its broadest sense, we feel that in the instant case, to attempt to discriminate, even under the most restricted interpretation, would lead only to confusion. It would be almost an absurdity to attempt to say that any definite percentage of the business must be the purchase and sale of goods, wares and merchandise.

CONCLUSION.

We have tried to pick the treaty of 1911 up by its four corners in order that we might view it as a whole. We have insisted that it is a contract between two enlightened modern nations, made for the protection of the rights of American and Japanese nationals, each in the country of the other. We are asking this court so to construe the solemn covenants of the contract that we may as a civilized nation not "* * * keep the word of promise to the ear, and break it to our hope." (Macbeth.)

In conclusion, may we compliment the learned attorney-general because appellant has presented his case with dignity and fairness, and with a commendable effort to present to the court the real issue, in simple and direct language. Our hope is that we may have followed the good example of appellant herein.

ALBERT H. ELLIOT,
CLYDE W. SMITH,
J. MARION WRIGHT,
Attorneys for Respondents.

Note.—Decision is pending.

CHAPTER IX.—J. HARADA CASE.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs, vs. JUKICHI HARADA and MINE HARADA and SUMI HARADA and YOSHIZO HARADA, Defendants.

IN THE CALIFORNIA SUPERIOR COURT.

RIVERSIDE COUNTY.

1. INFORMATION AND COMPLAINT.

Comes now the people of the State of California upon the information of, by and through U. S. Webb, attorney-general of the State of California, and for cause and action against the above-named defendants alleges:

I.

That on the 14th day of December, 1915, and at all times prior and subsequent to said date, the defendant Jukichi Harada was an alien, not eligible to citizenship under the laws of the United States; that on said date and at all times prior and subsequent thereto, said defendant Jukichi Harada was a Japanese person and citizen, and a subject of the Empire of Japan; that on said 14th day of December, 1915, there existed a treaty between the Government of the United States and the Empire of Japan whereby a citizen and subject of said Empire of Japan may acquire, possess, enjoy or transfer any real property or any interest therein in the State of California, or the United States of America, in any manner or at all.

II.

That on said 14th day of December, 1915, the said defendant acquired an interest in fee in and to that certain real property situate, lying and being in the City of Riverside, County of Riverside and State of California, described as follows:

Commencing at a point in the easterly line of Lemon street, 125 feet northerly from the southwesterly corner of block 3, range 4 of the town, now city, of Riverside, according to the map thereof in the office of the county recorder of the County of San Bernardino, State of California, in book 7, page 17, Maps; thence running at a right angle easterly, parallel with the northerly line of Fourth street, 100 feet; thence at a right angle, westerly, parallel with the easterly line of Lemon street 40 feet; thence at a right angle westerly, parallel with the northerly line of Fourth street 100 feet to the easterly line of Lemon street; thence at a right angle southerly along the easterly line of Lemon street 40 feet to the point of commencement.

III.

That on said 14th day of December, 1915, by reason of said acquiring of said interest and estate in said real property by the said defendant Jukichi Harada, the same escheated to and did become and now remains the property of the plaintiff herein; and that the State of California has right by law to said interest and estate.

IV.

That Fulton Gunnerson was the last person seized and possessed of said real property described in this complaint prior to the 14th day of December, 1915.

V.

That the defendants, Mine Harada, Sumi Harada and Yoshiyo Harada, and each of them claim some interest and estate in and to the real property hereinabove described adverse to the plaintiff.

VI.

That the claims of all of said defendants and each of them are without right, and that said defendants and each of them have no interest or estate in and to real property described herein.

Wherefore plaintiff prays judgment:

1. That by judgment of this court it be adjudged and decreed that interest and estate in said real property has escheated to and has become and now remains the property of the plaintiff herein.

2. That the same be ordered sold in conformity with the provisions of title 8, part 3, of the Code of Civil Procedure of the State of California.

3. That by a judgment of this court, it be adjudged and decreed that the defendants and each of them have no right, title, interest or estate in and to said real property or any part thereof.

4. That a receiver be appointed to take charge of said real property, to receive the rents, income and profits of same until the title thereto is finally settled.

5. That plaintiff recover its costs herein.

6. That plaintiff be granted general relief.

U. S. WEBB,

Attorney-General of the State of California.

By ROBERT M. CLARKE,

Deputy Attorney-General.

MIGUEL ESTUDILLO, of Counsel.

2. ANSWER OF DEFENDANTS.

Now come the defendants, Mine Harada, Sumi Harada and Yoshizo Harada, each of whom is an infant under the age of eighteen years, and severing from their co-defendant and appearing for themselves alone by Jukichi Harada, their duly appointed guardian *ad litem*, they and each of them answer the plaintiff's second amended complaint as follows:

I.

These defendants deny that on the 14th day of December, 1915, or at any other time, the defendant Jukichi Harada acquired or has acquired any interest whatever in that certain real property described in paragraph II of plaintiff's second amended complaint.

II.

These defendants deny each allegation and every part thereof, contained in paragraph III of said second amended complaint.

III.

These defendants admit that Fulton Gunnerson was the last person seized and possessed of said real property prior to the 14th day of December, 1915, and allege that on said date he conveyed to them the title in fee, to said property by a deed, a copy of which is hereto attached, marked Exhibit "A"

and made a part of this answer, and that since said date they have been and now are owners in fee of said real property.

IV.

These defendants allege that they were each born at the city of Riverside in the County of Riverside, State of California; that the defendant Mine Harada was born on the 10th day of May, 1906; that the defendant Sumi Harada was born on the 25th day of December, 1909, and that the defendant Yoshizo was born on the 6th day of June, 1912; that their parents have resided continuously at said city of Riverside since the month of August, 1905, and have had during all said time and now have their permanent domicile and residence there; that during a portion of said time their father has been a laborer, but now and for the most of said time has been working in or conducting a restaurant; that their parents have never been employed in any diplomatic or official capacity under the Government or Emperor of Japan or under any other government, and that these defendants at all times herein mentioned were and now are residents and citizens of the State of California.

V.

These defendants allege that said real property was at all times herein mentioned and now is an improved residence lot, having a two-story dwelling house thereon, built prior to the 14th day of December, 1915, that all said lot is necessary for its convenient use and occupation.

Wherefore these defendants pray that the plaintiff take nothing and that they have judgment for their costs.

PURINGTON & ADAIR,
Attorneys for said Defendants.

3. BRIEF OF DEFENDANTS.

This is an action brought by the State of California against various Japanese defendants, in which the state attempts to escheat and declare forfeited certain real property, owned by several of the defendants, on the ground that such ownership and possession is contrary to the act of 1913, chapter 113, commonly known as the "Anti-Alien Land Law."

For a better understanding of the discussion to follow, we hereby quote the sections that are particularly pertinent to the discussion of the above action. The applicable parts of the act are as follows:

"All aliens eligible to citizenship, under the laws of the United States, may acquire, possess, enjoy, transfer and inherit any real property, or any interest therein, in this state to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

"Sec. 2. All aliens, other than those mentioned in section 1 of this act, may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent, and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation, or country, of which such alien is a citizen or subject, and not otherwise, and may, in addition thereto, lease lands in this state for agricultural purposes, for a term not exceeding three years."

"Sec. 5. Any real property hereafter acquired in fee, in violation of the provisions of this act, by any alien mentioned in section 2 of this act * * * shall escheat to, and become and remain the property of, the State of California. The attorney-general shall institute proceedings to have the escheat of all real property adjudicated and enforced, in the manner provided by sec. 474 of the Political Code, and title 8, page 3, of the Code

of Civil Procedure, and upon the entry of final judgment in such proceedings, the title to such real property shall pass to the State of California. * * *

"Sec. 6. Any leasehold, or other interest, in real property, less than the fee hereafter acquired in violation of the provisions of this act, by any alien mentioned in sec. 2 of this act * * * shall escheat to the State of California. The attorney-general shall institute proceedings to have such escheat adjudicated and enforced as provided in section 5 of this act. In such proceedings the court shall determine and adjudge the value of such leasehold, or other interest, in such real property, and enter judgment for the amount thereof, together with costs, after which the court shall order a sale of the real property covered by such leasehold, or other interest, in the manner provided by section 1271 of the Code of Civil Procedure."

The state is proceeding, under the provisions of the above-quoted act, and alleges in its complaint, briefly, the facts upon which it relies to prevail in its action, viz.:

1. That Jukichi Harada is an alien, not eligible to citizenship under the laws of the United States; that he is a Japanese, and that there existed no treaty between the United States and Japan whereby a Japanese subject could acquire, possess, own or transfer any real property, or any interest therein, in this state.

2. That Jukichi Harada did acquire an interest in fee to certain property in Riverside.

3. That by reason of such acquisition of, and interest in, real property, the said property escheated to, and did become the property of, the State of California.

4. That Fulton Gunnerson was the last person seized and possessed of said real property, and that Mine Harada, Sumi Harada, and Yoshizo Harada claim an interest in the said property, and that all of the claims of the defendants are without right, and that they are not entitled to such interest as they claim.

Said complaint was filed in Riverside County, and a demurrer, by counsel for the defendants, was interposed and still remains under submission.

We will assume that all technical objections to the complaint, and to the form of action, have been duly raised, and for the purpose of this discussion will consider only the case on its merits. We might state, though, that the procedure in the case is by no means clear.

Section 474 of the Political Code, and sections 1269, 1270, 1271 and 1272 of the Civil Code of Procedure, were intended to take the place of the common-law action known as "inquisition of office." The attorney-general, under said section, has the right to make a preliminary inquisition by summoning the defendants to appear before the court and give testimony as to what interest, and by what right, they hold certain properties. This procedure is akin to the Bill of Discovery, which could be asked for in actions in bills of equity and were generally ancillary proceedings to whatever action the state might conclude to take after a preliminary investigation of the facts. The pleading in the action here—and we note that counsel for the defendants also present the point—resembles that of an action to quiet title, as to the form of the relief prayed for, but same is no doubt intended to be the information contemplated by section 474, Political Code, and the section previously mentioned of the Civil Code of Procedure. In this case the state, however, has proceeded directly without a preliminary investigation and we must presume that the information it has in its hands is sufficient to sustain the allegations made in the complaint, or "information," as the pleading is called.

Whatever may be the decision on the demurrer, we will now discuss the merits of the case, and whether our defense will prevail.

The facts of the case, as we understand them, are these: That Mr. Jukichi Harada is a Japanese citizen, and the remaining defendants are his children; that on the day set forth in the complaint, Mr. Jukichi Harada bought from Mr. Fulton Gunnerson the property mentioned; paid the consideration money therefor to Mr. Gunnerson, who gave a deed conveying said property to the remaining defendants—as aforesaid, the children of Mr. Harada.

The property is in the residential district of Riverside, California, and is now occupied by Mr. Harada and his children, and used as a place of residence. Deed, as aforesaid, is in the names of the children.

The allegations at issue, therefore, in the case will be as follows:

1. The allegation that Mr. Jukichi Harada is an alien, not eligible to citizenship under the laws of the United States;
2. That there is no treaty between the United States and Japan whereby a citizen of Japan may acquire or possess real property in the United States;
3. That Mr. Jukichi Harada acquired an interest in fee in the property;
4. That the said property escheated and did become the property of the state on the day that Mr. Harada is alleged to have acquired said interest in the property;
5. That the claims of all defendants are without right.

We will discuss the above issues in the inverse order, commencing with the allegation of the state; *that the claims of all defendants are without right:*

Prima facie the property now stands in the names of the children, as aforesaid, who were born in the United States, and are, therefore, citizens thereof, and entitled to hold the same.

The property is being used as a residence by the father and children, and at the time of the purchase the father intended the same to be and remain a permanent home for his children.

The legal aspects of the transaction do not make the same an unusual one, but, on the contrary, one that occurs very frequently; in fact, has occurred in so many instances that the law has made the same an exception to the doctrine which the state might assert and on it base its claim, namely, that Mr. Harada had an interest in the property.

The state's contention is undoubtedly that the real owner of the property is Mr. Jukichi Harada; that the children are merely trustees for him; that the transfer is an attempted evasion of the law, without consideration, and a fraud upon the state. They will perhaps be able to prove that Mr. Jukichi Harada paid the consideration money for the said property, and upon that fact alone will probably assume that a trust was raised in favor of Mr. Jukichi Harada, and that, therefore, the said trust is void and the interest of Mr. Jukichi Harada is forfeited and belongs to the state.

We concede that the general rule of law is that where a person purchases property in the name of another, and pays the consideration money therefor, the law will imply and raise a trust in favor of the purchaser, such trust being called a "resulting trust".

The decisions of the State of California as to the doctrine and its exceptions are very explicit, and we cite a few that are very clear and explicit.

In *Russ vs. Mebius*, 16 Cal. 355, the court says:

"No implication of the trust arises upon the purchase of property by a parent in the name of his child. *Prima facie* such purchase is to be regarded

as an advancement, and an implied trust in favor of the person paying the money does not arise. This is one of the exceptions to the general rule, and it seems to be as well settled as the rule itself."

"Where property," said the master of the rolls, in *Sidmouth vs. Sidmouth* (2 Beavns, 447), "is purchased by a parent in the name of his child, the purchase is *prima facie* to be deemed an advancement; the resulting, or implied, trust which arises in favor of the person who pays the purchase money and takes a conveyance, or transfer, in the name of a stranger, does not arise in the case of a purchase by a parent in the name of a child. (Sec. 2, Story's Equity, sec. 1202.)"

Again, in *Spitler vs. Koeding*, 133 Cal. 502:

"Aside from the parol testimony, the fact of the taking of the note and mortgage in the name of his daughter is *prima facie* evidence that the appellant intended to make a gift of it, *as no implication of the trust arises upon the purchase of property by a parent in the name of a child. Prima facie* such a purchase is to be regarded as a gift or advancement."

Citing *Russ vs. Mebius*, 16 Cal. 356; 2 Pomeroy's Equity Jurisprudence, sec. 1041; *Bennett vs. Bennett*, L. R. 10 Ch. Div. 476.

"In this last case it is said the doctrine of equity, as regards presumption of gift, is this, that where one person stands in such relation to another that there is an obligation on that person to make a provision for the other, and we find either a purchase or investment in the name of the other, * * * of an amount which would constitute a provision for the other, the presumption arises of an intention on the part of the person to discharge the obligation to the other, and therefore, in the absence of evidence to the contrary, the purchase, or investment, is held to be in itself evidence of a gift. In other words, the presumption of a gift arises from the moral obligation to give."

"The appellant lays great stress upon the fact that he retained the actual custody of the note and mortgage until produced in court at the trial. This might be explained from the fact that there was but one note, made payable to Spitler and Mrs. Williams, and one mortgage to secure the same, naming Spitler and Mrs. Williams as mortgagees, the instruments could not be in the possession of both interested persons at the same time, to-wit, Spitler and Mrs. Williams, and it seems quite natural that Mr. Casabeer, acting for his daughter in the premises, should retain possession of the same for her. Besides, it appears at that time the father and daughter were upon the most friendly terms, although subsequently they had a falling out, resulting in litigation between them. * * *

"The loaning of the money to Kaeding, and taking of the note and mortgage in the name of Mrs. Williams, perfected the gift, if intended as such at the time, and the court finds that such was the intention. That being so, the mere retention of the manual custody of the note and mortgage could make no difference. The title, and right to control same, had become vested in Mrs. Williams."

Citing *Calkins vs. Equitable etc. Assn.*, 126 Cal. 531; *Hart vs. Ketchum*, 121 Cal. 426, 429.

In *Elliott vs. Merchants' Bank*, 21 Cal. App., on page 541, the court says: "Even if * * * the consideration for the property, as alleged, was paid by the son, no presumption of a resulting trust would arise. Indeed, the presumption of law, owing to the relationship of the parties, is that the property was intended as a gift from the son to his mother." (*Hamilton vs. Hubbard*, 134 Cal. 603; *Taylor vs. Maier*, 19 Ore. 550.)

Again, in *Hamilton vs. Hubbard*, 134 Cal. 605:

"Ordinarily, indeed, where a conveyance is made to one, and the consideration paid by another, a trust is presumed in the form of the latter" (see Civil Code, sec. 583), "but this presumption arises only in transactions between strangers to each other (Perry on Trusts, sec. 126), and is not indulged where the conveyance is to the wife or child, or other person for whom the person paying the consideration is under some natural, moral or legal obligation to provide. In such cases the presumption is that the purchase and conveyance were intended to be an advancement for the nominal purchaser." (1 Perry on Trusts, sec. 143; Hill on Trustees, sec. 97, and note.)

From the above citations it clearly appears that the law would assume an intention on the part of Mr. Jukichi Harada to provide for his children. The transaction is not considered as one without a consideration, the consideration in such transactions being the natural love and affection which a parent has for his children, and the moral obligation which is cast upon him, by reason of the relationship, for the care and custody of his offspring. This consideration was, at common law, sufficient to pass a fee. The presumption, therefore, is in favor of the transaction, yet a closer view of the facts seems to fortify the position taken by Mr. Jukichi Harada.

The property, as it now stands, is in the minor children. Section 33 of the Civil Code of California provides:

"A minor cannot give a delegation of power, nor, under the age of 18, make a contract, relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control."

This places Mr. Harada in the position that he cannot alienate the property, cannot lease or rent the same, cannot mortgage or otherwise encumber the property, unless he receives the authorization of the court and is appointed guardian of the property of the said children.

The records of the County of Riverside show the property is in the names of the children, and, therefore, future purchasers, or lessees, would not acquire a title such as a title company would pass upon and insure.

The fact appears, and remains, that Mr. Jukichi Harada has permitted the property—if we assume for a moment that he had an interest in same—to pass away from his control. There is no question as to the property vesting in the said children by the said conveyance.

"The circumstance of her being a *femme covert* did not prevent the estate from vesting; where an estate is conveyed by a deed-poll to a minor, or married woman, the estate vests, subject only to be divested in case she should disagree to it when discover, or of full age." (*Scanlon vs. Wright*, 13 Pick. [Mass.] 523-25, Am. Dec. 344.)

Any purchaser of the said property, who would accept a deed made by the children as aforesaid, would take the same, subject to the risk of the children disaffirming the contract upon their reaching their majority.

Another item to be considered, as to the effect of said purchase by Mr. Harada for his children, and the conveyance standing in their names, is the fact that the weight of authority seems to hold that Mr. Harada could not enforce, or have a trust declared in his favor, if, at any time in the future, he desired to change his mind. Decisions upon this point are not very numerous, yet are very explicit.

"The law will never cast the legal or equitable estate upon a person who has no right to hold it. When an alien, for the purpose of evading the law of the state prohibiting him from taking, and holding, real property, purchases land, and takes a conveyance thereof in the name of a third person,

without any written declaration of a trust, a *resulting trust will not arise in favor of the purchaser*, as equity will never raise a resulting trust in fraud of the rights of the state, or the laws of the land. * * * So when an alien purchases real estate in fraud of the law of escheat, and takes a conveyance in the name of a third person, either upon an express, and declared, or secret, trust, to permit the alien to receive the rents and profits thereof, the interest in such trust belongs to the state, and may be enforced in its favor and for its benefit in a court of equity." (*Leggett vs. DuBois*, 5 Paige Ch. 114.)

"It is held that where land is purchased by or for an alien, and paid for by him, or with money furnished by him, but the conveyance was made to a citizen of the United States on the express trust that he should hold the land for the benefit of the alien, or his heirs, the trust estate of the alien would be so acquired by him for the commonwealth, and a court of equity would compel the trustee to execute the trust for her benefit." (*Hubbard vs. Goodwin*, 3 Leigh [Va.] 492.)

It therefore appears that if Mr. Harada would commence, or institute, a suit in court to have a trust declared in his favor, as against his children, eliminating, for the purpose of this discussion, the fact or presumption of an advancement in favor of the children, that the court could, or would, not raise a resulting trust in favor of Mr. Harada, but in favor of the state for the reason, quoting again from *Leggett vs. Dubois*, *supra*:

"Equity will never raise a resulting trust in fraud of the rights of the state, or of the law of the land."

Though we have no direct decision bearing on the point, in view of the language of the court of this state, it may be doubted whether "Equity would raise or imply a resulting trust, simply to forfeit it." "It is doubted whether equity could raise or imply a resulting trust in order to forfeit it." (*Leggett vs. Dubois*, *supra*.)

The children, therefore, in view of the decisions just quoted, appear to have a valid and indefeasible title.

The claim of the state that the interest of the children, in the said property, is without right, is hardly one that can be sustained upon the proof of the facts as they exist.

The general rule of law is well understood to be that fraud is never presumed, and further, "*that the law has been obeyed*." (Civil Code of Procedure, sec. 1963, subdivision 33.)

The further presumption of the law that the children received said property as a gift from their father, and the fact that they are now residing on the same, would seem to us to sufficiently strengthen the position taken by Mr. Harada as to defeat any imputation of fraud, made by the state. It seems clear that Mr. Jukichi Harada has no interest, and never did have or acquire any, interest in the property by his paying the consideration money for the said property.

The claim of the state is necessarily based solely upon the interest that Mr. Jukichi Harada acquired; not upon that acquired by the children. The complaint does not allege that the children are Japanese, or are not citizens. The presumption, therefore, is that said children are citizens, and capable of holding the property.

It is entirely by reason of their title being derived through Mr. Jukichi Harada that same would be liable to forfeiture.

This brings us to the second issue and claim of the state, viz.: *That said property escheated, and did become, and now remains, the property of the State of California, by reason of Mr. Jukichi Harada acquiring an interest in fee therein.*

It is to be borne in mind that, as mentioned in the earlier part of this discussion, there has been no preliminary proceeding, investigation, or "inquisition," wherein the state has sought to investigate the matter at all. This is the first judicial proceeding. The weight of authority seems, undoubtedly, to favor this interpretation of the law of escheat.

In this connection we might give the general law applicable to the acquiring, holding and disposing of property by aliens. By common law an alien could not take property by descent. He could, however, hold, or acquire, an interest in real property by purchase. That is, by act of parties. The interest, however, he had acquired was subject, at any time, to be forfeited to the king, based upon the theory that the act of an alien, in presuming to acquire, or purchase, property in the realm of the king was unlawful, and one that he was not entitled to, the right to hold land being a right only to be enjoyed by such persons who owed allegiance to the king. But even at common law the interest he so acquired by an act of parties, that is, by a deed, or other conveyance, was not forfeited until office found, that is, a proceeding wherein his alienage, and his incapacity to hold property, was proven.

The weight of authority, even at common law, conceded that the alien, before office found, could convey his said estate and interest to a third party, and that said conveyance was valid and not subject to a forfeiture in a proceeding instituted after the said conveyance, and vesting of the estate in a third party.

"By the common law, while an alien might purchase, he could do so only for the benefit of the king, and the king was entitled to land purchased by him, by virtue of his prerogative upon office found, and it was held that unless the proceeding of office found was perfected, the alien had the power to hold and convey the land *inter vivos*." (I Devlin, Deeds, 124, 125, cited in *Am. Mortgage Co. vs. Tennille*, Ga., 12 L. R. A. 529.)

The law in this state, though not express upon the question of whether an alien could convey a valid title at any time, yet seems to follow the common law in regard to the time of the vesting of title in the state by reason of escheat.

"Estate of alien does not vest in sovereign until office found." (*Ramires vs. Kent*, 2 Cal. 560.)

"Alien may hold real estate against everyone, and even against the government, until office found." (*People vs. Folsom*, 5 Cal. 373; *Ferguson vs. Nevill*, 51 Cal. 356.)

"An alien can acquire title to land, by purchase or other act of part, and hold the same until office found." (*Norris vs. Hoyt*, 18 Cal. 219.)

"Until office found, no individual can question the right, or title, by alien, either collaterally, in ejectment suit, or directly, in any other way." (*Norris vs. Hoyt*, *supra*.)

"Right of alien to hold property, under common or civil law, could not be questioned in collateral proceeding between individuals. (*Racouillat vs. Sausevain*, 32 Cal. 386.)

"To procure an escheat, or other real or personal property, there must be a proceeding in conformity with sections 1269, 1270, 1271 and 1272, Civil Code of Procedure." (*Estate of Stipney*, 5 Cof. Pro. Dec. 438.)

"An action of escheat is necessary to vest title in the state, whether the property is real or personal." (*Estate of Minor*, 143 Cal. 198.)

As regards the facts in this case, it therefore clearly appears that the state, as yet, has no title to the property in this suit. Assuming, for the purposes of this discussion, that Mr. Harada did acquire interest therein, title to same, by reason of escheat, would only vest in the state upon judgment in a proceeding of office found.

The "Anti-Alien Land Law" itself is very explicit in the matter, as will be noted in the language of the statute in section 5:

"The attorney-general shall institute proceedings to have the escheat of such real property adjudicated and enforced, in the manner provided by section 474 of the Political Code of Procedure, and title 8, part 3, of the Code of Civil Procedure.

"Upon the entry of final judgment in such proceedings the title to such real property shall pass to the State of California."

The language of the law, therefore, clearly leaves the implication that the legislature never intended that the forfeiture would be self-acting, but, on the contrary, contemplated the adjudication of the said forfeiture by the court.

The legislature, therefore, did not intend to deviate from the general trend of the decisions relating to the time of the vesting of the state's title to the alleged escheated property, but, on the contrary, adhered to the general principles as defined by not only the decisions of California, as heretofore cited, but also those of other states and England, of which the following are examples.

Before citing these decisions, for convenience it may be well to enlarge the scope of discussion, and include the question whether a conveyance, by an alien, of real property acquired by him, would be valid if such conveyance was made by him before the state instituted a proceeding of escheat, or an inquest of office found.

In Warvelle, I, page 271, referring to the title held by an alien, we find this language:

"The title held by him is not subject to collateral attack (*Norris vs. Hoyt*, 18 Cal. 217) and may be sold and conveyed before any action by the state; and in such event the purchaser will hold same in all respects as though the conveyance had been made by a citizen." (*Halsted vs. Commissioners*, 56 Ind. 363; *Montgomery vs. Dorian*, 7 N. H. 475.)

This seems to be the general trend of the decisions, and seems to be followed in practically all the states of the Union, and also is the doctrine approved by the Supreme Court of the United States.

"But even where the disability of aliens still exists, an alien may hold land, acquired by purchase, until office found, and meanwhile pass good title thereto."

Miner & W., Real Property, par. 868, p. 670; I Washburn, Real Property, secs. 131 and 132; I Dembitz, Land Titles, sec. 303; *Haley vs. Sheridan*, 190 N. Y. 331; *Fox vs. Southack*, 12 Mass. 143; *Wunderle vs. Wunderle*, 144 Ill. 40; *Oregon Mortgage Co. vs. Carstens*, 16 Wash. 165; *Abrams vs. State*, 45 Wash. 344; *State vs. World Real Estate Co. et al.*, 46 Wash. 104; *Levy vs. McCartee*, 6 Pet. 102; *Moers vs. White*, 6 John Ch. 360; *Quigly vs. Birdseye*, 11 Mont. 439; *Fairfax vs. Hunter*, 7 Cranch. 602; *Orr vs. Hodgson*, 4 Wheaton 753; *Monnet vs. Wulf*, 152 U. S. 505; *Phillips vs. Moore*, 100 U. S. 208.

The decisions above cited necessarily include the first principle, viz., that the title of the state does not vest until office found. There seems to be no doubt that this is the law. We find this language in the case of *Gouverneur vs. Robertson*, 11 Wheaton 332:

"That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary."

The question, however, whether an alien could convey a good title to his property, if such conveyance was made before the inquest of office found, was doubted in a few decisions which date back to the eighteenth and early part of the nineteenth century. The modern trend of decisions, however, and

by far the greatest number, and overwhelming weight of authority, supports the view that the conveyance made by the alien before inquest of office found is valid, as before cited.

The latest and leading case upon the subject is the case of *Abrams vs. State*, 45 Wash. 344, decided in 1907. The constitution of the State of Washington, section 33 of art. 2, reads as follows:

"The ownership of lands by aliens other than those who, in good faith, have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under a mortgage, or in good faith in the ordinary course of justice, in the collection of debts; and all conveyances of lands hereafter made to any alien shall be void."

The decision was a very well-considered one, and a short resume of the facts would tend to the thorough understanding of the principles of law cited therein.

The facts, briefly stated, are these:

Lou Graham, an alien, bought certain real estate in the city of Seattle from one Robert Abrams. Upon her death Abrams instituted suit to recover possession of the property, on the ground that at the time of the conveyance by him to Lou Graham, said Lou Graham was an alien, and under the provision of the section of the constitution, just cited, said conveyance, or deed, was void. The defendants in the suit were the State of Washington, which claimed the property under the section of the constitution, on the ground that said property had escheated to the state, and against the administrator of the estate of Lou Graham. It was a three-sided controversy, conducted between the state, the administrator of the estate of the alien, and the heirs of the alien.

Referring to the status of the plaintiff, the holding of the court is briefly stated in the syllabus:

"A deed to an alien estops the grantor from claiming an interest in the land, where he received the consideration and made no claim during the life of the grantee, while favorable improvements were being made thereon."

The language of the court's holding was as follows:

(P. 338.) "At common law, an alien might take land by deed, hold the same as against all persons whomsoever, subject only to the right of the state to claim it by escheat, upon office found, or by some other act or procedure equivalent thereto, and until such action was taken by the state, the alien might dispose of his interest in the realty, either by conveyance or devise, and his grantees would thereupon acquire title, notwithstanding his alienage." (2 Am. & Eng. Ency. of Law, 70, 74; 2 Cyc. 90; 3 Current Law 138; I, chapter 1, 202, Aliens; 2 Kent Commentaries, p. 61; I Jones, Law of Real Property in Conveyancing, 163-166.)

The court also cited the authorities cited above in this discussion.

As to the status of the state, the syllabus of the said decision reads as follows:

"The state loses its right to escheat lands held by an alien, contrary to the provisions of the constitution, by failing to institute proceedings therefor during the lifetime of the alien owner."

The state contended that the heirs of Lou Graham had no interest in the property after the death of Lou Graham, for the reason that the conveyance and grant to Lou Graham of the said property was void under the constitution. The court, considering the decisions quoted in this discussion above, and several others which are of the same import, and superfluous to mention in this discussion, used this language:

(P. 343.) "Being an alien, it follows that she had no right to acquire title to real estate in this state by purchase, and the deed executed to her

by the appellant, Abrams, was void in the sense that a forfeiture of the property might have been declared by the state at any time while it remained in her possession and under her control, she claiming title under such deed."

"This court, however, in the case of *Oregon Mortgage Company vs. Carstens* (*supra*), in substance held that an alien holding lands in this state under a defeasible title, subject to attack on the part of the state, might, by deed, transfer a good title to a third person, entitled to receive and hold it, provided no proceeding had theretofore been taken, by the state, for the purpose of declaring a forfeiture, or escheat. In other words, if Lou Graham, after receiving her deed from the appellant, Abrams, had, for a good and sufficient consideration, conveyed the property to a third person entitled to receive title, the State of Washington could not, thereafter, by office found, have forfeited such title and notes against her grantee. The state could, however, at any time prior to such transfer, have successfully instituted proceedings to declare a forfeiture and escheat."

The court summed up its conclusions on the points involved in the case as follows:

"Our conclusions are:

"(1) That the deed from the appellant, Abrams, divested him from title to the property;

"(2) That at all times prior to alienation of the property by Lou Graham, or prior to her death, the state was entitled, by proceedings in the nature of office found, to have declared a forfeiture or escheat;

"(3) That the state, having failed to declare such forfeiture, or escheat, prior to her death, lost its right so to do;

"(4) That upon her death the real estate descended to her alien heirs."

This decision was next affirmed in the case of the *State of Washington vs. The World Real Estate Co. et al.*, 46 Wash. p. 104.

A Japanese resident of Washington, by the name of Y. Ota, bought some real property from one Arthur Hamilton, a citizen of the United States. Mr. Y. Ota sold the property to the World Real Estate Commercial Company, a corporation entitled to hold lands in the State of Washington. The state, upon discovering the deed made by Mr. Y. Ota, and tracing back the manner in which Mr. Y. Ota acquired it, contended that the land escheated to it by reason of deed to Y. Ota. It, therefore, instituted this proceeding, under the provision of the constitution of the State of Washington cited in the case just previously discussed; held the deed to Y. Ota void, and the property escheated. The court in that case, upon the authority of the cases of *Oregon Mortgage Company vs. Carstens* (16 Wash. 165) and *Abrams vs. State* (45 Wash. 344), held that the state had lost its right to the escheat of said property, for the reason that the conveyance by Mr. Y. Ota was valid, and the property was vested in a third party entitled to hold said property. The decisions have never been reversed in the State of Washington up to this date, and were reaffirmed again in the later cases of '65 Washington 152 and 81 Washington 164.

The state in this case might contend that by reason of the peculiar language of the "Anti-Alien Land Law" the cases mentioned in this discussion are not applicable. We refer to this language:

"All aliens * * * may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation, or country, of which such alien is a citizen or subject, and not otherwise * * *."

That said language is an express prohibition to an alien acquiring any interest in real property, and that, therefore, the property never vested in him.

However, the law seems to be as follows:

"And it is immaterial that a statute expressly prohibits an alien from holding or acquiring lands by purchase." (2 Corpus Juris. 1054; *Phillips vs. Moore*, 100 U. S. 208, 180 Mo. 627; *Merle vs. Mathews*, 26 Cal. 456.)

This brings us, then, to the third point of discussion, viz., that *Jukichi Harada acquired an interest in fee, or other interest, in the property at Riverside.*

From the facts of the case it appears that the property is now vested in the children, and in their possession, same having been vested from the time of the conveyance to them of said property by Fulton Gunnerson, and the only interest that the state would seem capable of proving would be an equitable one, and that on the theory of the creation of a trust, as more amply explained in the earlier part of this discussion.

It is to be remembered that in this case the burden of proof will be upon the state to establish, by the preponderance of evidence, their allegations.

Mr. Jukichi Harada will not have to prove the negative—that he has not an interest—but the state must prove its allegation.

"The state must recover, if at all, on the strength of its own title, and not on the weakness of the appellees." (10 R. C. L. p. 613; *Louisville School Board vs. King*, 127 Ky. 824; *State vs. Williams*, 99 Miss. 293.)

In the note to the case of *State vs. Williams*, *supra*, found in Ann. Cas. 1913 E., p. 384:

"As to the question of the burden of proof in a proceeding to establish an escheat, the rule is now well affirmed by the authorities that it is incumbent on the state to prove that the property in question is in all respects liable to escheat." (*State vs. Miller*, 149 Cal. 208; *Donaldson vs. State* [Ind.], 101 N. E. 485, and numerous other decisions.)

Under the pleading of the state, referring to the information and complaint on file in this action, and which is primarily intended as an information filed in conformity with section 474, Political Code, sections 1269, 1270, 1271 and 1272 of the Civil Code of Procedure, we doubt whether the state could introduce evidence on the theory of fraud, and thereby seek to establish an implied or resulting trust.

The proper form of action to be taken by the state to us would seem an action to declare a trust brought in equity. We think, however, that the demurrer filed by counsel for the defendants in this case has amply raised this point, and will no doubt be disposed of and passed upon by the court, but even if the court should hold, in a trial on the merits, that Jukichi Harada had, or has, an equitable interest in the said property, we feel that it is such a variance which could not be cured by a subsequent amendment to the complaint on file in this action.

The question whether equity would raise or imply a trust simply to forfeit it in favor of the state seems to be doubted by the weight of authority of the decisions on the point on the question, as previously explained in this discussion.

It is to be borne in mind that the action of escheat at common law was not one in equity, but one brought in the court of exchequers, the action to declare a trust was brought in the jurisdiction of the chancery courts.

The proceeding of escheat is purely statutory. The action to declare a trust now comes under the jurisdiction of equity, though the various branches of the law are abolished in this state. Yet the rules applicable to each kind of action are still in effect.

The general rule as to statutory actions, including the action of escheat, is that the same must be instituted in strict conformity with the statutes.

As previously mentioned in this discussion, we doubt whether the action of the state, in the form in which it is brought, strictly conforms to the proceedings contemplated under section 474 of the Political Code, and sections 1269, 1270, 1271 and 1272 of the Civil Code of Procedure. Those points have, no doubt, been properly brought up on demurrer by the counsel for the defendants.

The next point of discussion is:

Is there a treaty between the Government of the United States and Japan under which a citizen of Japan could acquire or possess, etc., real property in the State of California?

Counsel in this discussion can not go as deeply into this matter as they wish, but will briefly state that for proper consideration of this point, the following elements appear:

1. The power of the United States, that is, the Federal Government, in entering treaties with the states; whether that power is exclusive.

2. Precisely what powers did the states, upon their entrance into the Union, grant to the United States? Is the right of each individual state to control and administer the laws relating to real property in each of the states such a right as was reserved by each individual state, and one not to be encroached upon by the Federal Government, but to be respected by the Federal Government in entering into treaties with foreign nations?

3. The proper interpretation and construction of treaties entered into by the United States and foreign governments.

4. Are there any exceptions to the rule that the treaties of the United States with foreign governments are the law of the land.

The second and fourth points are such which at first glance may seem not to be well taken, but we contend that the action of the State of California, in the Japanese controversies, both the school question in 1907 and the present land controversy, is to be sustained only if we find that the State of California has reserved some power which the Federal Government must respect in its decisions with foreign nations.

As to the first point, the treaty of 1911, entered into between the Government of the United States and Japan, presents, upon first glance, the omission of a phrase which was contained in the previous treaties between the two countries, viz., that of the most "*favored nation*." Naturally, we see at first glance that though the terms of the treaty of 1911 may be very broad, yet, considering the previous treaties, something has been omitted, whether expressly or inadvertently the courts and the governments of the respective countries will no doubt decide in the future. The applicable portion of the treaty relating to this discussion reads as follows:

"Article 1. The citizens or subjects of each of the high contracting parties shall have the liberty to enter, travel and reside in the territories of the other; to carry on trade, wholesale and retail; to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents

of their choice, to lease lands for residential and commercial purposes, and generally to do anything incident to or necessary for trade, upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects * * *."

The question whether "A citizen or subject of the said Empire of Japan" may acquire, possess, enjoy or transfer any real property, or any interest therein, in the State of California, or the United States of America, in any manner, or at all, "using the language of the pleadings in paragraph 1 in this action, seems to be easily answered by the recitation of a portion of article I of the treaty of 1911 between the Government of the United States and the Government of Japan.

The allegation at first glance appears to be a little too broad, and though there may be a question as to the extent of the interest that a Japanese subject may acquire in real property in the United States, yet there is no question that he can acquire some interest.

Sections of the Constitution of the United States, applicable to the treaty-making power, are as follows:

"Art. 6, clause 2. This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby in the * * * or laws of any state to the contrary notwithstanding."

"Article 1, section 10, clause 1. No state shall enter into any treaty, alliance or confederation. * * *

"Clause 2. * * * No state shall, without the consent of Congress * * * enter into any agreement or a compact with another state, or with a foreign power * * *."

"Art. 2, sec. 2, clause 2. He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

"Art. 3, sec. 2, clause 1: The judicial power shall extend to all cases in law and equity arising under this Constitution and laws of the United States, and treaties made, or which shall be made, under their authority."

At first glance, therefore, the "Anti-Alien Land Law" would seem to contravene the treaty of 1911 with Japan, and it would further seem that only by a hypocritical, minute and evasive construction of the Anti-Alien Land Law, and the treaties, the said Anti-Alien Land Law could be made to agree and conform with the spirit and sense of the treaty.

The discussions and opinions we find in the periodicals, and various law reviews, contemporaneous to the enactment of the California law of 1913, seem to be all of the opinion that at first glance the said law contravened the direct provisions of the treaty, and if not in direct words and terms, at least its spirit and sense. The spirit of the legislature, in enacting the said law of 1913, does not appear to be in conformity with the spirit of the

decisions of the supreme court of the State of California, and the diversity of the spirit seems to have been noted at first glance by not only the general public, but also Congress, the Government of the United States and the various states.

We find in "Law Notes," volume 17, page 31, 1913, the following expressions:

"The provisions of the treaty between the United States and Japan, which apparently preclude such legislation, are as follows: 'The citizens or subjects of each of the high contracting parties shall have the liberty * * * to own, lease and occupy houses, manufactories, warehouses and shops; to employ agents of their own choice, to lease lands for residential and commercial purposes, and generally to do anything incident or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.' This provision would seem too clear to admit of argument. That the Federal Government has power to make such a treaty provision would also seem clear from the language of Mr. Justice Field, in the *DeGeofroy vs. Riggs* (133 U. S. 258) case, wherein he said:

"That the treaty of the United States extended to all proper subjects of negotiation between our Government and the governments of other nations is clear; it is also clear that the protection which should be afforded to the citizen of one country, owning property in another, and the manner in which that property may be transferred, divested, or inherited, are subjects for such negotiation and of regulation by mutual stipulation between different countries. As commerce increases between different countries, the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been, within the present century, the frequent subject of treaty arrangement.

"The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government, or of its departments, and those arising from the nature of the government itself, and of that of the state. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or of that of any of the states, or a cession of any portion of the territory of the latter without its consent (*Ft. Leavenworth R. R. Co. vs. Love*, 114 U. S. 525, 541); but with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiations with a foreign country.'

"That a treaty is superior to a state statute could not be questioned, in view of the expressed language of the Federal Constitution, and, indeed, this is recognized by the Supreme Court. (*Blythe vs. Hinckley*, 127 Cal. 431.) The only reason for asserting the validity of the statute would appear to be found in the language of Mr. Justice Peckham, in *Blythe vs. Hinckley*, 180 U. S. 333, wherein he said, in concluding his opinion, 'The question of the extent of the power of the United States to provide, by treaty, for the inheriting by aliens of real estate, in spite of the statutes of the state in which the land may be, does not arise in this case, and we express no opinion thereon.' The language of the opinion preceding this excerpt would seem, however, to leave no ground for any argument founded upon the view that the Federal Government may not so provide."

The case of *Blythe vs. Hinckley*, 127 Cal. 431, went to the Supreme Court of the United States and was there affirmed. The tenor of the decision of the state court, and its applicability to the matter now under discussion, is plainly seen from the following language:

(P. 426.) "A state has the undoubted right to regulate the tenure and dispose of the real property within its boundary, and such regulations always have been, and should be, held valid except where they conflict with the express provisions of a higher law. Thus, in *U. S. vs. Fox*, 94 U. S. p. 315, it is said: 'The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established rule of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated.' (See also *Hutchison Inv. Co. vs. Caldwell*, 152 U. S. 65; *Mager vs. Grima*, 8 How. 490; *Beard vs. Rowan*, 9 Pet. 301.)

"And this right to regulate the tenure and disposition of real property within its boundaries is not only in the state, but is primarily in the state (*Hauenstein vs. Lynham*, 100 U. S. 483) and is subject only to such control as may be exercised by the Government within its treaty-making power. Therefore, it will be found that the Supreme Court of the United States nowhere declares state laws upon the subject to be void, as an invasion of the treaty-making power, but uniformly upholds the law when not in conflict with the express provisions of the treaty."

The decision, then, expressly affirms the doctrine that so long as the state laws relating to the tenure of property do not contravene any of the express provisions of a treaty, they are valid.

When the controversy arose in 1913, the attitude of the State of California, and the contention made by it, was that the Land Law of 1913 did not contravene the treaty in any respect. We find this language in a letter from Governor Johnson of California to Secretary of State Bryan, in which letter the governor defended his course in signing the bill affecting the question of rights in real property by a Japanese citizen:

"We assume that the right of the Japanese to own real property for the purposes described is absolute in our state, and we seek to deal only with our agricultural lands. We employ the treaty in our law, and we add to it permission to lease our agricultural lands for a period of three years.

* * *

And reading from page 705, 48 American Law Review, in an article entitled "The Japanese Question":

"The governor points out that at least three other states have, in the past, enacted laws similar to that adopted in California, and that the offense and discrimination really complained of by the Japanese will be in the section of the bill, distinguishing between those eligible and ineligible to citizenship."

"The naturalization laws of the United States long since, without demur from any nation, determined who were and who were not eligible to citizenship," asserts the governor. He concludes:

"We insist that, justly, no offense can be taken by any nation to this law, and more particularly does this seem to us clear in the instance of a nation like Japan, which by its own laws prevents the acquisition of land by aliens."

At the time of the adoption of the Land Law of 1913 in California, it is to be remembered that the draft of the law, as proposed by the assembly

of the State of California, was so drastic that upon its face it was declared unconstitutional, and was considered so by the legislature by its action in not adopting same. The law, as it now stands, however, received the most careful preparation conceivable, and was carried and adopted by a vote of 35 to 2 in the senate, and 72 to 3 in the assembly. It became a law on the 19th day of May, 1913. The Japanese ambassador carried on an extensive correspondence with the secretary of state, lodging his protests, and from the correspondence it is clearly seen what the contentions of the respective governments were.

We quote from Mr. Tucker, in his "World Limitations on the Treaty-Making Power," commencing on page 405:

"The protest filed by the Japanese ambassador with the secretary of state on the 9th day of May, 1913, states the ground of objection to the proposed legislation as follows:

"This protest is based upon the proposition that the measure is unjust and inequitable, and that it is not only prejudicial to the existing rights of Japanese subjects, but is inconsistent with the provisions of the treaty actually in force between Japan and the United States, and is also opposed to the spirit and fundamental principles of amity and good understanding upon which the conventional relations of the two countries depend."

"352. Secretary Bryan, on May 19, 1913, replied to the Japanese ambassador and said:

"The President and I very earnestly attempted to induce the legislative authorities of California to reconsider or to modify their plans in the matter, urging that the state should not act as a separate unit in this case, but, rather, in co-operation with the Federal Government. Under the constitutional arrangements of the United States we could do no more than that.

"At the same time we feel that the Imperial Government has been misled in its interpretation of the spirit and object of the legislation in question. It is not political. It is not part of any general national policy which would indicate unfriendliness or any purpose inconsistent with the best and most cordial understanding between the two nations. It is wholly economic. It is based upon the particular economic conditions existing in California as interpreted by her own people, who wish to avoid certain conditions of competition in their agricultural activities."

"353. To this the Japanese ambassador replied on June 4th, 1913, renewing the protest of the Japanese Government against such legislation and used this language:

"The question at issue is a question between Government of Japan and that of the United States, as to the true intent and meaning of their existing treaty, and the extent to which the rules and principles of fair and equal treatment may, in comity and good conscience, be invoked in the present case. The wrong complained of is directed against my countrymen as a nation. It was committed by the authorities of a single state of the Union, contrary to the expressed wishes and advice of the Federal Government. It is, nevertheless, to that Government alone that Japan must look to have the wrong undone, since it is with that Government alone that the Imperial Government hold diplomatic intercourse * * * and I beg to assure you that the Imperial Government have too high an opinion of the sense of right and justice of the American Government to believe for a moment that that Government will permit a state to set aside the stipulations of the treaty or to impair the obligations of reciprocal friendly intercourse and good neighborhood."

"354. To this second protest by the Japanese Government, Secretary Bryan, on the 16th of July, 1913, replied in full, and on the question of the right or propriety of local legislation in the determination of land tenure he said:

"The treaty to which your excellency's note refers is that which was signed at Washington on February 21, 1911, by Mr. Knox, secretary of state, representing the United States, and by Baron Uchida, your immediate predecessor, representing the Imperial Government."

"This treaty was based upon a draft presented by the Imperial Government. In article 1 of this draft there is found the following clause:

"'3. They (the citizens or subjects of the contracting parties) shall be permitted to own or hire and occupy the houses, manufactories, warehouses, shops and premises which may be necessary for them and to lease land for residential, commercial, industrial, manufacturing and other lawful purposes."

"It will be observed that in this clause, which was intended to deal with the subject of real property, there is no reference to the ownership of land. The reason of this omission is understood to be that the Imperial Government desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation."

"In the treaty as signed the rights of the citizens and subjects of the contracting parties with reference to real property were specifically dealt with (art. 1) in the stipulation that they should have liberty "to own or lease and occupy houses, manufactories, warehouses and shops," and "to lease land for residential and commercial purposes." It thus appears that the reciprocal right to lease land was confined to "residential and commercial purposes," and that the phrase "industrial" and "other lawful purposes," which would have included the leasing of agricultural lands, were omitted.

"The question of the ownership of land was, in pursuance of the desire of the Japanese Government, dealt with by an exchange of notes in which it was acknowledged and agreed that this question should be regulated in each country by the local law, and that the law applicable in the United States in this regard was that of the respective states. This clearly appears from the note of Baron Uchida to Mr. Knox of February 21, 1911, in which, in reply to an inquiry of the latter on the subject, Baron Uchida said:

"In return for the rights of land ownership which are granted Japanese by the laws of the various states of the United States (of which, I may observe, there are now about thirty) the Imperial Government will by liberal interpretation of the law be prepared to grant land ownership to *American citizens from all the states, reserving for the future, however, the right of maintaining the condition of reciprocity with respect to the separate states.*"

"In quoting the foregoing passage, I have italicized the last clause for the purpose of calling special attention to the fact that the contracting parties distinctly understood that, in conformity with the express declaration of the Imperial Japanese ambassador, the right was reserved to maintain as to land ownership, the condition of reciprocity in the sense that citizens of the United States, coming from states in which Japanese might not be permitted to own land, were to be excluded from the reciprocal privilege in Japan."

"This passage clearly shows an intent on the part of the Japanese Government, while dealing through the channels of diplomacy with the United States alone, to so shape their own legislation as to affect the individual states of the United States.

"The whole correspondence may be found in a publication of the State Department entitled 'Department of State, American-Japanese Discussions Relating to Land Tenure Law of California.'

"355. To judge of the correctness of the protests of the Japanese Government against the California legislation and to determine whether such legislation was in conflict with the treaty between the United States and Japan, it is proper to submit parts of the treaty of 1911.

"(1. Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers, 1910-1913. Charles, vol. 111, p. 77.)

"Article 1. The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses, and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects on their submitting themselves to the conditions imposed upon the native citizens or subjects.

"They shall, however, be exempt in the territories of the other from compulsory military service, either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions.

"Art. II. The dwellings, warehouses, manufactories and shops of the citizens or subjects of each of the high contracting parties in the territories of the other, and all premises appertaining thereto used for purposes of residence or commerce, shall be respected. It shall not be allowable to proceed to make a domiciliary visit to, or a search of, any such buildings, and premises, or to examine or inspect books, papers or accounts, except under the conditions and with the forms prescribed by the laws, ordinances and regulations for nationals.'

"In his note of July 16, 1913, to the Japanese ambassador, Secretary Bryan conclusively states the case in favor of California, as follows:

"From what has been pointed out it appears to result, first, that the California statute, in extending to aliens not eligible to citizenship of the United States the right to lease lands in the state for agricultural purposes for a term not exceeding three years *may be held to go beyond the measure of privilege established in the treaty, which does not grant the right to lease agricultural lands at all.* and secondly, that, so far as the statute may abridge the right of such aliens to own lands within the state, the right has been reserved by the Imperial Government to act upon the principle of exact reciprocity with respect to citizens of the individual state. In a word, the measure of privilege and the measure of satisfaction for its denial were perfectly understood and accepted.'

"In this correspondence it is seen that Secretary Bryan has dealt with characteristic frankness with the Japanese ambassador. After stating he had gone to California at the request of President Wilson to urge upon the legislature 'to reconsider or modify their plans,' he adds: 'Under the

constitutional arrangements of the United States we could do no more than that.'"

It is, therefore, clearly seen that the question of ownership and the leasing of lands was limited to quite an extent, and was intended so to be, as appears from the remarks and correspondence of the Japanese ambassador. The correspondence and the expressions of the Japanese ambassador were undoubtedly founded upon the course that the Government of Japan pursued shortly before the entry into the treaty of 1911 with the Government of the United States. The Diet of the Government of Japan, in the year 1910, passed a law by which:

"Foreigners domiciled, or resident, in Japan may own land, provided reciprocal rights of land ownership are accorded Japanese subjects in the countries whose citizens are so favored, and the countries entitled to the benefit of this law were to be specified by imperial ordinance; but no imperial ordinance has yet been issued to consummate the privilege * * * Governor Johnson's asserting that 'Japan can logically take no exception to the law passed in California, since that country prevents the acquisition of land by aliens by its own laws' does not do injustice to the attitude of Japan, to-wit: alien land-holding rights.

"Foreigners in Japan were formerly debarred from owning land, but they have had the right equivalent to ownership, of using the land of another for contractual periods, unlimited by law, for the purpose of owning thereon structures, trees or farms." (P. 706, 43 Am. Law Review.)

Summing up therefore, and considering the context of the various letters passing between the officials of the respective governments, and the acts of the executive of the State of California, and the law as it reads, it would seem to us that the position of the State of California is extremely technical, and based upon a somewhat close construction of the treaty. Governor Johnson, in his letter, seemed to imply that a Japanese might own land, at least for residence purposes. Possibly such implication could be due to his construction of the phrase contained in article I of the treaty of 1911, wherein the treaty reads:

"That the citizens * * * shall have the liberty * * * to own or lease, and occupy houses."

What the term "to own" a house might imply is certainly one that would not seem difficult to explain. Possibly the courts of the state, and the Federal Government, would include therein the right to own the land upon which the house is located.

"The general rule of interpretation of treaties is that a treaty should ordinarily be construed liberally, and so, when a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. (38 Cyc., p. 970; *In re Wyman*, 191 Mass. 276; *In re Stixrud*, 58 Wash. 339; *Disconto Gesellschaft vs. Umbreit*, 208 U. S. 570; *DeGeofroy vs. Riggs*, 133 U. S. 258.)

"And it is also the rule, as expressed in *Wunderle vs. Wunderle*, 144 Ill. 40, that the state law must give way if it conflicts with any existing treaty between the Government of the United States and the Government of the country of which such foreigner is a subject or citizen."

What the view of the courts of the State of California, or of the Supreme Court of the United States, will be as regards interpretation of the Land Law and construction of the treaty with Japan is, of course, one of conjecture. Yet it would seem that the Land Law, in its present form, and the construction which the state is endeavoring to place upon it in the particular case which we are now discussing, seems to be extreme, and in common justice and humanity ought to be modified. Even if the treaty

of 1911 be construed liberally, the controversy between the State of California and the United States would involve the constitutional questions whether the Federal Government, in entering into the treaty with Japan, infringed upon the "reserved rights" of the State of California, and whether the bill of 1913, by reason of its classification of citizens conflicts with the Fourteenth Amendment to the Constitution of the United States. The consideration of these points would lengthen this discussion to unreasonable proportions. Yet, considering the attitude of the United States against discriminating legislation, in interpreting the Fourteenth Amendment to the Constitution of the United States, we are under the impression that the Japanese citizens residing in this country, in fighting the aforesaid arbitrary classification as ineligible citizens, could present a formidable case in the United States court.

This brings us to the last point in the discussion of the case against Mr. Harada, viz., *the claim of the state that Mr. Jukichi Harada is not a person eligible to citizenship under the laws of the United States*. It is to be borne in mind, in considering this point—which we may say will be only treated cursorily—that the question of whether a Japanese person is not eligible to citizenship in the United States is one that has never been decided by the Supreme Court of the United States. True, there are decisions in a few state courts, and in a few district and circuit courts of the United States, holding a Japanese person ineligible to citizenship, yet, nevertheless, it is a point of great significance that the matter has never been carried to the Supreme Court of the United States, which, of course, is the last and final arbiter of the question.

Some of the decisions we refer to, and most important ones, are the cases of *In re Yamashita*, 58 Wash., and *In re Saito*, 62 Fed. 126.

Natives of Japan are, according to the tenor of the above decisions, classified as "Mongolian", or members of the yellow race, and whether such classification be correct or incorrect, the courts in those cases held Japanese natives ineligible for citizenship under the naturalization law. Under the Federal statutes—

"Aliens, being free white persons, and aliens of African nativity, and persons of African descent, are eligible to citizenship."

The classification certainly seems to be arbitrary, and when we consider the intelligence of the citizens of Japan residing in this country, and also the prominent, powerful and respected position which the Empire of Japan occupies amidst the great powers of the world, it seems a travesty upon justice to deny the privilege of citizenship to the Japanese. The language we find in the case of *In re Poe*, 7 Misc. Rep. 471, 28 N. Y. S. 383:

"A Congo negro, but five years removed from barbarism, can become a citizen of the United States, but his more intelligent fellow men, the native-born American Indians, and of the yellow races other than the Chinese, are denied the privilege," certainly palliates the humiliation which, in our opinion, these people must feel.

The Government of Japan assuredly displays good judgment, wisdom and great humanity in the extremely courteous and diplomatic manner in which it has sought, and still seeks, remedy and betterment of the conditions of its subjects and citizens in alien lands.

The legislature of the State of California, however, without a guiding decision from its supreme court, has jumped to the conclusion, without any higher authority than that of the supreme court of a sister state, that Japanese persons are among those ineligible to citizenship under the laws of the United States. The question, we think, is still one purely of conjecture,

and may perhaps, be settled by diplomatic channels before the Supreme Court of the United States will be able to take any action upon the matter.

As for the question of eligibility of citizenship, personally we prefer—and deem it the most wise course—that the matter be disposed of, not by an appeal to the Supreme Court of the United States, but through diplomatic channels.

As to the question of land ownership, we are inclined to think that even the supreme court of the State of California will agree with the view, and general trend, of the decisions cited and discussed in this case. The questions presented in this case may be quickly disposed of in the superior court of Riverside County, upon an actual trial of the facts. The various questions, though, which might be overlooked are certainly very deep, and we are sorry that time and space will not permit us to go into each and every phase of this situation as deeply and as thoroughly as it should, and would, be handled if actually in court.

Another point which will be briefly mentioned, and which also should be thoroughly gone into is the fact whether the amendment to the constitution of the State of California, adopted in 1894, really gives authority to the legislature to enact a law like the bill under consideration. Section 17, art. 1, of the constitution of the State of California, reads as follows:

“Foreigners, of the white races, or of African descent, eligible to become citizens of the United States under the naturalization laws there, when *bona fide* residents of this state, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission and inheritance of all property, other than real estate, as native born citizens; provided that such aliens, owning real estate at the time of the adoption of this amendment, may remain such owners, and provided, further, that the legislature may, by statute, provide for the disposition of real estate which shall hereafter be acquired by such aliens by descent or devise.”

Whether the bill of 1913 was enacted pursuant to the implied power granted in the above-mentioned section, or whether same was enacted under the section of the constitution of the State of California reading as follows:

“Art. 19, sec. IV. The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the life of the state, and the legislature shall discourage their immigration by all the means in its power * * * This section shall be enforced by appropriate legislation.” is a point which should also be very thoroughly considered, as the first section of the constitution seems to have reference only to such aliens as are eligible to citizenship, and the second portion of the constitution quoted seems to have reference only to Chinese. Possibly the state will contend that the law was passed under and by virtue of the police power of the state; yet the police power of the state is also subject to infraction, and the rights of alien persons residing in a state, and which are granted by the Fourteenth Amendment to the Constitution, might be infringed upon by an excessive or indiscreet application of the police power of the state.

We feel we have mentioned most of the important phases to be considered in the handling of the case before us, and, as has been said, we regret that we can not go into the discussion of each phase as deeply, and as thoroughly, as we desire.

Respectfully submitted,

H. L. GIESLER and
O. G. KUKLINSKI.

4. DEMURRER.

Comes now Jukichi Harada, one of the above-named defendants, but sued in this action in the name of Yukichi Harada, and severing from his co-defendants, and appearing for himself alone, he demurs to the plaintiffs' information and complaint herein; and for causes of demurrer he alleged:

I.

That said complaint does not state facts sufficient to constitute a cause of action against him.

II.

That the said information and complaint is ambiguous in this: that in paragraph II thereof it is alleged that defendant acquired an interest in fee in and to the real property therein described; and in paragraph III thereof it is alleged that by reason of acquiring said interest the said property escheated to and became and now remained the property of the plaintiff in said action.

III.

That for the reasons set forth in paragraph II of this demurrer, the said information and complaint is unintelligible.

IV.

That for reasons set forth in paragraph II of this demurrer the said information and complaint is uncertain.

PURINGTON & ADAIR,
Attorneys for Defendant Jukichi Harada.

5. OPINION OF DEMURRER.

This is a proceeding in which the people of the State of California, by and through U. S. Webb, attorney-general of the state, complain against Jukichi Harada, and Mine Harada, Sumi Harada, and Yoshizo Harada. The amended information and complaint sets forth that on the 14th day of December, 1915, and at all times prior and subsequent thereto, the defendant Jukichi Harada was an alien not eligible to citizenship under the laws of the United States, but was a Japanese person and citizen and a subject of the Empire of Japan; that on said date there existed no treaty between the Governments of the United States and Japan, whereby a citizen and subject of Japan may acquire, possess, enjoy or transfer any real property, or any interest therein, in the State of California or in the United States. The allegation is further made that on the date mentioned Jukichi Harada acquired an *interest in fee* in and to certain real property situate in the city of Riverside, State of California, a particular description of the real estate being set forth in the information and complaint. There is a further allegation that on said date "by reason of said *acquiring of said interest and estate* in said real property by said defendant, Jukichi Harada, the same escheated to and did become and now remains the property of the plaintiff herein, and that the State of California has the right by law to said interest and estate." It is also alleged that Fulton Gunnerson was the last person seized and possessed of said real property prior to December 14, 1915. The defendants Mine Harada, Sumi Harada and Yoshizo Harada are alleged to claim some interest and estate in and to the real property mentioned adverse to the plaintiff, and it is further alleged that the claims of all the defendants are without right and that they and each of them have no interest or estate in or to the said real property. The

prayer is for a decree that the interest and estate in the real property has escheated to and has become and now remains the property of the plaintiff, that the same be ordered to be sold in conformity with the provisions of title VIII, part III, of the Code of Civil Procedure; that the defendants have no right, title, interest or estate in and to the real property mentioned; that a receiver be appointed, and for costs and general relief.

A separate demurrer was filed by Jukichi Harada, and one by the other defendants.

The demurrers are identical in terms and, in addition to a general demurrer, set forth that the amended information and complaint is ambiguous in that it is alleged in paragraph II that the defendant Jukichi Harada on the 14th day of December, 1915, acquired an interest in fee to the real property described, and in paragraph III it is alleged that on the same day the said real property escheated to the plaintiff by reason of the acquisition by said defendant of said interest and estate. The demurrer is for *uncertainty* and also for *unintelligibility* on the same ground.

The demurrer is also for improper joinder of causes of action in that an alleged cause of action against the defendant Jukichi Harada for the forfeiture of his interest in the real estate and the escheating of said estate to the plaintiff has been joined with an action to quit title against the other defendants; and that said causes of action occur in one count and have not been separately stated.

The action, of course, is founded upon the so-called Anti-Alien Land Law approved May 19, 1913 (Statutes 1913, p. 206; Deering's General Laws of California, p. 40). The provisions of the first two sections of said law are as follows:

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy and transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Sec. 2. All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise, and may in addition thereto lease lands in this state for agricultural purposes for a term not exceeding three years."

On February 21, 1911, a treaty between the United States and the Empire of Japan was signed, and after subsequent amendment and ratification by the two governments, was proclaimed by the President on April 5, 1911.

Article I of the treaty provides as follow:

"The citizens or subjects of the high contracting parties shall have liberty to enter, travel, and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

It is urged that there is a conflict between the provisions of the so-called Anti-Alien Land Law and the provisions of the treaty just quoted, and that the treaty must control in such a situation, and not the statute enacted by the legislature of the state.

By the provisions of article VI of the Constitution of the United States, that Constitution and the laws of the United States made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, are the supreme law of the land; and the judges in every state are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding;

The provisions of section 3 of article I of the constitution of California are to the same effect, and the law has so been recognized without question. (*People vs. Nolan*, 144 Cal. 75-80; *Blythe vs. Hinckley*, 127 Cal. 431; *Opal vs. Shoup*, 100 Iowa, 407; *Hauckstein vs. Lynham*, 100 U. S. 483; *De Geofroy vs. Riggs*, 133 U. S. 258; *Orr vs. Hodgdon*, 4 Wheat. 453.)

The same authorities uniformly hold that where a state law is in conflict with a treaty, the latter is of course the paramount law. But in such cases, it is not held that the state law is void as an unwarranted encroachment upon or interference with the powers of the Federal Government; it is held merely that such laws, in so far as they conflict with the treaty provisions, are suspended or controlled during the life of the treaty. (*Blythe vs. Hinkley*, *supra*, *De Geofroy vs. Riggs*, *supra*.) This treaty, by the terms of article XVII, became effective July 17, 1911, and provided that it shall "remain in force for twelve years or until the expiration of six months from the date on which either of the contracting parties shall have given notice to the other of its intention to terminate the treaty." And it further provided that "in case neither of the contracting parties shall have given notice to the other six months before the expiration of the said period of twelve years of its intention to terminate the treaty, it shall continue operative until the expiration of six months from the date on which either party shall have given such notice."

It appears that there is no conflict between the treaty under consideration and the Anti-Alien Land Law. The latter by specific provision in the second section thereof, makes it possible for all aliens, who are not eligible to citizenship, to acquire, possess, enjoy and transfer real estate in this state to the extent and for the purposes prescribed by any treaty now existing (at the time of the passage of the act) between this Government and the nation of which such alien is a citizen or subject. The existence of treaties upon the subject is thus recognized, and the law does not attempt to make any provision contrary to such treaties.

In the presentation of this demurrer much was said and many authorities cited upon the proposition that when the law of any state and a treaty are in conflict, the statute must yield. Such a question is not presented here, because there is no such conflict, nor is any attempt made in the law to disregard or to violate any of the provisions of the treaty between the Government of the United States and that of Japan. The sole question, upon this branch of the discussion, is whether the treaty gives a right to citizens or subjects of Japan to hold the fee title to real estate in the United States. If it does, the law recognizes such right or any right given by the treaty. If it does not, then the legislature had a right to make such provisions as it deemed proper regarding the holding of land by such aliens.

A statute, a treaty or a contract which is free from ambiguity and uncertainty needs no interpretation. When the will of the framers is clear, interpretation is not allowable. (*Merkley vs. Williams*, 3 Cal. App. 268.) But when such will is obscure, or where there is room for reasonable dispute as to the meaning, courts are called upon to interpret or construe such laws, documents or instruments. The intention of the lawmaker is the principal consideration in the interpretation of laws (*Fox vs. Hale & Hor-*

cross S. M. Co., 97 Cal. 353) and treaties are a part of the supreme law of the land. The intention of the makers is of primary importance in construing contracts, and treaties, as has been pointed out in *De Geofroy vs. Riggs*, 133 U. S. 271, and *Estate of Ghio*, 157 Cal. 561, are contracts between independent states.

"A treaty should be so interpreted as to give effect to the object designed; and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances." (*Ross vs. McIntyre*, 140 U. S. 453.) "The entire instrument must be examined in order that the real intention of the two governments, which must control, may be ascertained." (*United States vs. Texas*, 162 U. S. 1.)

Such intention is to be ascertained from the language employed, and where this is possible, courts cannot go beyond the intent derivable from the terms used. (*Sharon vs. Sharon*, 75 Cal. 28.) Where the intent is declared there can be no implication of a different intent. (*Duffy vs. Greenbaum*, 72 Cal. 159.)

The opening words of the treaty itself are as follows: "The President of the United States and His Majesty the Emperor of Japan, being desirous to strengthen the relations of amity and good understanding which happily exist between the two nations, and believing that the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries will contribute to the realization of this most desirable result, have resolved to conclude a treaty of commerce and navigation for that purpose, and to that end have named their plenipotentiaries."

The President, who negotiated the treaty, in his proclamation promulgating it, refers to it as a treaty of commerce and navigation. On the same day that the treaty was signed, a protocol of a provisional tariff arrangement between the two nations was also signed, and here again, it was referred to as a treaty of commerce and navigation. It thus appears, beyond doubt, that the purpose of the treaty was to make rules for commercial intercourse between the two countries, and it was so understood and intended by the high contracting parties. Of course back of this was the larger matter of promoting amity between the two nations, but this was not the specific purpose of the treaty, but rather the general purpose of practically all treaties. In addition to the specific extent to establish rules for commerce and navigation there is also included the purpose to include therein rules for such other matters as are necessary for or incident to the enjoyment of the privileges granted. But while the intention of the framers is of greatest importance, still nothing can be added to the document by construction that would be violence to the language used or that would unreasonably restrict or enlarge the meaning of the terms employed.

In *Estate of Ghio*, 157 Cal. 561, the court quotes from the opinion in *De Geofroy vs. Riggs*, 133 U. S. 271, as follows: "As they are contracts between independent nations, in their construction, words are to be taken in their ordinary meaning as understood in the public law of nations, and not in any special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred." But the court adds, after quoting as above, "But treaties are subject to the same rules of interpretation as other documents. The clause in the Argentine treaty relates to proceedings for the settlement of estates and the words used are to be given the meaning they usually have in the respective countries when used in that connection."

In order to reach a solution of the question involved in this point raised by the general demurrer, it is necessary to ascertain, referring to section 2 of the Anti-Alien Land Law, in what manner, to what extent and for what purposes the treaty under discussion prescribes that a Japanese subject may acquire, possess, enjoy and transfer real property in this country, if at all.

The right of Japanese subjects to hold real property in the State of California must depend upon the meaning of the language employed in Section 1 of the treaty. It is provided that they shall have the right to "reside" in the United States to carry on trade, wholesale or retail. This does not necessarily imply that they shall hold the title to the place of residence. It is next provided that they shall have the right "to own or lease and occupy houses, manufactories, warehouses and shops." It is upon this provision, that they may "own * * * houses," that the defendant Jukichi Harada bases one claim that the information and complaint does not state facts sufficient to constitute a cause of action. It is urged that if he may own a house, it is necessarily implied that he may own the land upon which the house stands. It may be remarked here that there is nothing in the pleadings to indicate that the real estate there mentioned has a house upon it. It is urged, on the other hand, that the clause also found in section 1 of the treaty that a Japanese subject shall have the right "to lease land for residential and commercial purposes" in the United States necessarily excludes any other character of tenure of land by him; also that this clause permitting leasing would enable him to have a place in which to live or carry on his business and thus make it possible to do a thing that is incident to or necessary for trade. The clause of the treaty permitting a Japanese subject to "own houses, manufactories, warehouses and shops" refers to buildings. Of course, it is not unusual for one to own a building but not the land upon which it stands. The right to remove a building, erected by a tenant upon leased land, at the expiration of the lease, has often been provided in the contract between lessor and lessee, and there is nothing in the law which prohibits such a provision.

Defendants cite the case of *Sparks vs. Hess*, 15 Cal. 186, where the court says: "The true doctrine, we conceive to be this: that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing to the grantee." This case has been approved in *McShane vs. Carter*, 80 Cal. 310, and in *Crozer vs. White*, 9 Cal. App. 620. In *Whitney vs. Olsen*, 3 Mason 380, Mr. Justice Story held that by the devise of a mill and its appurtenances—not buildings, merely, but all the land under the mill and necessary for the use of it, and commonly used with it, passed to the devisees. In *McDonald vs. B. R. & A. W. Co.*, 13 Cal. 220, it was said "The deed to a house is held to include the land on which it is. Among the maxims of jurisprudence set forth in the Civil Code is the following, "One who grants a thing is presumed to grant also whatever is essential to its use." These rules are applicable in cases where a specific grant of a specific thing is under consideration, but it may well be doubted whether they apply to a document which does not purport to convey any property, but merely to define and set forth rules for the commercial intercourse of nations. Especially is this true where the language in the section specifically mentions land, and the only right given in plain terms with reference to land is to lease it. Is not this "language indicating a different intention" to quote from *Sparks vs. Hess*, *supra*? It is also stated in *Sparks vs. Hess* that "it frequently happens that the ownership of the land may reside in one person, and the ownership of the structures in another. In all cases of this kind, the buildings are erected by permission

of the owner of the land, for the use of the builder, and generally under a mutual expectation by the parties of its removal, or of compensation being made for it to the builder, or of the latter ultimately acquiring the title to the land."

It is a familiar rule of construction that the inclusion of one thing is the exclusion of the other, or as the authorities generally state it, *expressio unius est exclusio alterius*. Applying this rule here, the use of the expressions "houses, manufactories, warehouses and shops" in connection with the word "own" would indicate that it was the intention of the framers of the treaty to exclude ownership of land, especially when this language is followed up with express mention of "land" with permission to "lease" it. Applying the same rule to the clause "to lease land for residential and commercial purposes" any other holding of land is excluded. If the intention had been otherwise, it would have been a simple thing to so provide in the treaty. Those who framed the treaty were men skilled in the drafting of such documents, well versed in the shades of meaning given to words in different connections, and presumably familiar with the meaning of the words and phrases which they employed. It is therefore difficult to understand why they should not have used the expression "to own or lease land" if that is what they meant. The fact that they limited the holding of land to a leasing of the same, clearly indicates that they did not intend to provide for any other tenure of land. Again, if the word "houses" as used in the treaty included the land upon which the houses stand, it was not necessary after giving the right "to own or lease * * * houses" to go further and give permission to "lease land", a right already given, if the theory of the defendants is correct. It might be contended that the clause beginning with the words "to lease land" was intended to apply to such lands as are unoccupied by houses, but if that is true, it is difficult to understand why the words "for residential purposes" were used in the same clause.

The words "own", "houses", "lease", and "land" have an ordinary meaning, and are not, under this construction, used in any special or local sense, and the view the court has taken of their use here is entirely consistent with the views of the higher courts in *Estate of Ghio*, and *De Geofroy vs. Riggs*, cited above. The treaty does not, in the opinion of the court, admit of two constructions, and so there is no choice to be exercised between a restrictive construction and one favorable to rights. The construction here adopted does not in any way defeat the purpose of intention of the framers of the treaty, nor does it lead to an absurdity. The operations of trade or commerce, which are the subject of the treaty, can just as well be carried on under this construction as under the one sought to be established by the defendants.

It is true, as urged by counsel for defendants that "escheats and forfeitures are not favored by the law" (*People vs. Stockton Savings and Loan Assn.*, 133 Cal. 611), but in that case the attorney-general was not proceeding under a statute or clause of the constitution expressly providing for an escheat, as the statute here invoked provides, and no case has been cited, nor is it probable that any can be cited denying the right of the legislature to provide for an escheat, when not in violation of the supreme law. In the case cited the court was considering a proceeding for an escheat in a matter where the statute had not provided for one. A corporation was there holding land contrary to law, and an attempt was being made to have the property escheated to the state, which the court held could not be done in the absence of express authority in the statute.

It is not necessary here to discuss the question of the treaty-making power of the United States Government and whether the rights reserved to

the states under the Constitution may be encroached upon by the Federal Government in making treaties, because that question is not involved here. As has been pointed out, the Anti-Alien Land Law expressly provides that aliens ineligible to citizenship may acquire and possess real property in accordance with any existing treaty between this Government and that of the nation of which the alien is a citizen or subject.

From the foregoing discussion it follows that the court is of the opinion that the treaty here involved does not provide that subjects of Japan may own land here. If it does not so provide, the Anti-Alien Land Law does not permit such ownership, but on the contrary forbids it, and such law is not in conflict with the treaty. Therefore, of the two points raised by the general demurrer, the one just discussed is not tenable in the opinion of the court and in that aspect of the general demurrer, it must be overruled. But this does not conclude the inquiry, nor does it dispose of all questions involved.

It is further urged as a ground of general demurrer that there is no allegation in the complaint or information that Jukichi Harada had or claimed to have any interest in or claim to the real property described at the time of the filing of the complaint, and also that it is incumbent on the state to negative conditions under which title might be in another.

This contention is based upon the claim that such title as Jukichi Harada ever had was at least a defeasible title and that until proper proceedings were taken he could transfer his title and his grantee would acquire a good title.

"As to who may be freeholders, there is no exception in this country, beyond the disability in some states arising from alienage. By the common law, the chief difficulty in this respect is in acquiring title rather than in holding the estate when acquired. Thus an alien may purchase lands or take them by devise and hold them against all the world but the state. Nor can he be divested of his estate, even by the state, until after a formal proceeding called "office found"; and until that is done, may sell and convey or devise the lands, and pass a good title to the same. (And if an alien purchase lands and afterwards became naturalized before office found, he acquires an indefeasible estate.) But an alien cannot take lands by descent, nor transmit them to others as his heirs by the common law." (1 Washburn on Real Property, 6th Ed., sec. 131; *Abrams vs. State*, 45 Wash. 327; 88 Pac. 327, 122 Am. St. Rep. 914. See, also, *Levy vs. M'Cartee*, 6 Pet. 102, 8 L. Ed. 334; *Fairfax's Devisees vs. Hunter*, 7 Cranch. 603, 3 L. Ed. 453; *Orr vs. Hodgson*, 7 Wheat. 453, 4 L. Ed. 613; *Quigley vs. Birdseye*, 11 Mont. 439, 28 Pac. 741; *Whellat vs. Moore*, 100 U. S. 208, 25 L. Ed. 603.)

In *Oregon Mtg. Co. vs. Carstens*, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841, the supreme court of Washington, in commenting on a title acquired by an alien corporation by deed, said:

"It is further contended by the plaintiff that its title so taken would be only a defeasible one, at least, and that it could only be attacked by a direct proceeding on the part of the state, and that a deed of the land by the plaintiff to a party entitled to hold it, before the state should undertake to have the conveyance to it set aside, would transfer a good title; and we are of the opinion that this position is well taken, for the objection would then be obviated; and conceding this to be true, the deed tendered by the plaintiff to the defendant would have passed to the defendant an indefeasible title. There are a number of authorities to which our attention has been called, upon provisions very similar to the one here in question, and the tendency of the decisions elsewhere, although under somewhat different provisions, but all for a like purpose, is to strongly sustain the plaintiff here."

(6 Thompson on Corporations, sec. 7918; *Phillips vs. Moore*, 100 U. S. 208, 25 L. Ed. 603; *Cross vs. De Valle*, 1 Wall. 1, 17 L. Ed. 515; *Carlow vs. Aultman*, 28 Neb. 672, 44 N. W. 873; *American Mtg. Co. vs. Tennille*, 87 Ga. 28, 13 S. E. 158; 12 L. R. A. 529; *Williams vs. Bennett*, 1 Tex. Civ. App. 498, 20 S. W. 856.)

In *Cross vs. De Valle*, 1 Wall. 1, 17 L. Ed. 515, cited above, the Supreme Court of the United States said: "That an alien may take by deed or devise, and hold against anyone but the sovereign until office found, is a familiar principle of law, which it requires no citation of authorities to establish."

In *Abrams vs. State*, *supra*, the court said: "This court, however, in the case of *Oregon Mtg. Co. vs. Carstens*, *supra*, in substance held that an alien holding lands in this state by purchase under a defeasible title, subject to attack on the part of the state, might by deed transfer a good title to a third person entitled to receive and hold it, provided no proceeding had heretofore been taken by the state for the purpose of declaring a forfeiture or escheat. In other words, if Lou Graham (the alleged alien) after receiving her deed from the appellant Abrams, had, for a good and sufficient consideration, conveyed the title to a third party entitled to receive title, the State of Washington, could not thereafter, by office found, have forfeited such title as against her grantee. The state could, however, at any time prior to such transfer have successfully instituted proceedings to declare a forfeiture and escheat."

In many jurisdictions, it is held that no inquest or office or other judicial proceeding is necessary to enforce an escheat. But section 5 of the Anti-Alien Land Law is as follows: "Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section 2 of this act, * * * shall escheat to, and become and remain the property of the State of California. The attorney-general shall institute proceedings to have the escheat of such real property adjudged and enforced in the manner provided by section 474 of the Political Code and title VIII, part III of the Code of Civil Procedure. Upon the entry of final judgment in such proceedings, the title to such real property shall pass to the State of California. * * *"

From this section it is apparent that some proceedings are necessary and they are those set forth in sections 1269 to 1274 of the Code of Civil Procedure. It is of no consequence whether these proceedings be denominated "office found", "inquest" or any other technical name. There are proceedings required, and only "upon the entry of final judgment in such proceedings the title to such real property shall pass to the State of California." In other words, the escheat is not automatic, but is the result of proceedings provided for that purpose. In no place is it provided that the escheat is immediate.

The title cannot remain in abeyance. It must be lodged in some person, natural or artificial, or in the sovereign state. But, as has just been pointed out, it does not pass to the state until the entry of judgment. From these considerations, it follows that the rule announced by the supreme court of Washington and other courts in cases hereinabove cited, is applicable here. It would seem difficult to conceive why this should not be true. If the purpose of the law is to prevent the ownership of land by aliens of the class designated, the reason for applying the law ceases when the title to the land is held by persons not within the proscribed class, no matter through what channels the title may have passed.

The original information and complaint herein was filed October 6, 1916, and the amended information and complaint was filed October 19,

1916. In both it is alleged that on the 14th day of December, 1915, the defendant Jukichi Harada acquired an interest in fee to the real property in question, but it is nowhere alleged that he held title thereto at the time the information and complaint was filed. There is thus a period of practically ten months during which the title may have passed to persons entitled to hold it. "The information must allege all the facts which are essential to the acquisition of the state's title, and negative the existence of any conditions under which the title might be in another." (16 Cyc. 555; *State vs. Witz*, 87 Ind. 190; *State vs. Killian*, 51 Mo. 80.) It appears in no place in the information that at the time of filing same, the title was not in some one legally competent to hold it. In this respect the complaint and information is deficient and also in not setting forth that at the time it was filed the title was held by some persons whom the law forbids to hold such title. For this reason the general demurrer on this point is well taken and must be sustained.

The court is of the opinion that there is no ambiguity, uncertainty or unintelligibility in the complaint and information in the respect alleged in the special demurrer. It is perfectly clear what the pleader means. He alleges that Jukichi Harada acquired title to the real property described and on the same day by reason of this the property escheated to the state. There is no lack of clarity as to the meaning of such allegations. But, inasmuch as the court here has adopted the view that the escheat is not automatic but must follow proceedings, it may well be that the statement that on the said date the real property escheated to the state is not a correct statement of fact or conclusion of law, if indeed the statement of a legal conclusion could be permitted. However, the special demurrer makes no attack upon this portion of the pleading except on the grounds stated, and such objections are not well taken and must be overruled.

The special demurrer that two causes of action have been improperly joined in the complaint and information, and that same are not separately stated, remains to be considered.

The statement in paragraph V of the amended information and complaint that the defendants other than Jukichi Harada each "claim some interest and estate in and to the real property hereinabove described adverse to the plaintiff," and in paragraph VI that "the claim of all of said defendants and each of them are without right, and that said defendants and each of them are without right, and that said defendants and each of them have no interest or estate in and to said real estate" are similar to allegations found in actions for the foreclosure of mortgage liens or mechanic's liens, and are permitted under the practice in vogue in this state. In considering such an allegation in *Mitchell vs. Steelman*, 8 Cal. 363, the court said: "The only object of the allegation was to show a sufficient interest in Lawrence to make him a party. The object in making him a party was to settle any claim he might choose to set up to the property mortgaged. The intention was to prevent a multiplicity of suits * * * As against the adverse claim of Lawrence, the position of the plaintiff was substantially that of a defendant." In *Harmon vs. Ashmead*, 68 Cal. 321, it was held that under such an allegation, "where the defendants denied it but offered no evidence in support of the denial, the burden was on the defendants and the court was justified in finding their claim to be subordinate to that of plaintiffs. (See also *Himmelmann vs. Spanagle*, 39 Cal. 389; *Poett vs. Stearnes*, 28 Cal. 226; *Anthony vs. Nyc*, 30 Cal. 401; *Sichler*

vs. *Look*, 93 Cal. 600; *San Francisco Breweries vs. Schurtz*, 104 Cal. 420; *Wardlow vs. Middleton*, 156 Cal. 585.)

This is an action to obtain title to real property, and the defendants, other than Jukichi Harada, are properly brought in as parties to permit them to set up their title or claim in order to prevent a multiplicity of suits. If they choose to set forth such claims, the burden is on them to establish them. It is not an action to quiet title against them, but plaintiff occupies substantially the position of a defendant with respect to such claims. Under authority of the cases cited above, there is no misjoinder, nor was it necessary to separately state their relation to this litigation. The demurrer on that ground should be overruled.

Plaintiff is allowed ten days within which to amend.

HUGH H. CRAIG, Judge.

6. DECISION OF THE COURT.

The issue presented in this action is whether the state may claim an escheat of the property described in the complain under the provisions of the act known as the Anti-Alien Land Law, or, in other words, whether the state has established facts which would entitle it to the real property under such law.

The legal propositions involved in the Anti-Alien Land Law and its relation to the treaty of 1911 between the United States and Japan were thoroughly discussed on the presentation of the demurrer herein, and, so far as this court can do so, were settled by the ruling on the demurrer. It is therefore unnecessary to enter into any discussion of such propositions at this time.

It is conceded that the defendant, Jukichi Harada, is a Japanese subject, and that the other defendants, minor children of Jukichi Harada, were born in the United States and are citizens thereof. Under the view the court has taken of the law, as set forth in the opinion on the demurrer, Jukichi Harada is ineligible to hold an interest in fee in real property in California. It is conceded by the plaintiff that the other defendants may hold land in the state. The deed to the land in question names these American-born children of Jukichi Harada as grantees. The plaintiff, however, claims that the insertion of their names in the deed is a mere subterfuge to evade the law and that the real owner is Jukichi Harada.

The court has had the advantage of somewhat extended briefs upon both sides, and in view of the importance of the issue, has given most careful consideration to the suggestions thus advanced. (The real issue, as pointed out by counsel on both sides, is whether or not, when he negotiated the purchase, Jukichi Harada intended to make a *bona fide gift* of this property to his children or not.)

Counsel for plaintiff urges that he did not and bases the contention on the claim that Harada supplied the purchase money; that the property was used as a family home; that immediately after the deed passed he agreed to sell the property; that the deed was delivered to him and he had custody of it; that he withdrew the deed from recordation; that he caused rather extensive improvements to the property and paid for them and that he did not definitely refuse to treat with a committee who endeavored to purchase the property. It is very strenuously urged also, that Harada's testimony is unworthy of belief and contains contradictions which are inconsistent with honesty.

The purchase money was undoubtedly supplied by Harada and that fact raises a presumption of a resulting trust in his favor, but it is merely a

presumption which can be overcome by evidence. This evidence may be oral, or it may be documentary, or it may recite circumstances or actions, which would be hostile to the idea of a resulting trust. In the opinion of the court all of these are present here. The deed itself is in favor of the children. No mention whatever of Jukichi Harada is found in any part of it. He stated to the court that he had no intention of doing anything but make a gift of the property to the children. He stated this purpose to the real estate agent, Mr. Noble and to Mr. Gunnerson, before any controversy arose or threatened. The deed itself bears evidence of his intention, as it is a joint tenancy deed, with right of survivors, and not one to tenants in common. This provision was inserted, according to the testimony of Mr. Noble, after the difference between the two kinds was explained to him, and he stated that he wanted it fixed so that if one of the children should die, the others would have the property; and as a consequence no rights of himself or wife as heirs of any child that might die, would intervene. Harada stated himself that he had lost one child while living in a rooming house, and determined to obtain a home for them where there was room for them to be out of doors and where they would be conveniently located with reference to the Sunday school and public school which they attended.

The argument of counsel for plaintiff has been directed almost solely to a discussion of the relation of Jukichi Harada to this property, but has lightly passed over the interests of these children, who are defendants. They are American citizens, of somewhat humble station, it may be, but still entitled to the equal protection of the laws of our land. Their parentage has nothing whatever to do with their rights to hold property. That depends on their status as American citizens, which is admitted. They are named as grantees in a deed to this property given by Fulton Gunnerson and his wife for a valuable consideration. It follows that Gunnerson and his wife have no further interest in the property. The only other person who is suggested as having a possible interest in the property is Jukichi Harada. Yet he has again and again stated, informally, and repeatedly under oath, that he has no interest in it himself, that it belongs to these children. Before any controversy arose, before the deed was drafted, before the opinion of the attorney-general was received, he told Noble he wanted to buy the property for his children. He disclaimed any interest in it when he filed his answer herein, and when on the witness stand under oath, he said over and over that it was the children's property. He has never said anything else about it. These are matters in the record. Counsel for plaintiff are too well versed in the laws to believe for one moment that a resulting trust could exist or be enforced in the face of those reiterated disclaimers on the part of Jukichi Harada, all of which are matters of record. He does not own nor can he ever own or hold any interest in fee in this property while the law remains as it is. If this is true, there is no violation of the Anti-Alien Land Law and its purpose is accomplished.

The actions of Harada were precisely what the actions of an American-born father would have been had the latter wished to make a gift to his minor children. He would have paid the purchase money, he would have provided for the improvements, he would have attended to the negotiations and would have taken care of the papers. It can be confidently stated, that the children of American parents could not have their title attacked under such circumstances on the theory of a trust resulting in favor of the parent, where such parent had repeatedly under the solemn obligations of an oath, disclaimed any interest in the property, but had reiterated that it was a gift to his children. If this is true, such a theory can not obtain here,

as the political rights of American citizens are the same no matter what their parentage.

It is true that the property in question has been used as a home for the whole family. Yet it does not seem reasonable, that this of itself, or in connection with the other facts in evidence, should be sufficient cause to take from these children, who are American citizens, the property that the bounty of their father has given them. The purpose of the father, as stated repeatedly, both before the purchase, and at the trial, was to procure for the children a home near a school and the church which they attended, and one that had open spaces about it, instead of the rooming house where one child had died. Obviously they are of such an age that they could not live there alone. And it would be defeating the very admirable purpose that animated this parent, if after having procured for his children such a home they should not be allowed to live in it. Nor is it to be expected that the family should be broken up and separated. No conclusion adverse to the children's interest can be drawn from this fact by itself or in connection with other facts present.

It is urged that the deed was withheld or withdrawn from the record. The deed was offered for record December 15, and on the same day an entry in the records of the recorder's office shows that it was "withdrawn by consent of filer". It was further shown that the deed was recorded on December 22. There was evidence that Harada, at the request of the committee of property owners went with them to the recorder's office. He says he doesn't know just why they wished him to do this and no explanation is offered by the plaintiff on this point. It does not appear that any conclusion hostile to the ownership of the children can be drawn from this incident. It appeared in the testimony of Mr. Hansler and Mr. Urquhart that the recorder objected to recording the instrument, and was seeking advice on the matter. The entry is "by consent of the filer," and not "at his request". The most reasonable conclusion is that the recorder procured this consent until he could be advised on the law.

The second count sets forth that Harada procured the insertion of his children's names in the deed with the intent to evade and circumvent the law. Assuming for the moment that he did, although the court is of the contrary opinion, how can that effect the issue here, if he failed in his intent? The title to the property is held by American citizens. It is beyond the power of Harada ever to claim any interest in the property, even if there were no Anti-Alien Land Law. His statements to Noble, corroborated by Noble, and not contradicted in any way, made both before and after the deed was executed, makes it plain that he had no intent to acquire any interest in the property. He even went so far as to express a preference for a joint tenancy deed, securing the property to the survivors, and not to the heirs of the children. It is difficult to see what more he could have done to secure to his children what his generosity and the law entitle them to enjoy. The law has not been evaded because no one of a prescribed class holds or owns any interest in fee in or to the real property mentioned.

There is a rather significant fact that the evidence discloses, and that is that on December 17, two days after the deal was closed, Mr. Noble wrote to the attorney-general asking whether American-born children of Japanese parents could hold land in this state. This was done, Mr. Noble states, because an abstractor had suggested to him that some trouble might result because of the deed. On December 21 the attorney-general replied: "I have yours of the 17th inst. reading as follows: 'Can a Jap boy or girl born here in California acquire and hold real estate?' In reply section 1 of the Four-

teenth Amendment of the Federal Constitution provides, 'all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside.' And any citizen of the United States and of this state may acquire and hold real estate in California. Very truly yours, U. S. Webb, Attorney-General."

There is no doubt that this letter correctly sets forth the law, but the significant fact about the matter is that this correspondence all took place after the deal was concluded, so that it cannot be claimed successfully that the insertion of the names of the Harada children as grantors in the deed, was done to meet the statement of the law as made by the head of the legal department of the state.

Much has been said of discrepancies in the testimony of Harada, but such discrepancies, if they exist, relate to matters of small importance, such as whether Gunnerson was present at one or another conference in Noble's office, and whether the deal was abandoned at the first or second conference. It is not surprising that there were inaccuracies of a minor nature in his testimony. Such inaccuracies are frequently found in the testimony of honest witnesses who have every advantage of education and experience. But when it is recalled that the witness was taken over the same ground several times and the examination covered these several conferences with somewhat confusing rapidity, added to which was the very apparent imperfection of the witnesses knowledge of the English language, it would have been surprising if every detail of conversations occurring about two and one-half years before had been given with absolute consistency every time. The same observations may well apply to the acceptance of the offer of \$1,800.00 for the property. Doubtless such an offer was made and doubtless the witnesses who detailed it believed it was accepted. But it is by no means clear that Harada himself so understood it at the time. Even if he did, and the court is not at all convinced of his so understanding it, how could that deprive these minor children of their property?

Miss Fletcher, one of the plaintiff's witnesses, testified positively that Harada told the committee that visited him that he had bought the place for his children. This coincides with what Harada says, and it is in harmony with what Mr. Noble stated was said to him. It is not denied by any other members of the committee that such a statement was made. Some of them did not hear the statement, but are not willing to say it was not made.

In order to sustain the plaintiff's contention it would be necessary to discard the testimony of Harada, of Mr. Noble and of Miss Fletcher; to reform the deed by substituting the name of another grantee; and to deny that a father under similar circumstances with the same status as Jukichi Harada can make a gift of real property to his American-born children. The reasons urged upon the court for doing this are suspicious and inferences based upon facts which more reasonably bear the aspect and construction of good faith. If the plaintiff prevails, three American citizens would be deprived of their property without one penny of compensation. Strong reasons should exist before such a result should be permitted. Such reasons do not exist here, but, on the contrary, there is much stronger reason for denying the claim of the plaintiff.

Doubtless many of the neighboring residents, as well as others, object to the presence of the defendants as neighbors but that is not sufficient reason for depriving these children of their property. The law is not sufficiently broad to deny the right to own land to the American-born children of aliens ineligible to citizenship. The law must be enforced as it is writ-

ten and its terms may not be enlarged by the courts to include others than those mentioned in the statute itself.

If an embarrassing or unfortunate situation results by reason of the limitations of the statute, the remedy is not to be sought in the courts, for they cannot deny to American citizens the right to own or hold an interest in land under our laws as they now exist.

Judgment will be for the defendants, Mine, Sumi, Yoshizo Harada, the three children whose interest is attacked. Counsel for the defendants will prepare findings in accordance herewith.

HUGH H. CRAIG,
Judge.

CHAPTER X.—SUMIDA CASES (ESCHEAT CASES).

STATE OF CALIFORNIA, Plaintiff, vs. H. SUMIDA, J. E. GOREE, ELBA LAND COMPANY, a Corporation; BANK & TRUST COMPANY OF CENTRAL CALIFORNIA, a Corporation; AKIYO SUMIDA (also known as MAMIE SUMIDA); NATSUKO SUMIDA, SUMIKO SUMIDA and HOOMI SUMIDA (Minor Children of H. Sumida); JOHN DOE, JANE DOE, RICHARD ROE and ALLEN POE, Defendants.

IN THE CALIFORNIA SUPERIOR COURT.

No. 12303. DEPT. No. 1.

1. H. SUMIDA CASE.

COMPLAINT.

Now comes the plaintiff, State of California, and for cause of action against the above-named defendants alleges:

I.

That during all of the times mentioned in this complaint the defendant H. Sumida was, and he now is, a Japanese person, a native citizen and subject of the Empire of Japan, and was and is not eligible to citizenship under the laws of the United States.

II.

That at no time mentioned in this complaint was there, nor is there now, any treaty existing between the Government of the United States and the Government of Japan, under which a native-born Japanese citizen and subject of the Empire of Japan could acquire, possess, enjoy, or transfer real property, or any interest therein, in the State of California, or elsewhere in the United States.

III.

That defendant Elba Land Company, a corporation, now is, and during all the times mentioned in this complaint has been, a corporation organized, existing and doing business under the laws of the State of California, and having its principal place of business in the County of Tulare, State of California.

IV.

That defendant Bank and Trust Company of Central California now is, and during all the times in this complaint mentioned was, a corporation organized and existing under the laws of the State of California, and with its principal place of business in the County of Fresno, State of California.

V.

That U. S. Webb is the duly elected, qualified and acting attorney-general of the State of California, and has been informed that the property herein-after described has escheated to the State of California, through and by reason of the facts in this complaint alleged.

VI.

That on and prior to the 21st day of July, 1919, defendant Elba Land Company, a corporation, was the owner in fee, in the possession, and entitled to the possession, of all of the real property situated in the County of Tulare, State of California, and particularly described as follows, to-wit:

All of section thirty-six (36) in the township nineteen (19) south, range twenty-four (24) east, Mount Diablo base and meridian.

The northeast quarter ($NE\frac{1}{4}$) of section one (1), in township twenty (20) south of range twenty-four (24) east, Mt. Diablo base and meridian, excepting the right of way heretofore granted to the San Francisco and San Joaquin Railway Company, being the right of way now occupied by the Atchison, Topeka and Santa Fe Railway Company.

All of that portion of the southwest quarter ($SW\frac{1}{4}$) of section one (1), in township twenty (20) south of range twenty-four (24) east, Mount Diablo base and meridian, lying north of the right of way of the San Francisco and San Joaquin Valley Railway Company, being the right of way occupied by the Atchison, Topeka and Santa Fe Railway Company.

Lots three (3), four (4), seven (7) and eight (8) of the Elba Villa Tract, according to the map of Elba Villa Tract filed in the office of the county recorder of the said County of Tulare, and appearing of record in book 12 of Maps at page 34, record of said county.

The fractional southwest quarter ($SW\frac{1}{4}$) of section thirty-one (31), in township nineteen (19) south of range twenty-five (25) east, Mount Diablo base and meridian, the same being also described as lots one (1), two (2), three (3), four (4) and five (5), and the tract of land designated as the Reserve of Chandler's Subdivision, according to the map of Chandler's Subdivision filed in the office of the county recorder of the said County of Tulare, and appearing of record in volume 1 of Maps at page 145, records of said county.

All that portion of the southeast quarter ($SE\frac{1}{4}$) of section thirty-one (31), in township nineteen (19) south of range twenty-five (25) east, Mt. Diablo base and meridian, lying north of the northerly line of the right of way of the San Francisco and San Joaquin Valley Railway Company, being the right of way now occupied by the Atchison, Topeka and Santa Fe Railway Company.

The fractional northwest quarter ($NW\frac{1}{4}$) of section six (6) in township twenty (20) south of range twenty-five (25) east, Mt. Diablo base and meridian.

The northwest quarter ($NW\frac{1}{4}$); the east half of the southwest quarter ($E\frac{1}{2}$ of $SW\frac{1}{4}$), the north half of the southeast quarter ($N\frac{1}{2}$ or $SW\frac{1}{4}$), and the southwest quarter of the southeast quarter ($SW\frac{1}{4}$ of $SE\frac{1}{4}$) of section three (3) in township twenty (20) south of range twenty-five (25) east, Mt. Diablo base and meridian.

VII.

That on the 21st day of July, 1919, defendant Elba Land Company, a corporation, entered into a contract in writing with defendant J. E. Goree, by the terms of which defendant Elba Land Company, a corporation, agreed to sell to defendant J. E. Goree, and defendant J. E. Goree agreed to buy, all of the real property described in paragraph VI of this complaint, a true copy of which contract is hereto attached, marked Exhibit "A", and is hereby expressly made a part of this complaint.

VIII.

That plaintiff is informed and believes, and on such information and belief alleges, that defendant H. Sumida furnished from his own means all

of the consideration which was paid to or received by the Elba Land Company, a corporation, on the 21st day of July, 1919, or thereafter, pursuant to the terms of said contract including the sum of fifty thousand dollars (\$50,000), the receipt of which is in said contract acknowledged, and that all the title and interest acquired by virtue of such contract and such payments were so acquired by and for defendant H. Sumida, and that defendant J. E. Goree was acting as the agent, representative, or trustee of defendant H. Sumida, and that whatever title or interest was acquired by said defendant J. E. Goree, by virtue of such contract or the payments made thereunder, was acquired and was to be held by him as the agent, representative, or trustee, and for the sole benefit of defendant H. Sumida, and not otherwise.

IX.

That plaintiff is informed and believes, and upon such information and belief alleges, that defendant J. E. Goree paid no part of the purchase price of the property described in said contract, and acquired no interest therein, except as the agent, representative, or trustee of defendant H. Sumida, and that defendant J. E. Goree became a party to said contract, and has acted thereunder for the sole purpose of enabling defendant H. Sumida to gain an interest in and title to the property described in said contract and in paragraph VI of this complaint, in violation of the provisions of an act of the legislature of the State of California, entitled "An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, and repealing all acts or parts of acts inconsistent or in conflict herewith" (approved May 19, 1913), and found in the Statutes of 1913, at pages 206, 207 and 208 thereof, and that defendant H. Sumida is the actual owner of all the interest in said real property held and acquired by the defendant J. E. Goree pursuant to the terms of said contract.

X.

That plaintiff is informed and believes, and on such information and belief alleges, that the interest in said real property passing from defendant Elba Land Company, a corporation, by virtue of said contract, is of a value in excess of fifty thousand dollars (\$50,000).

XI.

That by reason of the facts hereinbefore alleged all of the right, title and interest passing from defendant Elba Land Company, a corporation, under and in pursuance of the provisions of said contract, has escheated to the plaintiff.

XII.

That on or about the 21st day of April, 1920, said J. E. Goree and Louisa C. Goree, his wife, executed and delivered to said Bank and Trust Company of Central California an instrument in writing by which said J. E. Goree attempted to grant, assign, and convey to said Bank and Trust Company of Central California the said contract herein referred to as Exhibit "A", together with all the right, title and interest acquired by said J. E. Goree under and by virtue thereof in and to all the real property described in paragraph VI of this complaint under certain trusts attempted to be created in said instrument of April 21, 1920, which said instrument of April 21, 1920, was accepted by said Bank and Trust Company of Central California and was duly acknowledged and certified so as to entitle it to be recorded and the same was recorded on the 24th day of April, 1920, in volume Y of

assignments, page 1, in the office of the county recorder of the County of Tulare, and a true copy of said contract is hereto attached and marked Exhibit "B" and is hereby expressly made a part of this complaint.

XIII.

That plaintiff is informed and believes, and on such information and belief alleges, that defendant H. Sumida furnished from his own means all of the consideration which was paid to, or received by the said J. E. Goree on the 21st day of April, 1920, or thereafter, pursuant to the terms of said contract Exhibit "B", and that all the title and interest acquired by virtue of such contract and such payments were so acquired by and for defendant H. Sumida, and that defendant J. E. Goree was acting as the agent, representative, or trustee of defendant H. Sumida, and that whatever title or interest was acquired by said defendant Bank and Trust Company of Central California, by virtue of such contract or the payments made thereunder, was acquired and was to be held by it as the agent, representative or trustee, and for the sole benefit of defendant H. Sumida, and not otherwise.

XIV.

That plaintiff is informed and believes, and upon such information and belief alleges, that defendant Bank and Trust Company of Central California paid no part of the purchase price of the property described in said contract Exhibit "B" and acquired no interest therein, except as the agent, representative or trustee of defendant H. Sumida, and that defendant Bank and Trust Company of Central California, became a party to said contract, and has acted thereunder for the sole purpose of enabling defendant H. Sumida to gain an interest in and title to the property described in said contract and in paragraph VI of this complaint, in violation of the provisions of an act of the legislature of the State of California, entitled, "An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, and repealing all acts or parts of acts inconsistent or in conflict herewith (approved May 19, 1913), and found in the Statutes of 1913, at pages 206, 207 and 208 thereof, and that defendant H. Sumida is the actual owner of all the interest in said real property held and acquired by defendant Bank and Trust Company of Central California pursuant to the terms of said contract.

XV.

That the names of the defendants John Doe, Jane Doe, Richard Roe and Allen Poe are fictitious, and plaintiffs asks that upon the discovery of their true names that such true names be inserted to the effect as if written herein.

XVI.

That each of said defendants claims some interest or estate in and to the real property in paragraph VI described, and that the claim of each of said defendants is without right, and that neither of said defendants has any estate or interest in or to said real property.

Wherefore, plaintiff prays that it be adjudged and decreed:

1. That all the interest passing from the defendant Elba Land Company, a corporation, by virtue of said contract, has escheated to the State of California.

2. That the value of such interest be determined, and that a judgment for the amount of such value be entered in favor of the plaintiff.

3. That a receiver be appointed to take charge of and receive the rents, issues and profits of said property pending this action.

4. That the said property be ordered sold in conformity with the provisions of title VIII, part III of the Code of Civil Procedure of the State of California, and from the proceeds thereof shall be paid into the state treasury the amount of the judgment in favor of the state.

5. That neither of said defendants has any right, title, estate or interest in or to said real property, or any part thereof.

6. That plaintiff have and recover its costs herein.

7. That plaintiff have such other further relief as the fact may warrant.

U. S. WEBB,

Attorney-General of the State of California,

Attorney for Plaintiff.

MIDDLECOFF, SCOTT & HAM, Of Counsel.

"EXHIBIT A."

This agreement, made and entered into this 21st day of July, 1919, by and between Elba Land Co., a corporation, organized and existing under and by virtue of the laws of the State of California, and having its principal place of business at the City of Tulare, in the County of Tulare, State of California, the party of the first part, and J. E. Goree, of the County of Fresno, State of California, the party of the second part;

Witnesseth: That the said party of the first part agrees to sell and convey unto the said party of the second part, and the said party of the second part agrees to purchase from the said party of the first part all that real property situate in the County of Tulare, State of California, and described as follows, to-wit:

All of section thirty-six (36) in township nineteen (19) south of range twenty-four (24) east, Mount Diablo base and meridian.

The northeast quarter (NE $\frac{1}{4}$) of section one (1) in township twenty (20) south of range twenty-four (24) east, Mount Diablo base and meridian, excepting the right of way heretofore granted to The San Francisco and San Joaquin Valley Railway Company, being the right of way now occupied by the Atchison, Topeka and Santa Fe Railway Company.

All that portion of the southwest quarter (SW $\frac{1}{4}$) of section one (1) in township twenty (20) south of range twenty-four (24) east, Mount Diablo base and meridian, lying north of the right of way of The San Francisco and San Joaquin Valley Railway Company, being the right of way now occupied by the Atchison, Topeka and Santa Fe Railway Company.

Lots three (3), four (4), seven (7) and eight (8) of the Elba Villa Tract, according to the map of Elba Villa Tract filed in the office of the county recorder of the said County of Tulare, and appearing of record in book 12 of Maps at page 34, records of said county.

The fractional southwest quarter (SW $\frac{1}{4}$) of section thirty-one (31) in township nineteen (19) south of range twenty-five (25) east, Mount Diablo base and meridian, the same being also described as lots one (1), two (2), three (3), four (4) and five (5), and the tract of land designated as the Reserve of Chandler's Subdivision, according to the map of Chandler's Subdivision filed in the office of the county recorder of the said County of Tulare, and appearing of record in volume 1 of Maps at page 145, records of said county.

All that portion of southeast quarter (SE $\frac{1}{4}$) of section thirty-one (31) in township nineteen (19) south of range twenty-five (25) east, Mount Diablo base and meridian, lying north of the northerly line of the right of

way of The San Francisco and San Joaquin Valley Railway Company, being the right of way now occupied by the Atchison, Topeka and Santa Fe Railway Company.

The fractional northwest quarter (NW $\frac{1}{4}$) of section six (6) in township twenty (20) south of range twenty-five (25) east, Mount Diablo base and meridian.

The northwest quarter (NW $\frac{1}{4}$), the east half of the southwest quarter (E $\frac{1}{2}$ of SW $\frac{1}{4}$), the north half of the southeast quarter (N $\frac{1}{2}$ of SE $\frac{1}{4}$), and the southwest quarter of the southeast quarter (SW $\frac{1}{4}$ of SE $\frac{1}{4}$) of section three (3) in township twenty (20) south of range twenty-five (25) east, Mount Diablo base and meridian.

Together with that personal property situated on the above-described lands, and described as follows, to-wit:

All horses, mules, colts, cattle and hogs on any and all of the above-described lands or which were thereon on July 21, 1919, consisting of about 56 horses, 23 mules, 415 hogs, 10 colts, 71 head of cattle, all farming implements, all household goods and furniture, mattresses and bedding, piano, all office fixtures and office safe, all machinery, harness, picking boxes, sweat boxes, trays, all hay and feed barns and fields, all pumping plants and pumping apparatus, all sulphur and cement on lands, all box shook, 1 Reo runabout, 1 Reo truck, 1 Fageol six-ton truck and two trailers, 2 Fords, all appliances, machinery and equipment of the winery and distillery, all wood, lumber and timbers, all corn, one double-barrel shotgun, all wagons, tractors, vineyard trucks and other personal property, also all blacksmith tools, apparatus and appliances, and four and one-fourth shares of the capital stock of the Farmer's Ditch Co., a corporation (but excepting herefrom the following: 60 raisin boxes not owned by the party of the first part, 4 iron vats for pickling olives, the pumping plant which belong to R. D. Helm, near the Tulare irrigation ditch, all barrels of 50 gallons or less at the winery or distillery, and 1 saddle horse now belonging to the foreman on the ranch).

The consideration to be paid for all of the above-described property is the sum of \$475,000.00, being the sum of \$390,000.00 for said land and the crops growing thereon, and the sum of \$85,000.00 for all said personal property.

And the said party of the second part promises and agrees to pay said sums in lawful money of the United States as follows:

\$50,000.00 paid in cash on or prior to the execution of this contract, receipt whereof is hereby acknowledged.

The balance of said purchase price shall be paid as follows, to-wit: Seventy-five per cent of the gross sales of all products, crops and livestock from said lands during the year 1919 shall be paid to the said party of the first part on account of the purchase price to be paid hereunder, such payments to be made as crops, products or livestock are sold, and all crops and products to be sold and the proceeds paid on this contract by the first day of December, 1919, as above set forth, and such crops, products and livestock are to be marketed in the joint names of the parties to this contract, or their assigns, and the returns are to be paid directly to the parties hereto in the above proportion, and no sale of products, crops or livestock from said premises during the years 1919 and 1920 shall be made except for the reasonable market value thereof at the time of sale, or at the time of making contract for such sale, unless such sale or contract for sale is made with the knowledge and consent of the said party of the first part.

On the first day of December, 1919, the said party of the second part shall execute crop mortgages on all crops growing and to be grown during the season of 1920 on any of said lands to the said party of the first part, securing to the said party of the first part so much of the purchase price to be paid hereunder as will equal the difference between the amount then and theretofore paid on said purchase price and \$225,000.00, the amount thereof so evidenced by said crop mortgage to be payable on or before the first day of December, 1920, with interest thereon at the rate of six per cent per annum, and on said first day of December, 1920, a note shall be executed for the sum of \$250,000.00, being the balance of said purchase price, and payable in installments of \$40,000.00 each year for five consecutive years, and \$50,000.00 the sixth year from the date of said note, and bearing interest at the rate of six per cent per annum, interest payable annually, and to secure the payment of said note, the said party of the second part shall execute to the said party of the first part a mortgage on said land and personal property, which said mortgage shall be a first lien on said property, subject only to the taxes and assessments for the then current year, and said note and mortgage shall be in the form and contain the terms, recitals and conditions usually contained in mortgages made to secure loans on real property in the said County of Tulare, and said mortgage shall also be executed by the wife of any person receiving the deed of said property hereinafter provided for or having acquired any interest in said property under or through the said party of the second part, if any such party be then married. The party of the first part reserves the use for storage purposes of the winery on said premises, and all equipment thereof, until the first day of January, 1920, or later, if the wine on hand cannot be removed before that date; and also reserves the use for Joe Fontana, or his successors, of one dwelling-house until the wine is disposed of; and also reserves the use of the truck and trailer to move the wine to shipping points, the said party of the first part to keep the same in order and repair and furnish necessary oil and gasoline while using the same.

It is understood and agreed that all taxes assessed against said land and personal property for the fiscal year 1919-1920 shall be paid by the said party of the second part.

All deferred payments shall bear interest at the rate of six per cent per annum as follows: \$375,000.00 of said principal sum shall bear interest from the first day of June, 1919, until paid; \$50,000.00 of said principal sum shall bear interest from the 14th day of July, 1919, until paid, and said interest is to become due and payable annually on the first day of December of each year.

It is further stipulated and agreed that the abstracts of title furnished with said lands show the title thereof to be in the said party of the first part, except as to some minor defects, which defects the said party of the first part agrees to remove prior to the time when a deed shall be made to said lands, so that when the deed is executed and delivered to the said party of the second part, all objections now made to said title will have been removed and no further showing of title will be required of the said party of the first part other than as herein noted.

It is expressly understood that in the handling of said lands, crops and personal property up to the time a deed shall issue for said lands, such lands, crops and personal property shall be so handled and managed that the same will be satisfactory to the said party of the first part and his security not impaired.

It is further understood and agreed that as to the installment of pur-

chase price that will be required to be made by the first day of December, 1920, to make the payments on said purchase price to \$25,000.00, and for the unpaid portion of which said sum a crop mortgage shall be given on the crops to be grown on said land during the season of 1920 as aforesaid, the said party of the second part shall also pay over to the said party of the first part such proceeds of sales of livestock or other personal property sold from said premises during said year, as may be demanded by the said party of the first part, except, however, as to the sale of any increase of livestock acquired subsequent hereto by the said party of the second part.

It is further understood and agreed that (except on making sales as hereinabove provided for) said party of the second part is not to remove any of said personal property from the land above described except in the ordinary course of business, and the same must be returned to said lands immediately thereafter, and that under no circumstances is any of said personal property to be loaned or leased to any person other than the person or persons having the possession and care of said lands.

It is further understood that a deed shall issue to said land on the first day of December, 1920, or sooner if \$225,000.00 has been paid on said purchase price, and the note and mortgage is executed for the balance to be paid hereunder as hereinabove specified and that the said party of the first part will cause said deed to be executed to the said party of the second part, or to his assigns, conveying the title of said real and personal property to the said party of the second part, or his assigns, free and clear of all liens and incumbrances at any time hereafter made or caused by the said party of the first part.

If the said party of the second part shall fail to perform each and all of the covenants herein agreed to be performed, at the times and in the manner herein stated, then all moneys theretofore paid shall belong to the said party of the first part, and shall be retained by it as liquidated damages for the nonperformance of the conditions hereof by the said party of the second part, and as part of the consideration of this agreement, and this agreement shall become null and void; such second party now has and shall have possession of all said personal property so long as he complies with this contract.

It is further understood and agreed that this contract shall apply to and shall bind the successors and assigns of the said party of the first part and the heirs, administrators, executors and assigns of the said party of the second part, and that time is expressly declared to be the essence of this agreement.

In witness whereof, the said party of the first part has caused its corporate name and seal to be hereunto affixed by its president thereunto duly authorized, and the said party of the second part has hereunto set his hand the day and year first above written.

ELBA LAND CO.,

By F. GIANNINI, President.

J. E. GOREE.

(Corp. Seal)

State of California, County of Tulare.—ss.

On this 25th day of July, in the year one thousand nine hundred and nineteen, before me, Peter Lowson, a notary public in and for the County of Tulare, State of California, personally appeared Frank Giannini, known to me to be the president of the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the County of Tulare, the day and year in this certificate first above written.

PETER LOWSON,

Notary Public in and for the County of Tulare, State of California.

(Seal)

Recorded at the request of J. E. Goree Jul. 26, 1919, at 47 Min. past 11 o'clock A. M., in vol. 46 of Contracts page 157, Tulare County Records.

IRA CHRISMAN, Recorder.

"EXHIBIT B."

This indenture, made this 21st day of April, 1920, between J. E. Goree and Louisa G. Goree, his wife, of the County of Fresno, State of California, the first parties, herein, and Bank and Trust Company of Central California, a corporation organized and doing business under and by virtue of the laws of the State of California, and having its principal place of business at the City of Fresno, in the County of Fresno, State of California, the second party herein.

Witnesseth: That, for value received, and for settling and assuring the property hereinafter described and granted unto such uses and upon such trusts as are hereinafter mentioned, expressed and declared of and concerning the same, and for carrying out and completing a declaration of trust of which a memorandum thereof was heretofore made bearing date the 21st day of July, 1919, the said first parties have granted, bargained, sold, assigned, conveyed and confirmed and by these presents do grant, bargain, sell, assign, convey and confirm unto the said second party, and to its successors (in trust, however, and for the uses and purposes, and upon the trusts and confidences hereinafter set forth), that certain contract of sale bearing date the 21st day of July, 1919, made by Elba Land Co., a corporation, as vendor, with J. E. Goree, as vendee, which said contract was recorded in the office of the county recorder of the County of Tulare, State of California, on the 26th day of July, 1919, in volume 46 of Contracts, at page 158, record of said county;

Together with all right, title and interest acquired under and by virtue of said contract in and to all that real property situate in the County of Tulare, State of California, described as follows, to-wit:

All of section thirty-six (36) in township nineteen (19) south, of range twenty-four (24) east, Mount Diablo base and meridian;

The northeast quarter (NE $\frac{1}{4}$) of section one (1) in township twenty (20) south of range twenty-four (24) east, Mount Diablo base and meridian, excepting the right of way heretofore granted to The San Francisco and San Joaquin Valley Railway Company, being the right of way now occupied by the Atchison, Topeka and Santa Fe Railway Company;

All that portion of the southwest quarter (SW $\frac{1}{4}$) of section one (1) in township twenty (20) south of range twenty-four (24) east, Mount Diablo base and meridian, lying north of the right of way of The San Francisco and San Joaquin Valley Railway Company, being the right of way now occupied by the Atchison, Topeka and Santa Fe Railway Company;

Lots three (3), four (4), seven (7) and eight (8) of the Elba Villa Tract, according to the map of Elba Villa Tract filed in the office of the county recorder of the said County of Tulare, and appearing of record in book 12 of Maps at page 34, records of said county;

The fractional southwest quarter (SW $\frac{1}{4}$) of section thirty-one (31) in

township nineteen (19) south of range twenty-five (25) east, Mount Diablo base and meridian, the same being also described as lots one (1), two (2), three (3), four (4) and five (5) and the tract of land designated as the Reserve of Chandler's Subdivision, according to the map of Chandler's Subdivision filed in the office of the county recorder of the said County of Tulare, and appearing of record in volume 1 of Maps at page 145, records of said county;

All that portion of the southeast quarter ($SE\frac{1}{4}$) of section thirty-one (31) in township nineteen (19) south of range twenty-five (25) east, Mount Diablo base and meridian, lying north of the northerly line of the right of way of the San Francisco and San Joaquin Valley Company, being the right of way now occupied by the Atchison, Topeka and Santa Fe Railway Company;

The fractional northwest quarter ($NW\frac{1}{4}$) of section six (6) in township twenty (20) south of range twenty-five (25) east, Mount Diablo base and meridian;

The northwest quarter ($NW\frac{1}{4}$), the east half of the southwest quarter ($E\frac{1}{2}$ of $SW\frac{1}{4}$), the north half of the southeast quarter ($N\frac{1}{2}$ of $SE\frac{1}{4}$) and the southwest quarter of the southeast quarter ($SW\frac{1}{4}$ of $SE\frac{1}{4}$) of section three (3) in township twenty (20) south of range twenty-five (25) east, Mount Diablo base and meridian.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

Also all personal property now remaining on hand of the personal property set forth and described in said contract of sale.

To have and to hold all and singular the said contract and property, together with the appurtenances, for the uses, ends, intents and purposes, and under and subject to the several reservations, provisos, restrictions, limitations and conditions following, that is to say:

1. To have and to hold, control, lease, mortgage, hypothecate, sell and convey (as a whole or in separate parts and parcels) said property and any and all property that may or shall be substituted for each or any part thereof, and to invest and re-invest the proceeds thereof.

2. To pay from the rents and profits of said property and from the proceeds thereof, all taxes, assessments and charges accruing against said property, all expenses for the upkeep and improvement of said property, and the reasonable charge for the management and control of said property and of the proceeds thereof, and also the interest and installments of principal of the purchase price of said property under said contract, and any and all mortgage indebtedness, and other liens and indebtedness that are now, or may hereafter, be against said property.

3. To prosecute and defend any and all suits and proceedings which may be instituted or pending during the continuance of this trust, or which in its judgment in anywise affect the trust property, or the interest of the said second party, or the beneficiaries therein, and to pay out of any funds which may come to its hands under this trust any and all costs, charges, and expenses which in its judgment it may deem necessary and proper; and to settle or compromise any and all adverse claims which may in its judgment affect the trust property or any part thereof, or the interests of the trustee or beneficiaries therein.

4. To pay out of the income and profits of said property, or in case they shall be insufficient, then out of the principal of the trust property, the

costs and expenses of this trust including a compensation to the trustees, an annual fee of \$450.00

5. At the expiration of such calendar year, after all other charges, expenses and payments due or to become due for or during such year has been paid from the said income and profits, to pay over the balance, if any, of the net earnings and income from said property during the preceding year unto Akiyo Sumida (also known as Mamie Sumida), Natsuko Sumida, Sumiko Sumida and Hoomi Sumida (minor children of H. Sumida of Fowler, California) and to the survivor of them, in equal shares, all of which said above-named children are hereby and hereinafter designated as the beneficiaries of this trust.

6. When the said Akiyo Sumida arrives at the age of 18 years, to-wit, on the 11th day of December, 1921, if she be living on said date, the title to all said property then remaining shall thereupon pass to and vest in her, and the same in such event is granted to her, and she shall thereupon have, take and own absolutely in her own right an equal one-fourth part of the whole of said property, and the said Akiyo Sumida shall receive, take, have and hold the remainder of all said property in trust, with the same power and authority, and upon the same trusts and confidences as are hereinabove and hereinafter set forth; and the said Akiyo Sumida is hereby appointed as the successor of the said second party, and is authorized and empowered to act as trustee, and to have, hold and control said property in trust as herein specified; and on her reaching said age of 18 years, the said second party shall thereupon convey and deliver over to her all said property accordingly.

7. In the event the said Akiyo Sumida does not live to reach the age of 18 years, then this trust, as to all said trust property, shall be continued with and held and exercised by the said second party, and the said property and the proceeds, income and profits thereof, shall be managed, controlled and disbursed by it, and it shall pay and deliver over annually to the agent and in the manner aforesaid the balance, if any, of said income and profits to the surviving beneficiaries until the said Natsuko Sumida shall have reached the age of 18 years, to-wit, on the 9th day of August, 1924, if she be living on said date, at which time the title to all said property then remaining shall thereupon pass to and vest in the said Natsuko Sumida, and the same in such event is granted to her, and she shall thereupon have, take and own absolutely in her own right an equal one-third of the whole of said trust property then on hand; and the said Natsuko Sumida shall receive, take, have and hold the remainder of all said property in trust, with the same power and authority and upon the same trusts and confidences as are hereinabove and hereinafter set forth; and the said Natsuko Sumida is in such event appointed as the successor of the said second party, and is authorized and empowered to act as such trustee, and to have, hold and control said property in trust as herein specified, and on her reaching the age of 18 years, and in the event and contingency aforesaid, the said second party shall thereupon convey and deliver over to her all said property accordingly.

8. In the event neither the said Akiyo Sumida nor the said Natsuko Sumida lives to reach the age of 18 years, then this trust as to all said trust property shall be continued with and held and exercised by the said second party, and the said property and the proceeds, income and profits thereof, shall be managed, controlled and disbursed by it, and it shall pay and deliver over annually to the extent and in the manner aforesaid the balance, if any, of said income and profits, to the surviving beneficiaries until Sumiko Sumida shall have reached the age of 18 years, to-wit, on the

14th day of January, 1934, if she be living on said date, at which time, the title to all said property then remaining shall thereupon pass to and vest in the said Sumiko Sumida, and the same is in such event granted to her, and she shall thereupon have, take and own absolutely in her own right an equal one-half of the whole of said trust property then on hand; and the said Sumiko Sumida shall receive, take, have and hold the remainder of all said property in trust with the same power and authority, and upon the same trusts and confidences as are hereinabove and hereinafter set forth, and the said Sumiko Sumida is in such event appointed as the successor of the said second party, and is authorized and empowered to act as such trustee, and to have, hold and control said property in trust as herein specified, and on her reaching said age of 18 years, the said second party shall, in such event and on such contingency, thereupon convey and deliver over to her all said property accordingly.

9. In the event neither the said Akiyo Sumida, Natsuko Sumida nor Sumiko Sumida lives to reach the age of 18 years then this trust as to all said trust property shall be continued with and exercised by the said second party, and the said property, and the proceeds, income and profits thereof, shall be managed, controlled and disbursed by it, and it shall pay and deliver over annually to the extent and in the manner aforesaid, the balance, if any, of said income and profits, to the surviving beneficiary until the said Hoomi Sumida shall reach the age of 21 years, to-wit on the 17th day of May, 1935, if he be then living on said date, at which time the title to all said property then remaining shall thereupon pass to and vest in the said Hoomi Sumida, and the same in such event is granted to him and he shall thereupon have, take and own absolutely in his own right the remainder of all said trust property and the said second party shall thereupon convey and deliver over all said property accordingly.

10. When all of said beneficiaries who live to reach the age of majority, have reached that age respectively, then this trust shall cease and determine, and the trust property then remaining shall go and be delivered over and shall be conveyed to the beneficiary then surviving who has not theretofore received her or his portion of the principal or corpus of said trust property, and in the event of the death of any beneficiary before receiving her or his share of said principal or corpus of said property, and before the final determination of this trust, and while any of the other beneficiaries are still living, and at or over the age of majority then the trust property then remaining shall go and be delivered over to the beneficiaries then surviving, and same shall be conveyed and delivered to them in such parts and amounts as will give to each beneficiary who so survives and participates in the final distribution of said trust fund, such an amount or share as will, as near as may be, be equal to the total share theretofore and then received by each of the beneficiaries so entitled to participate therein under the terms hereof.

11. As each of said beneficiaries reaches the age of majority, she or he shall be entitled to receive her or his respective share of said trust property in her or his own right, subject, however, to any and all mortgages, liens, and encumbrances charges and then being on or against the same, and shall be entitled to have her or his respective share partitioned, distributed and allotted to her or him, respectively, and the trustee of this trust is hereby authorized and empowered to make such partition, division and allotment of said property, quantity and quality relatively considered, and such partition division and allotment being made and a written declaration of the same having been recorded in the office of the county recorder of the county where the said property is situated, same shall be effective for the purpose

of freeing such party's divided share or allotment from this trust, and vesting in her or him absolutely the whole of such distributive or allotted portion, and vesting in the trustee for the purposes of this trust the whole of the balance of said property.

12. In the event none of the said Akiyo Sumida, Natsuko Sumida, Sumiko Sumida and Hoomi Sumida lives to reach the age of majority, then upon the death of the last survivor of them this trust shall cease and determine, and if there shall be then living any one or more heirs at law of any of said beneficiaries, who is at said time entitled, authorized and empowered to take, have and hold real property under the laws of the State of California, then said trust property shall thereupon go to and shall by said trustee be delivered and conveyed over unto such heir or heirs at law, but if there be no such person entitled, authorized and empowered by the laws of said State to take, have and hold and own title to real property at said time, then said property so held in trust to said time shall thereupon be sold and converted into money, and said money thereupon distributed and delivered over to such person or persons as the said trustee shall then ascertain to the satisfaction of such trustee is the heir, or are the heirs at law of the last survivor of said beneficiaries according to the law of succession at said time; and the decision of said trustee as to such heirs and as to such distribution shall be final;

13. In the event that either the said Akiyo Sumida, Natsuko Sumida or Sumiko Sumida should become the trustee of this trust as the successor of, or in the place of, the said second party, and she should die while acting as such trustee, and before the final determination of this trust, and before any other of said four hereinabove named beneficiaries now living has reached her or his majority then the said second party shall again act and perform the duties of such trustee until the survivors of said four beneficiaries now living (if there then be such) shall reach the age of majority, and be qualified to act as such trustee of this trust, or until the final determination of this trust; and if, at any time through the resignation or death of a trustee, or of the inability or refusal of any party named herein as trustee to act as such, and there be no person or party herein named provided for to act as such trustee, then the said first party or in the event he be not living, then the court having jurisdiction thereof, may select and designate a person to act as such trustee, and such person so selected and designated shall act as such trustee with full power and authority in the premises, and in the manner herein set forth.

14. This grant and conveyance is made subject to the terms and conditions of said contract of sale, also to a lease of said property made by the said first parties, as lessors, with H. Sumida, as lessee, and recorded on the 27th day of July, 1919, in volume F of Leases at page 211, in the office of the county recorder of the said County of Tulare, and the lien of a mortgage made on certain crops growing and to be grown on said premises and made to the vendor of said contract of sale; and subject to the lien of the indebtedness secured and to be secured thereby, and also subject to the taxes and assessments on said premises for the year 1920.

15. Said second party, and its successors, are and each thereof, is, hereby authorized and empowered to execute all claims, contracts, leases, deeds, grants, conveyances, mortgages, deeds of trust and other instruments and documents that may be necessary or essential to comply with the terms of said contract of sale and carry into effect the purposes of the trust herein provided for.

16. In accepting this trust, the said second party assumes no individual

or personal liability or responsibility for the performance of the terms and conditions of said contract of sale, nor any liability or responsibility for the legality or validity of this instrument, nor does it assume any liability or responsibility for providing, or undertake or agree to provide, funds for completing any payments required to be made under the terms of said contract of sale, or other indebtedness against said property, or amounts required to be paid on and about the management of said property, nor any liability therein other than as and to the extent that it may receive or have from the income and profits and proceeds of said property, or any party thereof, funds which in its judgment are properly available for such payments, nor does the said second party assume any liability or responsibility whatsoever except for the due performance of the obligations expressly imposed and conferred upon it by the terms hereof.

17. No bond or undertaking to the beneficiaries is or shall be required to be given by any of the parties who are specifically named and designated as or for a trustee herein, for the faithful performance of the duties of the trust hereby reposed.

18. If any of the foregoing paragraphs, or any subdivision or provision thereof, shall in any action or proceedings be held invalid, such determination shall not affect the remaining portion, or any other provision of this instrument; and the said first parties hereby declare that they would have executed this instrument and would have set forth each of said paragraphs, subdivisions and provisions irrespective of the others, and irrespective of the fact that one or more of said paragraphs, subdivisions may be declared illegal or void.

STATE OF CALIFORNIA, Plaintiff, vs. K. SUMIDA, L. C. HYDE, J. D. MARTIN, JOHN DOE, JANE DOE, RICHARD ROE and ALLEN POE, and AKIYO SUMIDA (also known as MAMIE SUMIDA), Defendants.

IN THE CALIFORNIA SUPERIOR COURT.
No. 12304.

2. K. SUMIDA CASE.
COMPLAINT.

Now comes the plaintiff, State of California, and for cause of action against the above-named defendants alleges:

I.

That during all the times mentioned in this complaint the defendant K. Sumida was, and he now is, a Japanese person, a native citizen and subject of the Empire of Japan, and was and is not eligible to citizenship under the laws of the United States.

II.

That at no time mentioned in this complaint was there, nor is there now, any treaty existing between the Government of the United States and the Government of Japan, under which a native-born Japanese citizen and subject of the Empire of Japan could acquire, possess, enjoy, or transfer real property, or any interest therein, in the State of California, or elsewhere in the United States.

III.

That U. S. Webb is the duly elected, qualified and acting attorney-general of the State of California and has been informed that the property hereinafter described has escheated to the State of California, through and by reason of the facts in this complaint alleged.

IV.

That on and prior to the 8th day of June, 1916, C. A. Bisher was the owner in fee, in the possession, and entitled to the possession of all that certain real property situate in the City of Visalia, County of Tulare, State of California, particularly described as follows, to-wit:

All of lots one (1) and eight (8) and the east twenty-four (24) feet of lots two (2) and seven (7) in block twenty-six (26) of the City of Visalia, except a strip off of the west side of east twenty-four feet of said lot seven (7), said strip being fourteen (14) inches wide on Main Street and eighteen (18) inches wide in the alley which runs through said block twenty-six (26), which said strip was heretofore conveyed by Chas. A. Bisher to R. E. Hyde, by deed dated March 27, 1915, and recorded in the office of the county recorder of said County of Tulare, in book 238 of Deeds, page 160, said descriptions being according to the official map of said City of Visalia, on file and of record in the office of the said county recorder of the County of Tulare.

V.

That on the 8th day of June, 1916, said C. A. Bisher, and Sarah Ida Bisher, his wife, sold and conveyed by deed all of the above-described real property to L. C. Hyde, defendant herein, which said deed was recorded on the 27th day of June, 1916, at page 203 in book 239 of Deeds, Tulare County Records.

VI.

That plaintiff is informed and believes, and on such information and belief alleges that defendant K. Sumida furnished from his own means all the consideration which was paid to, or received by said C. A. Bisher and Sarah Ida Bisher, his wife, as purchase price for the said real property, and that all the title and interest in said real property acquired by virtue of such deed was so acquired by and for said defendant K. Sumida, and that defendant L. C. Hyde was and is acting as the agent, representative or trustee of defendant K. Sumida in acquiring and holding said real property, and for the sole benefit of the said K. Sumida and not otherwise.

VII.

That plaintiff is informed and believes, and upon such information and belief alleges that defendant L. C. Hyde paid no part of the purchase price of the said property and acquired no interest therein except as the agent, representative or trustee of defendant K. Sumida, and that defendant L. C. Hyde became a party to said transaction and has acted thereunder for the sole purpose of enabling defendant K. Sumida to gain an interest in and title to the said property, in violation of the provisions of an act of the legislature of the State of California, entitled, "An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, and repealing all acts or parts of acts inconsistent or in conflict herewith" (approved May 19, 1913), and found in the Statutes of 1913, at pages 206, 207 and 208 thereof, and that defendant K. Sumida is the actual owner of all the interest in said real property held and acquired by defendant L. C. Hyde pursuant to said deed.

VIII.

That plaintiff is informed and believes that the interest in said real property so held and acquired by said L. C. Hyde is the title in fee thereto and is of a value in excess of thirty-five thousand dollars (\$35,000.00).

IX.

That on or about the 8th day of June, 1916, B. B. Dudley was the owner in fee, in the possession, and entitled to the possession of all that certain real property situate in the City of Visalia, County of Tulare, State of California, particularly described as follows, to-wit:

An undivided one-half interest in and to the west forty-two (42) feet of lot numbered two (2) and all of lots numbered three (3) and four (4) in block numbered twenty-six (26) according to the official map of said City of Visalia on file and of record in the office of the county recorder of the said County of Tulare.

X.

That on or about the 8th day of June, 1916, said B. B. Dudley sold and conveyed by deed all the last above-described real property, and plaintiff is informed and believes, and on such information and belief alleges that said B. B. Dudley so sold and conveyed the same to L. C. Hyde, defendant herein.

XI.

That plaintiff is informed and believes, and on such information and belief alleges that defendant K. Sumida furnished from his own means all the consideration which was paid to, or received by said B. B. Dudley as purchase price for the said real property, and that all the title and interest in said real property acquired by virtue of such deed, was so acquired by and for said defendant K. Sumida, and that defendant L. C. Hyde was and is acting as the agent, representative or trustee of defendant K. Sumida in acquiring and holding said real property, and for the sole benefit of said K. Sumida and not otherwise.

XII.

That plaintiff is informed and believes and upon such information and belief alleges that the defendant L. C. Hyde paid no part of the purchase price of the said last above described real property and acquired no interest therein except as the agent, representative or trustee of defendants K. Sumida, and that defendant L. C. Hyde became a party to said transaction and has acted thereunder for the sole purpose of enabling defendant K. Sumida to gain an interest in and title to the said real property, in violation of the provisions of an act of the legislature of the State of California, entitled "An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, and repealing all acts or parts of acts inconsistent or in conflict herewith" (approved May 19, 1913), and found in the Statutes of 1913, at pages 206, 207 and 208 thereof, and that defendant K. Sumida is the actual owner of all the interest in said real property held and acquired by defendant L. C. Hyde pursuant to said last-mentioned deed.

XIII.

That plaintiff is informed and believes, and upon such information and belief alleges that the interest in said real property last above described so held and acquired by said L. C. Hyde is the title in fee thereto and is of a value in excess of \$12,500.00.

XIV.

That by reason of the facts herein before alleged all of the said real property in this complaint described has escheated to the plaintiff.

XV.

That the names of the defendants John Doe, Jane Doe, Richard Roe and Allen Poe are fictitious, and plaintiff asks that upon discovery of their true names that such true names be inserted to the same effect as if written herein.

XVI.

That each of the defendants named herein claim some interest or estate in and to the said real property in this complaint described, and that the claim of each of said defendants is without right, and that neither of said defendants have any estate or interest in or to said real property.

Wherefore plaintiff prays that it be adjudged and decreed:

1. That all the interest in and to the said real property passing unto the said defendant K. Sumida under and by virtue of said deeds, has escheated to the State of California.

2. That a receiver be appointed to take charge of and receive the rents, issues and profits of said property pending this action.

3. That neither of said defendants has any right, title, estate or interest in or to said real property or any part thereof.

4. That plaintiff have and recover its cost herein.

5. That plaintiff have such other and further relief as the facts may warrant.

U. S. WEBB,

Attorney-General of the State of California.

3. NOTE.

The complaint in this case alleges that certain land was transferred July 21, 1919, from the Elba Land Co. to J. E. Goree, and that the purchase price was furnished by H. Sumida, and therefore that Goree held the land in trust for Sumida. It is further alleged that on April 21, 1920, the land was transferred to the Bank and Trust Company of Central California to be held in trust for Sumida's children. It is declared that the real interest in the land is in Sumida, and that this is contrary to the provisions of the Alien Land Law of 1913. The state asks for an escheat.

A second complaint alleges that the land was transferred from C. A. Bisher to L. C. Hyde on or about June 27, 1916, and that the purchase price was furnished by K. Sumida, and therefore that the land was held in trust for K. Sumida. It is alleged that this is a violation of the Alien Land Law of 1913, and the state asks for an escheat.

No further court action was taken in these two cases due to the fact that a disposal was made of the land in question. The state consented to this settlement of the matter.

CHAPTER XI.--U. N. FARM CASE.

STATE OF CALIFORNIA, Plaintiff, vs. U. N. FARM COMPANY, a Corporation, Defendant.

IN THE CALIFORNIA SUPERIOR COURT.

1. COMPLAINT.

Now comes the State of California, the plaintiff above named, and complains of the above-named defendant and for cause of action alleges:

I.

That on the 13th day of October, 1920, there was filed in the office of the county clerk of the County of Placer, State of California, certain articles of incorporation of which the following is a true copy:

"ARTICLES OF INCORPORATION OF THE U. N. FARM COMPANY.

Know all men by these presents: That we, the undersigned, a majority of whom are residents of the State of California, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California.

And we hereby certify,

First. That the name of said corporation shall be *U. N. Farm Company*.

Second. That the purposes for which it is formed are:

(a) To engage in the business of buying and selling fruits and vegetables and farm products of every kind and character. To engage in the cultivation, planting and production of fruits, vegetables and all kinds of agricultural, viticultural and horticultural products. To prepare and manufacture fruit and vegetable products, and kindred goods of every class and description; to build, construct, or otherwise acquire, maintain and operate canneries, and driers of all kinds and character.

(b) To acquire, buy, purchase, lease, own, hold, sell, convey, mortgage or encumber, both improved or unimproved real estate wherever situated.

(c) To own, lease and operate farm lands.

(d) To engage in the business of farming.

(e) To acquire and deal in stocks, bonds, securities, evidences of debt, choses in action, privileges, patents, licenses and every estate, right, title, interest, and appurtenance in, to or concerning real or personal property, chattels and chattels real, of every name and nature, legal or equitable, and to have and to hold, use and enjoy, manage, control, grant, sell, assign, transfer and convey, lease, encumber by mortgage, pledge, deed of trust or otherwise dispose of or burden the same and every or any part thereof or interest therein.

(f) To subscribe and contract for, buy or otherwise acquire, hold, operate, sell, assign, mortgage, pledge, exchange, deal in or with, or otherwise dispose of stocks, bonds, securities, and shares in the capital stock of any corporation whatever, and to exercise, in reference to such stocks or securities of other corporations, all of the rights, powers and privileges, including the right to vote thereon, which natural persons, being the owners of such stock or securities, might, could or would exercise.

(g) To purchase, hold, pledge and re-issue the shares of the capital stock of this company.

(h) To issue bonds secured by mortgage or mortgages or trust deeds upon the property of this company.

(i) To produce, purchase, sell, import, export and generally deal in milk, butter, cheese and dairy products of all kinds and character; to sterilize, condense, preserve, and certify milk; to engage in poultry raising; to breed, raise, buy, sell, export, import and deal in cattle, sheep, horses and live stock of all kinds.

(j) To engage in the cultivation of rice; to manufacture, buy, sell, export, import and generally deal in rice and products of all kinds manufactured from rice, grain or cereals.

(k) To deal in and with and dispose of any and all kinds of property, and engage in any and all lawful business, which may be or become necessary, useful, convenient, auxiliary or appurtenant to any of the main or principal purposes of this corporation or to be deemed advisable by its board of directors.

Third. That the place where the principal business of said corporation is to be transacted is in the town of Loomis, Placer county, State of California.

Fourth. That the term for which said corporation is to exist is fifty (50) years from and after the date of its incorporation.

Fifth. That the number of directors or trustees of said corporation shall be three (3) and that the names and residences of the directors or trustees who are appointed for the first year and to serve until the election and qualification of such officers are as follows, to-wit:

NAMES.	WHOSE RESIDENCES ARE AT
Tsunesuke Uyeda	Loomis, California
Ichino Nakano	Loomis, California
Carl K. Nakano.....	Loomis, California

Sixth. That the amount of the capital stock of said corporation is twenty-five thousand (\$25,000) dollars, and the number of shares into which it is divided is two hundred and fifty (250) shares of the par value of one hundred (\$100.00) dollars each.

Seventh. That the amount of said capital stock which has been actually subscribed is three hundred (\$300.00) dollars, and the following are the names of the persons by whom the same has been subscribed, to-wit:

NAMES OF SUBSCRIBERS.	NO. OF SHARES.	AMOUNT.
Tsunesuke Uyeda	1	\$100.00
Ichino Nakano	1	100.00
Carl K. Nakano.....	1	100.00

In witness whereof, we have hereunto set our hands and seals this 9th day of October, 1920.

TSUNESUKE UYEDA.
 ICHINO NAKANO.
 CARL K. NAKANO.

State of California, County of Placer—ss:

On this 9th day of October, 1920, before me, S. L. Henry, a notary public in and for the County of Placer, residing therein, duly commissioned and sworn, personally appeared Tsunesuke Uyeda, Ichino Nakano, Carl K. Nakano, known to me to be the persons whose names are subscribed to the foregoing instrument, and they duly acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official

seal, at my office in said county, the day and year in this certificate last above written.

(Seal)

S. L. HENRY,

Notary Public in and for the County of Placer, State of California.

II.

That on the 15th day of October, 1920, a certified copy of said articles of incorporation, duly certified under the hand of the county clerk and ex-officio clerk of the superior court of the county of Placer, and the seal of said court, on the 13th day of October, 1920, was filed in the office of the secretary of state of the State of California, and on the 10th day of November, 1920, a certified copy of the copy of the original articles of incorporation of said U. N. Farm Company, duly certified under the hand of the said secretary of state of the State of California, and under the seal of said state, was filed in the office of the county clerk of the county of Sutter, State of California, and at all times since the 15th day of October, 1920, said U. N. Farm Company has been and now is a corporation, duly formed and organized under the laws of the State of California.

III.

That on the first day of November, 1920, one E. B. McCormick and Florence G. McCormick, his wife, who, on said date were the owners in fee, of the lands and premises described in the deed in this paragraph set forth, made and executed a deed to said defendant corporation of said lands and premises which said deed was and is in the following words and figures, to-wit:

"I (or we) E. B. McCormick & Florence G. McCormick, his wife, herein called the grantors, hereby grant to U. N. Farm Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, herein called the grantee, all that real property situate in the county of Sutter, State of California, described as follows:

Lots four (4) and five (5) of subdivision "D" of the Gledhill Colony as said lots are laid down, numbered and designated upon a map entitled "Plat of Subdivision D, Gledhill Colony," filed in the office of the county recorder in and for the County of Sutter, State of California, and recorded in Book No. 3 of Surveys, at page 9.

"Also, a part of lot 7 of said subdivision "D," Gledhill Colony, described as follows: Beginning at the southeast corner of lot 4 of said subdivision "D" of said colony; and run thence south at a right angle 130 feet; thence east at a right angle 330 feet; thence north at a right angle 130 feet to the south line of lot 5 of the subdivision aforesaid, and thence west on the south line of said lot 5, 330 feet to the point of beginning.

"To have and to hold the same together with the appurtenances unto the grantee, its heirs or assigns forever.

"In witness whereof, the said grantors have executed these presents this 1st day of November, 1920.

"E. B. McCORMICK,

"FLORENCE G. McCORMICK.

"(\$15.50 Rev. Stamps cancelled)."

"State of California, City and County of San Francisco, ss:

"On the first day of November, in the year of our Lord, one thousand nine hundred and twenty, before me, Nettie Hamilton, a notary public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared E. B. McCormick and Florence G. McCormick, his wife, known to me to be the persons de-

scribed in and whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in said City and County of San Francisco, the day and year in this certificate first above written.

“(Seal)”

“NETTIE HAMILTON,
“Notary public in and for said City and County
of San Francisco, State of California.”

That thereafter, and between the first day of November, 1920, and the 20th day of the same month, the exact date being unknown to plaintiff, the said deed was delivered by said E. B. McCormick and Florence G. McCormick, his wife, to the defendant herein, and on the 20th day of November, 1920, the same was recorded in the office of the recorder of the County of Sutter, State of California, in Book 71 of Deeds, at page 200.

That by the execution and delivery of said deed to said defendant as above alleged, the said defendant became the purchaser and owner of said real property described in said deed, and said defendant is now the owner of the same.

That the purchase price paid by said defendant to said E. B. McCormick and Florence G. McCormick, the grantors named in said deed, was the sum of fifteen thousand five hundred dollars, and plaintiff alleges said sum to be the actual value of said property.

IV.

That at the time of the execution and delivery of said deed and of the purchase of the lands therein described as hereinbefore alleged, as plaintiff is informed and believes, and upon said information and belief alleges, there had been issued two hundred and fifty shares and no more of the capital stock of said defendant corporation, and said capital stock was issued to and ever since the date of the issuance of the same, the same has been owned by the following named parties, and in the following proportions, to-wit:

To Albert H. Elliott and Guy C. Calden, as trustees for Chezuye Uyeda, Mitsuye Uyeda and Tsutomu Uyeda, there were issued one hundred and fifty shares of said capital stock;

To Carl K. Nakano, there were issued thirty-three shares of said capital stock;

To Tomeno Nakano, there were issued thirty shares of said capital stock;

To Ichino Nakano, there were issued thirty shares of said capital stock;

To Tsunesuke Uyeda, there were issued five shares of said capital stock;
and

To Kiyo Uyeda, there were issued two shares of said capital stock.

V.

That during all the times in this complaint mentioned as plaintiff is informed and believes and upon such information and belief, alleges, the said Shezuye Uyeda, Mitsuye Uyeda, Tsutomu Uyeda, Carl K. Nakano, Tomeno Nakano, Ichino Nakano, Tsunesuke Uyeda and Kiyo Uyeda, the owners of the entire issued capital stock of said defendant corporation, and each of them was and each of them is now an alien and subjects of the Emperor of Japan, and the entire membership of said corporation and the entire issued capital stock of said defendant corporation is owned by such aliens, and no one of said aliens is, and no one of said aliens is eligible to become, a citizen of the United States under the laws thereof.

VI.

That at no time in this complaint mentioned have said Albert H. Elliott and Guy C. Calden, or either of them, as plaintiff is informed and believes and upon such information and belief alleges, been members of said defendant corporation, nor have they or either of them ever owned any of the capital stock of said corporation.

This plaintiff further alleges upon information and belief, that said Shezuye Uyeda, Mitsuye Uyeda and Tsutomu Uyeda, and each of them, during all the times mentioned in this complaint, have no money or property and that the entire consideration paid to said defendant corporation for the issuance of the one hundred and fifty shares of its capital stock to said Albert H. Elliott and Guy C. Calden, as trustees of said parties, was paid by other persons who were and are ineligible to citizenship under the laws of the United States and with and for the express purpose of defeating and violating the provisions of an act of the legislature of the State of California, entitled "An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, and repealing all acts or parts of acts inconsistent or in conflict herewith" (approved May 19, 1913).

VII.

That at no time mentioned in this complaint was there, nor is there now, any treaty existing between the Government of the United States and the Government of Japan, under which a corporation organized under the laws of this or any other state, or nation of which a majority of the members are citizens or subjects of the Emperor of Japan or in which a majority of the issued capital stock is owned by citizens or subjects of the Emperor of Japan, can acquire, possess, enjoy or transfer real property, or any interest therein, in the State of California or elsewhere in the United States.

VIII.

That U. S. Webb is the duly elected, qualified and acting attorney-general of the State of California, and has been informed that the property herein-after described has escheated to the State of California, through and by reason of the facts in this complaint alleged.

IX.

That by reason of the facts hereinbefore alleged all said real property in this complaint described has escheated to the plaintiff.

X.

That defendant herein claims some interest or estate in and to the said real property in this complaint described and that the claim of said defendant is without right, and that said defendant has no estate or interest in said real property or any part thereof.

Wherefore, plaintiff prays that it be adjudged and decreed:

1. That said property described in said complaint and the whole thereof has escheated to and has become the property of the State of California, and that the State of California is the owner and entitled to the possession thereof.

2. That a receiver be appointed to take charge of and receive the rents, issues and profits of said property pending this action.

3. That said property be ordered sold in conformity with the provisions of title VIII, part III, of the Code of Civil Procedure of the State of California.

4. That said defendant has no right, title or interest in or to said property or any part thereof.
5. That plaintiff have and recover its costs herein.
6. That plaintiff have such other and further relief as the facts may warrant.

U. S. WEBB,

Attorney-General of the State of California, Attorney for Plaintiff.

A. H. HEWITT, of Counsel.

Note.—No further court action was taken.

CHAPTER XII.—J. SHINGU CASE (ESCHEAT CASE).
THE STATE OF CALIFORNIA, Plaintiff, vs. JUSUKE SHINGU, SUMIYE
SHINGU, Defendants.

IN THE CALIFORNIA SUPERIOR COURT.

1. DEFENDANTS' BRIEF.

This action was brought for the purpose of escheating certain lands situated in Sutter County on the ground that it was taken and held in violation of the Alien Land Law of 1913.

The statement of facts found in plaintiff's brief make it unnecessary to repeat the historical facts of the case.

There are, however, certain statements in plaintiff's brief which are nothing more than conclusions and of course cannot be considered statement of facts. Some propositions of law are also advanced which are foreign to the issues, therefore we do not think it necessary to make reply.

The evidence of the plaintiff is simply an attempt to show the alleged conduct of the father in engaging certain necessary work to be done about the property in order to make it liveable and productive.

It is now claimed that because the father did these things fraud has been shown. But are these acts not also consistent with a showing of good faith?

Someone had to carry on this work. Someone had to make contracts. The children could not. The parent, the natural guardian was the only person who could or would undertake this work.

The burden of proof is upon plaintiff. If it is not a violation for an alien father to give his American-born children an advancement such as in this case, then it certainly is not a violation for him to make his property livable and productive.

The evidence before this court is far from sufficient to show fraud or even lack of good faith. No case has been cited which holds that it is unlawful for an alien father to give his American born child a gift of real property.

We also have been unable to find any case which even hints that way. We can therefore assume that there is no such authority.

If there were any doubt at the time plaintiff closed its case, the testimony on part of the defendant surely dispelled that doubt.

It was not circumstantial but positive and to the very point. Mr. Douglas, one of the grantors, a kindly old gentleman was called by the defense.

His frankness, his manner on the stand, his fairness all bespoke nothing but the truth. Why should a man of his standing in the community speak anything but the truth. His testimony was corroborated by Mrs. Douglas in so far as she testified. Could anyone accuse her of deliberately perverting?

Mrs. Douglas tells us that while the negotiations were in progress, the passing of the deed was held up because the second child had not yet

been born. That the father was buying the property for both of his children. That shortly after the birth of the second child the deed was delivered.

Mr. Douglas further tells us that in order to make sure that the transaction was legal and proper, he sought advice of his legal adviser, Mr. Hewitt. Mr. Hewitt told him that it was proper for him to deed this property in question to the children.

Do not the facts corroborate Mr. Douglas in this particular? It will be recalled that the transaction was consummated in Mr. Hewitt's office. If the transaction had not been proper, surely Mr. Hewitt would not have approved. That he did approve is evident from the fact that the transaction was closed under his guidance.

The father testified positively that the property was bought for his children. The deed, itself is mute evidence of the fact and is entitled to much weight. It cannot be lightly considered. These are the salient facts which stand out in the record.

In passing, we cannot help but to remark that if there had been any studied attempt to defeat the law, the father would not have held himself out to the public as the owner of the property.

Would it not have been more likely, if the intent to defraud had been present, for him to have represented to the world that his children were the owners of the property? This circumstance should carry much weight.

It is alleged in said complaint that the said minors "hold the legal title thereof in trust for the defendant Jusuke Shingu." If it be contended that the children hold this property in trust because the parent paid the consideration, under section 853 Civil Code, then there are two answers thereto (1) That it was impossible for the minor trustee to consent to act as such trustee. (Sections 33 and 34 C. C.) (2) That this section does not apply to transactions between the parent and children.

In *Hamilton vs. Hubbard*, 134 Cal. 605, it is said, "but this presumption arises only in transactions between 'strangers to each other', and is not indulged where the conveyance to 'the wife or child of other persons for whom (the person paying the consideration) is under some natural, moral or legal obligation to provide. In such cases the presumption is, that the purchase and conveyance were intended to be an advancement for the nominal purchaser.'"

A trust relation is a matter of contract. How can it be claimed that these minors had entered into a contract of this character for the purpose of evading the law? If this had been the parent's intention, he is the one who would suffer because even though he paid the consideration he could not divest the title held by the minors. (20 Cyc. 615; *Montgomery vs. Hunt*, 1 Cal. 366; *Bickerstaff vs. Doub*, 19 Cal. 109; *Good vs. Morilton*, 67 Cal. 536.)

The deed from the grantor to the minor grantee passed an absolute title. There is no authority that we know of which would permit the plaintiff, particularly in this form of action, to inquire beyond the deed in question. The general rule seems to be, that this cannot be done. *Swain vs. Duane*, 48 Cal. 359-360; *Shannahan vs. Crampton*, 92. Cal. 9-13.)

Where an attempt is made to set aside a transfer, it is incumbent upon the plaintiff to show that he is a creditor otherwise the transfer is binding upon the whole world.

In 18 Corpus Juris, page 244, sec. 180, it is said: "If a deed is made by one seized in fee and having a perfect right to convey, other persons cannot question its efficacy in giving the title to the grantee, except upon

the ground that they are creditors of, or *bona fide* purchasers from the grantor, or are holders under such purchasers or have authority from them."

Whatever may have been the intention of the parent in this case such intentions cannot prejudice the rights of the minor grantees. Since the title has vested in the minor grantees by virtue of the deed there is no one that can divest that title save and except in the one case where it is shown that the conveyance was made for the purpose of defrauding the creditors.

We do not quite understand the reasoning of plaintiff in discussing sections 33 and 34 of the Civil Code. These sections have no application to this case. The father paid the consideration for this property which was made a gift to the children.

There is no question of an express contract under these circumstances. The consent is implied by law.

In 22 Cyc. 530 it is said: "In case of a gift to an infant no formal acceptance is necessary, but if the gift is for his advantage the law accepts it for him and will hold the donor bound, while if the gift is not for the infant's advantage the law will repudiate at his instance." See, also, *Lackman vs. Wood*, 25 Cal. 147-151; *Devillian vs. Evand*, 39 Cal. 120; *Jennings vs. Jennings*, 104 Cal. 150-154.

There are certain legal conclusions which follow as a matter of law from the passing of the deed in question. One is that the grant presume to pass a fee simple title from the grantors to the grantees. The complaint alleges that the grantors held the title fee and consequently having made, executed and delivered the deed a fee simple title passed on to the minors. (Section 105, C. C.; *Klumpke vs. Baker*, 68 Cal. 561; *Van Slyke vs. Arrow, etc., Co.*, 155 Cal. 675-679; *S. P. R. R. vs. Hamilton*, 161 Cal. 616.)

If it be contended that the deed in question is void, it necessarily follows that the title is still in the grantors and therefore no occasion to bring suit. In the case of *Risford vs. Ziegler*, 150 Cal. 436, it is held that a deed of conveyance is void unless the grantee is capable of taking the property named in the deed, and that to make a deed effective the grantee must be a person, either natural or artificial, capable of taking and holding the property.

In construing the act in question it must be strictly construed. (*Mulligan vs. Smith*, 59 Cal. 229; *Lake County vs. Sulphur Co.*, 66 Cal. 17.)

Reference is made to the testimony taken in the guardianship proceedings but the conclusions found in the plaintiff's brief of that testimony is not borne out by the records. Of course the attempt is made to show that the father was buying the property for himself and that because he was a Japanese he did not take the title in his own name. Aside from the fact that the deed introduced into evidence was *prima facie* showing that the minors owned the property in question, aside from the fact that the court could not try title to the property in the guardianship proceedings, the record does not bear out the conclusions of the plaintiff.

We do not believe that the true purport of the questions were understood by the witness at the time they were asked, and at that time no explanation was sought from him as to the true state of facts.

His explanations in this trial of that testimony showed that he did not understand the questions. He testified positively that he bought the land for his children.

Whatever may have been his intentions in the matter, he cannot set aside the effect of the transaction.

The title became vested in the children, not in him.

The state had to prove title in him, but the introduction of the deed proved title in the children and hence it has proven itself out of court.

Any reasonable construction of that testimony would not lead to the conclusion claimed by the state.

In *People vs. Stockton Savings & Loan Society*, 133 Cal. 611, it is said: "Escheat and forfeiture are not favored by law and the remedy of escheats does not exist in the absence of an expressed provision therefor."

Plaintiff refers to the case of *Longworth vs. Close*, 1 McLean 282, 15 Fed. Cas. 839, in support of its contention, but it will be found that even this case recognizes the propositions we contend for. This case arose between the assignees of the son, David B. Close and the widow of the father, David Close. In order to understand this decision or any other decision it is necessary that the law of the case be construed with the facts of the case. The statement of the facts found in the plaintiff's brief does not show the true situation nor does the quotation from the case give a correct understanding of the law of the case. Hence we make a further statement and quotations from the case. It might be here stated that the portion of the opinion quoted by plaintiff was unnecessary to the decision of the case.

It appears that one Kemper made a deed to David B. Close, the son of David Close, at the latter's request on the 27th day of March, 1809, and acknowledged on that day, but this deed was not recorded until the 11th day of May, 1835, a period of twenty-six years later. At the time of the making of this deed David B. Close resided in the State of Connecticut, while the land in question was situated in the State of Ohio, at which place the father David Close resided. David B. Close, the son, was at that time somewhere between the age of 1 and 3 years.

"The defendants gave in evidence a deed from the said Elanthan Kemper to David Close, the father of David B. Close, for the same land, dated September 29, 1821, and recorded the 3d of October following.

"The substance of the parol evidence as testified by Samuel Jelly and John Craft, is that David Close, the father, was residing on the land, and had made some improvement, when the witness Jelly first came to the country in 1812. That he stated to the witnesses at different times, that he had purchased the land of Kemper, with his own money, and for his own use in 1809, but took a deed in the name of his son, David B. Close, who at that time was an infant residing in the State of Connecticut, that the reason he gave why he took the deed in his son's name was because that after the death of his first wife, he had married a woman in Pennsylvania, who had children by a former husband, that he had left his wife, and had come to this state, that he paid for the land with money or property he had obtained by his wife, and fearing his wife or her heirs might claim the land, he took the deed in his son's name. That he kept possession of the deed and never had it recorded. That after the death of his wife he delivered up the deed to Kemper in 1821, and took the deed from Kemper in his own name, giving Kemper a writing on the back of the deed thus given up, to indemnify him against the claim of D. B. Close.

"That David Close married a third wife, by whom he had children. That David B. Close lived with his father on the premises in 1818, that his father became displeased with him and sent him away. That David Close continued to reside on the premises and use them as his own until his death, which took place in 1832. That his wife and family still continued in possession.

"I presume this is the deed that was taken by David Close of Nathaniel

Kemper, in the name of David B. Close, and which David Close afterwards delivered up to Kemper with a writing on the back of it to indemnify Kemper against the claim of D. B. Close. That D. B. Close was then an infant in the State of Connecticut, and knew nothing of the transaction.

"If D. B. Close was in existence when the deed was executed, he had been of age more than five years before the deed was recorded; but the testimony will warrant the supposition that he was 2 or 3 years of age, at least, when the deed was executed—and that seven, eight or more years had passed after he was of age before the deed was recorded. These circumstances, taken in connection with the fact that the deed was not recorded until several years after the decease of David Close, and altogether they give this deed a more suspicious aspect than if the copy was before us without any explanatory circumstances.

"Here, then, is no evidence that D. B. Close knew of the existence of the deed until after the death of his father, twelve years after the deed has been given up, and another taken for the same land in his father's name.

(This quotation follows the quotation found in plaintiff's brief.)

"But the father having kept the first deed in his own power, in such a way, and for so long a time, that if his design was fraudulent, was well calculated to defeat that design, and then having taken a deed in his own name, it is not now with the son, after such a lapse of time, to urge this indefinite fraud of his father, in order to revive his own dormant title, and defeat the deed of his father, which had been on record thirteen or fourteen years before he set up his claim, and to disturb a possession which has been uninterrupted for more than five and twenty years.

"There can be but little doubt about the length of time of the father's possession. It is in proof that he was in possession, and had improved the premises in 1812. The presumption is, he took actual possession as soon as he made the purchase, in 1809. His possession continued until his death, since which time his widow and family had retained the possession, being nearly twenty-five years before this action was commenced.

"Whatever doubts may have existed as to the character of the possession of David Close, prior to the time he received the deed from Kemper in his own name, there can be no doubt, but that after he received that deed, and had it recorded, he held the possession, as in his own right, adversely to all the world."

It will be observed from the evidence in the case that the property was admittedly purchased by the father in the name of the son and that the real question was whether or not the deed to the son conveyed title to him under the circumstances and facts of the case.

There was no evidence which tended to show that the property was bought for or by the son. In fact, the son admitted to one witness that this and other land bought in his name by the father was paid for by the father. There was a total absence of any testimony which tended to prove what our relative position would have been in that case. If it is possible for the court to obtain the report of this case (for it is an old one), we would ask that the entire case be read.

The facts in this case are so radically different from the facts in the case at bar that there is no semblance between them. David Close, the father, never intended that property as an advancement to his son. There never was any delivery of the deed, either actual or constructive.

In the case at bar we have not only the deed itself delivered and recorded but positive and direct evidence that it was bought for the children.

In the suit to set aside a transfer on the ground of fraud of creditors, the reason for the rule can be readily seen. The donor in such case makes a gift of property which should be used to satisfy claims of his creditors. It is really property that belongs to creditors and hence it is no more than right that such property should be subjected to the claims of creditors. The state does not stand in the same position as a creditor.

No inquiry has been shut off as to the facts and circumstances in this case. We think the court was very fair and liberal in the matter of introduction of testimony and that a full opportunity was given to show fraud, if such existed.

Plaintiff admits that its evidence is circumstantial. Those circumstances are as much, if not more, in favor of fair dealing and good faith than bad faith. But aside from this the direct, positive and convincing evidence given in favor of the defense by witnesses whose testimony was unimpeached disproves what the plaintiff should have proven.

The burden of proof was upon plaintiff, but it did not prove that any trust relation existed; it did not prove that the defendant, Jusuke Shingu owned this land; it did not prove any fraud.

It certainly would be a grave situation if such a solemn transaction as the execution of a sealed document which had passed the scrutiny of able counsel, could be set aside upon circumstantial evidence of the character and effect found in this case, particularly in face of positive evidence to the contrary.

We submit that the plaintiff has failed to establish her case and that judgment should be rendered in favor of the defendant.

Respectfully submitted,

ROBT. H. SCHWAB,
Attorney for Defendants.

2. PLAINTIFF'S BRIEF.

This action was brought under the so-called Alien Land Law as adopted by the legislature of this state in 1913. That act prohibited the acquisition, possession, enjoyment, or transfer of real property or any interest therein by aliens ineligible to citizenship except in the manner and to the extent and for the purposes prescribed by treaty existing between the Government of the United States and the nation or country of which such alien is a citizen or a subject, permitting, however, leases for the duration of a period of three years.

The act provided for the escheat to the State of California of all lands or any interest therein transferred in violation of its terms, and for an action to be brought by the state to vest the title to such escheated lands or interest in the state. This is such action.

It seems advisable to give here a statement of the facts admitted and proven. It has been established in this case, either by admission of the pleadings or by proof at the trial, that defendant Jusuke Shingu is a native of Japan and as such ineligible to citizenship in the United States; that he is the father of the other two defendants, who were both born in California, Sumiye Shingu being something less than 4 years of age and Kiyoko Shingu having been born on the 6th day of April, 1919; that no guardian has ever been appointed of the estate of either of such minors.

It has been established that G. L. Douglas and Mary E. Douglas, his wife, were the owners of the property described in the complaint and on April 12, 1919, executed a conveyance of such property in which the two minor defendants were named as grantees, and that the names of such

grantees were so written in such conveyance at the instance of defendant Jusuke Shingu. It also has been established that the purchase price of the property was \$3,250 and that the whole thereof was paid by defendant Jusuke Shingu from his own means; that the negotiations for the purchase of such property was carried on between defendant Jusuke Shingu and the then owners, commencing some time prior to the 11th day of March, 1919, and that the first payment, being \$250, was made by defendant, Jusuke Shingu, on that date; that the deed conveying such property was executed by G. L. Douglas and Mary E. Douglas on April 12, 1919; that defendant, Jusuke Shingu, took actual possession of the property in question on the 11th day of March, 1919, purchased on that date a bill of lumber at Yuba City, had the same taken to the property in question and proceeded in the construction of a house on said premises; that he moved his family to said premises and established his home thereon on March 12, 1919, and has continued ever since to reside thereon; that continuously since defendant Jusuke Shingu has been in the actual occupancy, possession, enjoyment and control of such property, exercising full rights of dominion thereover in all respects and particulars as though he were the actual owner of such property.

It is shown that in 1920 such defendant purchased a pump and motor for irrigation purposes, had the same installed upon the premises in question and that the contract therefor was made by defendant in his own name; and in the same way such defendant ordered a concrete irrigation pipe system installed upon the place, entered into the contract therefor, signing such contract as the owner of such property; that the system was installed and paid for by such defendant, and in all negotiations such defendant dealt with the property as his own.

It was shown that the property was agricultural land situated about three miles west of Yuba City and was planted in part to orchard. At the trial defendant Jusuke Shingu testified that he bought the property, paid for it with his own money, but bought it for his two minor children. It was shown that one of such minor children was born after the negotiations and purchase of the property had been completed and after the first payment of \$250 had been made, and that the other of such minor children was less than two years old at the time of the purchase.

It was also shown that in a proceeding in the superior court in the County of Sutter, in which defendant Jusuke Shingu had made application to be appointed guardian of said two minor children on November 6, 1920, defendant Jusuke Shingu testified in such court and in such proceeding that the purchase of this property was made with his own money and that he did not take title in his own name because he was a Japanese and could not buy land.

Generally, the evidence showed that in all transactions leading up to the purchase of this property defendant Jusuke Shingu proceeded as though the purchase were being made for himself and that continuously since the said transaction was closed he has acted in every respect in relation to the property as though he were the actual owner thereof, entitled to exercise dominion thereover and to take unto himself the benefits thereof. His relation to the property and his manner of dealing with it have been in all respects consistent with his statement that he did not take the title in his own name because he was a Japanese and could not buy land.

Upon these facts plaintiff contends that the taking of title in the name of the minor defendants was a subterfuge, was and is a fraud upon the law and that the property has escheated as fully and as effectually as though the title in this instance had been taken in the name of Jusuke Shingu.

The action and the evidence in its development quite closely resemble a criminal prosecution. Every crime is a violation of law and every fraudulent act violates some provision of law. In both crime and fraud intent is generally present and usually quite difficult of positive proof, though in both cases courts are authorized to presume the intent from established facts. One committing a crime uses every precaution to conceal all evidence of his criminal act; one committing a fraud likewise uses every effort to conceal the evidence of his fraudulent act. In both crime and fraud not infrequently the plaintiff, because of defendant's success in concealing direct evidence of his acts and his intent, must to a large degree prove his case by circumstantial evidence. Here the facts show irresistibly that the entire transaction was with the intent to give to defendant Jusuke Shingu the possession, enjoyment and beneficial use of the property purchased and that the title was to be held by the minor children in trust. The negotiations for the property were had and concluded and the first payment thereof made while one of his children was yet unborn. He was not acting as the guardian of the estates of the children. The consideration was paid with his own money. At the time prior to the commencement of this action when the significance of his testimony was not so apparent he testified that the title was taken in the name of the children because he, being a Japanese, could not purchase land. At all times after the purchase of the land he dealt with the land as the owner, established his home upon it, farmed it, improved it and had without limitation the beneficial use and enjoyment thereof. No more complete case of fraudulent intent could be established in the absence of a confession by the defendant and in the presence of a confession defendant would not be defending. Plaintiff's case has here been established with that degree of certainty required in a criminal proceeding, though not here required. It might be well here to give attention to some features of the Alien Land Act with some of the objects sought to be accomplished by its enactment.

Prior to the adoption of this law aliens ineligible to citizenship could legally purchase agricultural lands. That act did not stop with the prohibition of the acquirement of the title. It prohibited likewise the possession and enjoyment of the property. It was the intention of the legislature to prevent lands passing into the ownership or the possession or the enjoyment of aliens who were ineligible to citizenship and to reserve such lands for the possession and enjoyment and beneficial use of American citizens or aliens who can become such.

If on such a record as is presented in this case the court should hold the transaction to be within the law, with approximately 100,000 Japanese in California at the present time, with their numbers rapidly increasing, the majority of whom are tilling the soil, it requires no proof to form a clear conception of the condition which will result within a generation if Japanese colonization shall be so permitted to go forward unchecked. If the stamp of judicial approval be placed upon a record of this character, the way will be made clear for the lands of California to be occupied and the fruits thereof to be taken by an alien race owing allegiatnce to another government, upholding another flag, worshipping another god and bearing arms when called upon to do so for another government.

Some of the reasons which underlie legislation of the character we are here considering were a few days ago aptly stated by the district court of the United States, Western District of Washington, Southern Division, Justices William B. Gilbert, Edward E. Cushman and Jeremiah Neterer sitting, and considering a law of the State of Washington closely modeled after the California act, as follows:

"If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a tower of Babel from which the tenants in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged."

We are not unmindful that parents, alien or citizen, may make gifts to their minor children, nor are we unconscious of the many laudatory things which may be said of such action, but before an action purporting to be a gift can be upheld by the courts it must appear that a gift was in deed and in law made. It must appear that it was free from fraud, that it was not in violation or evasion of a statute or intended to be such, and indeed the entire circumstances must be consistent with a *bona fide* effort to give the minor something and negative the idea that the form of gift was used to gain something for the donor.

When the law prohibits a transaction any proceeding which if carried out would effectually negative the prohibition is to be deemed fraudulent and void. The states having prohibited the acquisition of land by aliens ineligible to citizenship, and conveyance made in derogation of the statute is fraudulent and void. A conveyance to one who has no real interest in the land but who takes as grantee merely for the purpose of permitting the ineligible person to enjoy what he could not enjoy if he was himself the grantee is in derogation of the law and may be set aside as fraudulent and void. The fact that the nominal grantee is eligible does not foreclose inquiry as to the real interest of those concerned.

A conveyance for a consideration passing from grantor to grantee contemplates a contract which, if the contracting parties were an adult and a minor under eighteen, would be void under the laws of California. It is provided in sections 33 and 34 of the Civil Code of this state that a minor under the age of eighteen cannot make a contract relating to real property or any interest therein. A contract so attempted by such minor is void. It must therefore be conceded that if the grantees of the property here in question were in fact the contracting parties, the deed in question would have conveyed no title. In such case, however, there would have been no occasion for the intervention of the state as the minors would be citizens and if the deed was void title would have remained in the grantors. This, however, would not have accomplished what was desired by the father of these minors. It was necessary that a valid contract should be made to pass the title out of the grantors and this he attempted by being himself the other contracting party and by making his two minor children the beneficiaries of the contract as grantees. For this reason it will no doubt be contended that the provisions of sections 33 and 34 of the Civil Code do not apply as the contracting parties are the original owners and the alien father, and that the Alien Land Law has not been violated as there is no inhibition against the minor children of an ineligible alien being the beneficiaries of a contract by which there is conferred upon them the title to land. Furthermore, it will no doubt be said that the deed being to the minors, although a delivery will be required, such delivery may be made to a stranger for the minors and that the assent thereto of the minors will be assumed so as to render the deed effective in their favor. Many such cases may be found, but as was said by the supreme court of this state quoting with approval from a case decided in another jurisdiction:

"Of a large number of these cases it may be said of the deeds involved

in them, as was said in the opinion of the court in *Hulick vs. Scovil*, that 'they were voluntary deeds by parents settling property upon their minor children and the benignity of construction given to them, has originated to no inconsiderable extent in the favor with which transactions of that character when not in fraud of creditors are always viewed.' (4 Gilm. 178; *Hibberd vs. Smith*, 67 Cal. 547, 560.)

Here we have an intimation by the court that a presumption of delivery to and assent by the minor will not be indulged in if the transaction is in fraud of creditors, that is to say, one which the law denounces. Where there is no violation of laws effected or contemplated and a parent in good faith desires to benefit a child, the law in its willingness and desire to aid in the accomplishment of such a worthy object will presume a delivery to and assent by the minor, especially when the transaction is one which would ordinarily enure to the benefit of the minor. On the other hand, when by the transaction there is a positive violation of the law or the circumstances are such as to induce the belief that the transaction is colorable, no such presumption should be indulged in.

By analogy the same consideration should govern when a deed is made to minors under such circumstances as to raise a suspicion that the transaction was to circumvent the statute prohibiting the transfer of lands to ineligible aliens.

Thus, where a father, for the purpose of defrauding his creditors, purchased property and caused the same to be conveyed to a daughter, a court of equity at the suit of a judgment creditor declared the deed fraudulent and void. (*Lander vs. Beers*, 48 Cal. 546.)

In the case cited, while the daughter could legally be a grantee of the property, the father could not be such grantee without subjecting the property to the claims of his creditors, nor could he employ his own funds for a purchase in the name of the daughter and shut off an inquiry by a court of equity as to whether the whole transaction was not in fact colorable and the daughter but a means to secure to his own use and enjoyment the property in question.

So here assuming that the child of the ineligible alien might be legally a grantee of the property, the father could not be such grantee without thereby subjecting the property to the claims of the state as escheated property, nor will he be permitted to employ his own funds for a purchase in the name of the minor and thereby shut off an inquiry by a court of equity as to whether the whole transaction is not in fact colorable and the minor but a means to secure to the father's own use and enjoyment property of which he could not have the use and enjoyment without violating the law.

As in the case cited the Court found upon inquiring into the facts that the transaction was colorable and that the father was the sole person interested and in fact the real owner of the land, so here the facts show it was the intent of this transaction that the father was to be the real owner of this land and to have, as he has had, all the benefits from ownership thereof.

While it is true that in the present case, because of the age of the grantees, there could have been no agreement between the father and those grantees, yet the power of a court of equity to inquire into the facts and go behind the deed is not limited to cases where there has been such agreement or collusion between the one furnishing the funds and the one in whose name the deed is taken. There can be no question but that if this were a case where creditors of the father were seeking to reach the property thus conveyed to the minor children and the father had no

other property, a court of equity would on the facts here disclosed decree in favor of the creditors. In this proceeding the state should be accorded the same consideration as would the creditors in such other proceeding, except that here it is not necessary to show that the alien had no other property.

When one purchases land with his own money and takes the deed in the name of another, although the legal title stands in that other by virtue of the deed, equity will regard the grantee as taking the title in trust for the purchaser. On the other hand, if a parent purchases land and takes the deed in the name of a child, to whom no property has theretofore been given, the law presumes the transaction to be an advancement for the child and not a trust. But if thereafter the parent acts as proprietor of the land or does not commit any act that implies him to be the owner, such acts overcome such presumption of law.

These principles are well stated in a case where a father, one David Close, purchased some land of one Kemper, with his own money, but fearing that his wife or her heirs might claim the land he took the deed in the name of his infant son, David B. Close, who knew nothing of the transaction. The father kept possession of the deed and never had it recorded. Later he delivered up the deed to Kemper and took a deed from Kemper in his own name. The father from the time of the first deed continued to reside on the premises and use them as his own until his death. In answer to the claim that the son was the owner of the land, the court said:

"In the first place, David B. Close acquired no title by virtue of the deed from Kemper. Laying out of view the question of fraud, that I will presently look into, this position seems to be incontrovertible. When a man purchases lands with his own money, and takes the deed in the name of another, the general rule in the equity is, that the grantee takes the title in trust for the purchaser. (*Gascoigne vs. Thwing*, 1 Vern. 366; *Lloyd vs. Spillet*, 2 Atk. 148; *Smith vs. Baker*, 1 Atk. 385; *Walley vs. Walley*, 1 Vern. 484; 2 Fonbl. Eq. 117.) But if a father purchases and takes a deed in the name of his son, unadvanced, it is presumed to be an advancement for the son, and not a trust, except the father acts as proprietor, or does anything that implies him to be the owner of the land, this shall overrule the presumption of the law. (2 Fonbl. Eq. 121, 122; *Lloyd vs. Read*, 1 P. Wms. 608; *Finch vs. Finch*, 15 Ves. 43.) In this case the conduct of the father shows conclusively that he did not intend this land as an advancement for his son. He took possession of it, improved it, and used it as his own, and never recognized his son as having any interest in it. Holding up the deed, and not having it recorded, and afterwards delivering it up to the grantor and taking a deed in his own name.

"But it is contended that the son received the legal title to the land by virtue of the first deed from Kemper, of which he could not be divested by the act of the father. It is true, on general principles of law, that a title is not divested by the destruction of the deed that conveyed the title, and that a voluntary deed once perfected cannot be revoked at the pleasure of the maker; but these principles in their application are subject to various modifications, and are not conclusively applicable to any case, except the title is in all respects complete. In this case the title of the son was not complete. No man can make another a grantee, without his consent; and a deed though recorded is null and void if it is not afterwards accepted by the grantee. (*Harrison vs. Trustees of Phillips Academy*, 12 Mass. 456.)" *Longworth vs. Close*, 1 McLean 282, 15 Fed. Cas. 839.

Heretofore reference has been made to the application of Jusuke Shingu

in the superior court of the County of Sutter for letters of guardianship on the estates of these minor defendants. This application was heard by the Hon. K. S. Mahon, judge of such superior court, on November 6, 1920, and though no opposition was made the court, upon the testimony submitted in behalf of the application, denied the letters. The testimony of the applicant, Jusuke Shingu, who is a defendant here, in support of his application for letters of guardianship, was offered and admitted in this case. Judge Mahon held that the transaction vested no property interest in the children and that the deed was fraudulently taken in the children's name. In denying the application the judge expressed his views as follows:

"In my judgment the child has no property. It is a plain effort on the part of the father to evade the laws of the State of California, not to take the property in his own name, but to take the property in the name of his child—paying for it himself; and as he stated, he took it, not as a gift to the child, but because he himself was not able to take it in his own name on account of the laws of the State of California. And in that case the child is the trustee of the father. The father owns that property if he can own it, but in my judgment the State of California owns it, and an action ought to be commenced to have it escheat to the State of California. Neither the father nor the child own it."

All of the evidence before his Honor in the guardianship matter is in this record and the conclusion reached by Judge Mahon is amply supported by much evidence in this record, of which he did not have the benefit.

Respectfully submitted,

U. S. WEBB,

Attorney-General,

ARTHUR COATS,

District Attorney of Sutter County,

Attorneys for Plaintiff.

3. DECISION OF THE COURT.

The above-entitled action was commenced in the County of Sutter, that being the county in which the property involved is situated and in which the defendants reside. Said cause of action, upon motion, was duly ordered transferred to the County of Yuba for trial.

The defendants, Sumiye Shingu and Kiyoko Shingu, are minor children of Jusuke Shingu, and they appear represented by their guardian *ad litem*.

The suit is brought by the attorney-general of the State of California for the purpose of obtaining the decree of the court that the real property in the complaint described has escheated to the State of California, and that the said property be ordered sold in conformity with the provisions of title eight, part three, of the Code of Civil Procedure of the State of California, and the proceeds paid into the treasury of said state, and that plaintiff have and recover its costs herein.

The principal allegations of the complaint are that the defendant, Jusuke Shingu, was and now is a Japanese person, a native, citizen and subject of the Empire of Japan and not eligible to citizenship under the laws of the United States; that on and prior to the 12th day of April, 1919, one G. L. Douglas and Mary E. Douglas, his wife, were the owners in fee and in the possession and entitled to the possession of certain real property, it being agricultural land situated in the County of Sutter, State of California, and particularly described in the complaint; that on the 12th day of April, 1919, the said G. L. and Mary E. Douglas sold and conveyed by deed the said real property to Jusuke Shingu, and in the deed con-

veying said property, by direction of the defendant, Jusuke Shingu, the names of the defendants, Sumiye Shingu and Kiyoko Shingu, were written as grantees; that the purchase price was \$3500, paid by the defendant, Jusuke Shingu, to said Douglasses, and that by virtue of said deed, Jusuke Shingu became the owner of the described real property; that the sole purpose of Jusuke Shingu in having the names of the defendants, Sumiye Shingu and Kiyoko Shingu, his minor children, written in said deed as the grantees therein, was to violate and avoid the provisions of the act of the legislature of the State of California, entitled, "An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, and repealing all acts or parts of acts inconsistent or in conflict herewith" (approved May 19, 1913), and found in the Statutes of 1913, at pages 206, 207 and 209 thereof; that defendants Sumiye Shingu and Kiyoko Shingu, acquired, by virtue of said conveyance, no interest in said real property and hold the legal title thereto in trust for the defendant, Jusuke Shingu; that the value of said real property is in excess of \$3500; that the defendant, Jusuke Shingu, entered into the possession of said real property and continuously since the date of the execution of said deed has continued in the actual possession of said real property; and that by reason of the facts as alleged in said complaint the real property has escheated to the state.

The theory upon which the pleading is drawn is that an attempted fraud on the part of Jusuke Shingu was perpetrated for the sole purpose of evading the purpose and effect of the Alien Land Law as it stood in this state in 1913; that the effect of the transaction was that under section 853 of the Civil Code of California a resulting trust was created for the benefit of said Jusuke Shingu and the children merely held the paper title and had themselves acquired no real interest in the land, and the whole transaction being in derogation of the statute which forbids sales to and purchases of lands by aliens ineligible to citizenship was fraudulent to the extent of causing the real title to the land to escheat to the State of California, as provided by the terms of said Alien Land Law.

The answer of the defendants admits the details of the transaction as far as the payment of the money by Jusuke Shingu and the execution of the deed by the Douglasses are concerned, but alleges that the money was paid for and on behalf of the defendants, Sumiye Shingu and Kiyoko Shingu, the minor children of defendant, Jusuke Shingu, both of whom are alleged to be citizens of the United States, and so are entitled to acquire, possess, enjoy and transfer real property in the State of California or elsewhere in the United States; that the said minor citizens are now and during all the time since the 12th day of April, 1919, the owners of and entitled to the possession of said real property described in the complaint; and said defendants deny that by virtue of the deed referred to in the complaint or otherwise or at all defendant, Jusuke Shingu, became the owner of the real property described or that he is now the owner thereof or of any interest therein; the answer denies that the names of said minors were caused to be written in said or any deed as grantees therein for the sole or any purpose of violating or avoiding any provision of the act of the legislature of the State of California referred to in the complaint, or any law of the State of California, but on the contrary alleges that the sole purpose of writing in said names was to convey a title in fee to them as the grantees. It is denied that the said minor defendants did not acquire any interest in said real property and that they or either of them hold the legal title in trust for said defendant, Jusuke Shingu. It is further denied that

Jusuke Shingu entered into possession of said property or has been in actual possession thereof, except as natural guardian and parent of said minor defendants and for and on their behalf. It is denied generally that by reason of any facts alleged in the complaint there has been an escheat of said lands to the State of California.

Upon the trial of the case it was shown that the defendant, Jusuke Shingu, began negotiations with the Douglasses some time prior to the 11th day of March, 1919, and on that date made a payment of \$250; that the transaction, however, was completed on April 12, 1919, six days after the birth of the younger child, one of the two minor defendants, namely Kiyoko Shingu; that the defendant with his family actually went upon the property on or about the 11th day of March, and after buying a bill of lumber and other needed things in his own name, proceeded to construct a house on said premises, wherein he established his home, and wherein he has continued ever since to reside. Of course, the house, as soon as it was constructed, became a part of the realty. He also purchased in his own name a pump and motor for irrigation and installed them upon the premises in question; he also ordered installed an irrigation pipe system, signing the contracts for those purchases in his own name, and paying for them with his own money.

The defendant Jusuke Shingu testified that he bought the property for his two minor children, paying for it with his own money.

It was also shown, in a proceeding in the superior court of Sutter County, the defendant, Jusuke Shingu, had made application to be appointed guardian of his said two minor children on November 6, 1920, and it appeared that Jusuke Shingu had testified in support of his petition for said guardianship as follows:

"Q. By Mr. Crofton. Mr. Shingu, are you the father of Sumiye Shingu and Kiyoko Shingu? A. Yes, sir.

"Q. How old is Sumiye Shingu? A. Three years old.

"Q. How old is Kiyoko Shingu? A. Nineteen months old.

"The Court. The first one is three years old? A. Yes, sir.

"Q. And the next one is nineteen months? A. Yes, sir.

"Mr. Crofton. Where were they born? A. Sutter City.

"Q. In the State of California? A. Yes, sir.

"Q. Do these children own any real estate in the County of Sutter?

A. Well, I—

"The Court—(Interrupting) That is a conclusion.

"Mr. Crofton—We offer in evidence, if your Honor please, a deed from Mary E. Douglas and G. L. Douglas of Sutter County, to the two minors named. * * * The deed was admitted in evidence and it was shown that the property was orchard or farming land and that some orchard has been set out upon it after the transaction in question.

"Q. (By Mr. Crofton.) Are these children now in your custody and care and living with you. A. I don't understand that.

"Q. Where do your children live? A. Right at home, my children live right at their home on the ranch.

"Q. Is this ranch in Sutter County? A. Yes, sir.

"Q. Is it necessary for you in operating that ranch for you to hire additional help to irrigate or prune the orchard? A. Yes, sir.

"Q. And to work the farm? A. Yes, sir.

"Mr. Crofton—I think that is all unless the court desires to ask some questions.

"The Court—Who furnished the money to buy this place? A. Well, I did.

"Q. You furnished it? A. Yes, sir.

"Q. Why didn't you take it in your own name, this deed, why didn't you take it in your own name? A. Oh, well, I Japanese.

"Q. You are Japanese? A. Yes, sir; and I can't buy land.

"Q. You cannot buy land—and that is the reason A. Yes, sir.

"Q. And so you took it in the name of your children for that reason? A. Yes, sir.

"The Court. That is all.

"Mr. Crofton. Have you made any agreement to retransfer that land to yourself? A. I couldn't understand that.

"The Court. He couldn't make any agreement then, the child was only——

"Mr. Crofton. (Interrupting). Let that go.

"The Court. The child was only two months old when he took the deed.

"Mr. Crofton. Had any guardian been appointed for your children previous to this time? A. What? I like to be guardian.

"Q. No, before this, was there any other guardian appointed for the children? A. No.

"Mr. Crofton—That is all.

"The Court—That is all."

The transcript shows that the court upon the testimony of the defendant, Jusuke Shingu, in said guardianship proceedings denied the application for the appointment of the guardian, stating that in the conclusion of the court, the children had no property, that it was a plain effort on the part of the father to evade the laws of the State of California, not to take the property in his own name but to take the property in the name of the children, paying for it himself. The judge in his decision remarked that the defendant Jusuke Shingu stated "he took it, not as a gift to the children, but because he himself was not able to take it in his own name on account of the laws of the State of California, and in that case the child is the trustee of the father. The father owns that property if he can own it, but in my judgment the State of California owns it and an action ought to be commenced to have it escheat to the State of California. Neither the father nor the children own it."

This court has the very highest respect for the opinions and judgment of the honorable judge who presided in the hearing of said guardianship proceedings, and while it is not evidence in this case, it is within the knowledge of this court that a similar ruling in guardianship proceedings in another case arising in Sutter County, was made by his Honor, Judge Mahon, and an appeal is now pending in the supreme court of the state from the judgment denying letters of guardianship to the father of minor children where the basis for the application was similar to that of the petition of Jusuke Shingu, wherein no appeal was taken. If the ruling of Judge Mahon be affirmed, it may not necessarily affect this case because the defendant, Jusuke Shingu, without changing his testimony, testified herein more fully as to his reasons.

I have examined the transcript of said proceedings carefully and can find no place in the transcript where the witness, Jusuke Shingu stated, as is declared in the opinion rendered, that *he took the property "not as a gift to the children,"* because he was not able to take it in his own name on account of the laws of the State of California. In fact he does not state either "that he took it himself", or "that the land was not a gift to the children." It may be conceded, however, that the court probably did not intend to be understood as literally quoting the exact language of the witness. He likely was giving his own conclusions from all the

facts and circumstances shown by the evidence before him. But all those facts and circumstances are shown in the quoted testimony hereinbefore stated, and while they may be susceptible of the interpretation put upon them, so far as Jusuke Shingu's purpose or intentions may have controlled his actions in procuring the execution of the deed, nevertheless they are entirely consistent with complete honesty of purpose on his part as the father of the children in the desire to provide them with property which they as citizens of the United States might lawfully possess. In fact, it seems to me that Jusuke Shingu's unlawful intentions or purposes, if conceded, were immaterial.

The transaction here involves three parties, the grantors, the Douglasses, whose intentions are nowhere questioned in the pleadings or in the argument; the grantees, the two minor children of tender years, native-born American citizens, whose good intent cannot be questioned; and the alien father, the defendant, Jusuke Shingu, who paid the money for, and subsequently made the improvements upon the land. That money and the cost of those improvements must be presumed to have been advancements under the law and the testimony of the said Jusuke Shingu.

Nothing has been pointed to in the law to the effect that an alien may not reside upon property belonging to his children, where, as American citizens and the owners, they might, of course, legally reside; and nothing, either, has been pointed to in the law which forbides an alien father making improvements upon and assisting in the improvement of lands owned by his children who are citizens.

When the witness replied in answer to the court's question why he did not take the land in his own name, "This deed, why didn't you take it in your own name," it seems to this court a perfectly natural answer for one in the defendant's situation to say, "Well, I am a Japanese and cannot purchase land under the laws of California." That answer given to the question propounded might be consistent with the theory that he had a fraudulent intent to evade the laws merely, but it is submitted that the answer equally is consistent with the theory based upon the hypothesis of innocence, for it is a statement merely of a legal conclusion and a true one under the laws of California.

The grantors in this transaction, unless they were conspirators, intentionally endeavoring to aid the defendant, Jusuke Shingu, to perpetuate a fraud upon the law and circumvent it, had the legal right, of course, to sell their property to American citizens. The evidence showed they sought counsel and were advised by a reputable attorney at law that they had a right to make such transfer in good faith, even though the grantees were the children of alien parents ineligible to citizenship, if they themselves were American citizens.

Mr. Hewitt, it is true, stated he qualified his advice by suggesting that there might be invalidity in the transaction if the consideration was not the property of the children but was the property of the alien father. This testimony of Mr. Hewitt was flatly denied by both Mr. and Mrs. Douglas. However, the contradiction involves immaterial matters, because, if the statement were made by Mr. Hewitt as he states, his legal proposition is not sound, if the good faith of all the parties concerned be conceded and the father was endeavoring to advance the purchase price of the land for the benefit of his children, the grantees.

It was conceded by the attorney-general on the oral argument that if the Emperor of Japan, the Mikado himself, were to visit California and find here a relative of Japanese extraction, born in California, and therefore

under the Fourteenth Amendment to the Constitution of the United States an American citizen, he might in good faith advance the purchase price and buy in that way land for his said citizen relative.

It is very earnestly contended by the attorney-general in this case that "in all the negotiations relative to the execution of the deed in question, the defendant, Jusuke Shingu, dealt with the property as his own, that the taking of title in the name of the minor defendants was a subterfuge, that the title was held by the minor children in trust, that at all times after the purchase of the land he dealt with the land as the owner, established his home upon it, farmed it, improved it, and had without restriction the beneficial use and enjoyment thereof, that because the negotiations for the property were had and concluded and the first payment therefor made while one of his children was yet unborn," that that was evidence of fraud vitiating the entire transaction.

As a matter of fact the negotiations were not concluded while one of the children was yet unborn. Both children were alive upon the conclusion of the transaction.

Most of the foregoing quoted matters, it seems to me are mere conclusions, not based upon the evidence. He did reside upon and do certain things in the way of improvements and farming the land in question, but the law itself defines the limits beyond which he could not go in handling this property.

Section 202 of the Civil Code of this State provides that "A parent as such has no control over the property of the child."

These children, being infants and unable to contract for themselves, are fully protected by the laws of California. The law will guard their property rights. The father cannot alienate the property, can make no valid lease of the property to anyone else, can commit no waste, can make no valid contract concerning it, as the natural guardian. He legally cannot even manage the property of the children without being authorized so to do by appointment of court.

"Guardianship by nature extends only to the custody of the person of the ward and not to his property. To entitle the guardian to manage the property of his ward, he must be duly appointed by some competent public authority. A guardian cannot sell even the personal property of his ward without order of court." (*Kendall vs. Miller et al.*, 9 Cal. 592; *De La Montaigne vs. Union I. C.*, 42 Cal. 293; *Schmidt vs. Wieland*, 35 Cal. 343.)

In making improvements to the land, Jusuke Shingu was doing nothing to injure the children, but increasing the value of their estate, and the law would accept the benefits for the children, even though the parent had not been properly authorized to make them. If in his management and use of the children's property, in his capacity as natural guardian, he misplaced or has misapplied the proceeds or profits from said lands during the time of his usurpation of the management, the law will hold him accountable and may be invoked to protect the real owners, the native-born children.

Section 203 of the Civil Code provides for full protection against abuse of parental authority, which abuse is the subject of judicial cognizance in a civil action brought by the child or by its relatives within the third degree, or by the supervisors of the county where the child resides, and when the abuse is established, the child may be freed from the domination of the parent and the duty of support and education enforced.

Section 250, Civil Code, provides that "in the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the court."

That provision applies to a natural guardian as well as to a guardian of the estate.

It is unnecessary to quote all of the sections of the Codes to show that the law is amply sufficient to protect, fully, minors in all their personal and property rights. Therefore, if it be conceded that Jusuke Shingu's intentions were malign or secretly intended to be subversive of the laws of our state in this transaction, such evil intent on his part would not be entitled to much consideration or weight because his such evil intents and purposes could never become effectuated to his own advantage.

It was admitted upon the oral argument of this case that the good intentions and motives of the Douglasses were unquestioned. The deed was executed by them to the two minor children and at the request of Mr. G. L. Douglas duly recorded.

The recording of a deed voluntarily made to a minor amounts to a formal delivery and acceptance by the minor. (*Masterson vs. Check*, 23 Ill. 72, 25 Am. Dec. 344.)

An infant of any age is capable of being a grantee in a conveyance of land. The delivery of a deed conveying land to an infant or one incapable of formally accepting the same may be shown by facts and circumstances indicating an intention on the part of the grantor to part absolutely with his title and vest it in the grantee. An acceptance will be presumed in such case from the beneficial nature of the transaction.

In the case at bar there is no question raised by the evidence but that it was the intention of both Mr. and Mrs. Douglas to convey their land to the two Japanese minor children, but both American citizens.

"When a deed clearly beneficial to an infant is given to him, his acceptance is presumed." (6 Am. Rep. 112; *De Villian vs. Evans*, 39 Cal. 120; *Jennings vs. Jennings*, 104 Cal. 150; 22 Cyc. 530; 25 Cyc. 527.)

It is strenuously urged by the attorney-general that the evidence in this case shows an attempt to create a resulting trust in favor of the father, Jusuke Shingu, under section 853 of the Civil Code. A number of cases have been cited showing how resulting trusts have been created by the law as set forth in said section.

In this connection, however, to the mind of this court there is no evidence at all of any resulting trust (which cannot arise out of an attempted fraud upon the government). Nowhere in this transaction did the title ever nominally vest in the father, Jusuke Shingu, and it may be conceded that had the children been adults, capable of contracting and even though American citizens, accepted the deed in question with the understanding between themselves and their father that they would merely hold the title to assist him in evading the force of the Alien Land Law, that while still no resulting trust could have been created in his favor, the transaction would have been so tainted with the fraud not only on the part of Jusuke Shingu, but also on the part of the other defendants, a resulting trust might impliedly be created in favor of the state, through the escheat clause in the law of 1913.

"Where an alien, therefore, purchases land and takes an absolute conveyance in the name of a citizen, without any agreement or declaration of a trust, the law will not raise a trust in favor of the alien purchaser, who cannot hold the land, any more than it would cast by descent upon an alien heir who cannot hold it against the state. The result in such case must be either that the nominal grantee takes the land, discharged of any

trust by implication of law, or that there is a resulting trust in behalf of the people of the state, which they alone can enforce against the grantee in the deed." (*Leggett vs. Dubois*, 28 Am. Dec. 413.)

An express agreement for the grantee in such case to hold the land in trust for the ineligible alien incapable of taking and holding real estate, would be null and void *ab initio*, and equity will never raise a resulting trust in favor of an alien in fraud of the laws of the land. The law will never cast a legal or equitable estate upon a person who has no right to hold it.

In the case at bar, it is practically an impossibility, under the laws of California, to make minor children the grantees of real property and create thereby a resulting trust in favor of anyone advancing the purchase price of the land transferred to such minors, who, if American citizens, entitled to own property, necessarily would take absolute title in fee simple.

It has been held that "Where the escheat is on the ground of alienage, the judgment will not divest the title of a grantee under a deed of bargain and sale, duly executed and recorded, before the inquest of office found." (16 Cyc. 556).

Under section 33 of the Civil Code of this state, an infant cannot be burdened with a trust relating to real property.

Some additional authorities that have been consulted are *Spitler vs. Kaading*, 131 Cal. 50; *Russ vs. Menius*, 16 Cal. 350; *Hamilton vs. Hubbard*, 134 Cal. 603; *Taylor vs. Miles*, 19 Ore. 550; *Adley vs. Fletcher*, 55 Wash. 52.

It is strongly urged that "if on such a record as is presented in this case, the court should hold the transaction to be within the law, with approximately one hundred thousand Japanese in California at the present time, with their numbers rapidly increasing, the majority of whom are tilling the soil, it requires no proof to form a conception of the condition which will result within a generation if Japanese colonization shall be so permitted to go forward unchecked. If the stamp of judicial approval be placed upon a record of this character, the way will be made clear for the lands of California to be occupied and the fruits thereof to be taken by an alien race, owing allegiance to another government, upholding another flag, worshipping another god and bearing arms, when called upon to do so, for another government."

This court is not blind to the persuasive force of such argument in a proper case, but this is not such a case, even if theoretically there may be some semblance of truth in the argument. Practically it describes an impossible situation, and if the evil exist, the blame and the fault are basic, growing as they do out of possibilities created by the Fourteenth Amendment to the Constitution of the United States, which declares, "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," etc.

Even though the grantees in the deed herein are pure-bred Japanese, nevertheless they are American citizens and as such entitled to every right that any American citizen from President Harding down enjoys. They have as much right to own land as any citizen. If the dire results to California, as predicted by learned counsel, are bound to follow the acquisition of the title to lands within the state by American-born Japanese, it is very true that a more serious problem confronts the people of this nation and particularly the citizens of California, who are loyal to the Constitution of the United States and to our form of government. The remedy, however, will

never be found in attempts to subvert or destroy the rights of American citizens on flimsy evidence. Resort must be had rather to the treaty-making power or to Congress that might make laws regulating immigration of Japanese to this state and nation. The only other possible method, assuming the evil to be as described by the attorney-general, by which a remedy may be found will be a constitutional amendment to the article defining citizenship. Article fourteen possibly might be amended so that only such of the native born as are the children of citizens or of parents eligible to citizenship shall be citizens of the United States. However, these are matters not within the purview of this court, which must accept the law as it finds it.

All of the cases cited in the briefs for the people, where deeds have been set aside on the ground of fraud at the instance of creditors, appear to be without analogy and to have no application to the facts in this proceeding. Of course, where creditors are interested, they have a right to prevent a man from putting his money or property otherwise available for the payment of debts, out of his own hands for the purpose of placing it beyond reach of his creditors. In such case the grantor is deliberately perpetrating a fraud. The creditors properly are deemed to have some interest in their debtor's property or funds.

Here in the instant case the grantors concededly acted in good faith. The grantees themselves are innocent American citizens and the beneficiaries at most of an alien father incapable of acquiring and holding land, who desired to provide for their future welfare and maintenance, at the same time perhaps secretly hoping and openly endeavoring to subvert the laws of the land. His hopes and efforts of such evil import, however, are futile and ineffective and incapable of accomplishment, because the many safeguards of our laws fully protect the helpless infants, the real owners of the land, and safeguard the sovereignty of the State of California.

No opinion is expressed here as to the right of the father, the natural guardian of the children, to letters of guardianship, for it in no way is herein involved.

I am clearly of the opinion that the evidence in the case does not show that Jusuke Shingu took the property at all, nor does it show that the transfer by the Douglasses to the minors, at the instance of the father, was not intended as a gift to the children, nor does it show, because he himself stated the legal conclusion that he was not able to acquire property in his own name on account of the laws of California, that that statement was proof positive of fraudulent intent on his part. He did not try to take it and he did not take it; he could not do so, of course, as he stated, because the laws did not permit it, but the law does not say he cannot advance the purchase price for the benefit of his children, who, as American citizens, are not under the disabilities which stand in his own way.

The attorney-general in his brief said: "We are not unmindful that parents, alien or citizen, may make gifts to their minor children, nor are we unconscious of the many laudatory things which may be said of such action, but before an action purporting to be a gift can be upheld by the courts, it must appear that a gift was indeed and in law made. It must appear that it was free from fraud, that it was not in violation or evasion of the statute or intended to be such, and indeed the entire circumstances must be consistent with a *bona fide* effort to give the minor something and negative the idea that the form of gift was used to gain something for the donor."

Not much fault may be found with the foregoing, except that the burden of proving fraud is upon the people in this case, and there is not an iota of evidence in the case inconsistent with the view that the gift of the purchase price and the transfer of the land by the Douglasses were valid in all

respects, for as already shown the father could legally gain nothing by the transaction, while the proof is overwhelming that all that was done was for the benefit of the children.

The defendant, Jusuke Shingu, being the father and under natural, moral and legal obligations to provide for his minor children, the other defendants herein, will be presumed to have made the payment of the purchase price for their land and to have added the improvements thereto at his own expense as advancements for the said children. (*Hamilton vs. Hubbard*, 134 Cal. 635.)

Counsel for the defendant in his brief made some suggestions as to the constitutionality of the Alien Land Law of 1913; and his argument was met by counsel for plaintiff upholding the constitutionality of the said act. This court has assumed at all times in the consideration of this case that the act is constitutional, and the view this court holds of the law and facts of this case in the light of said assumption makes it unnecessary to consider or make any determination of the constitutional questions presented.

Let findings and judgment be entered in accordance with the foregoing views.

The defendants are entitled to their costs.

Dated: March 9, 1922.

EUGENE P. McDANIEL, Judge.

CHAPTER XIII.—DATE CASE (ESCHEAT CASE).

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ISAO DATE
and F. W. COOK, Defendants.

IN THE CALIFORNIA SUPERIOR COURT.

No. 218916.

1. COMPLAINT.

Now comes the plaintiff, the State of California, by U. S. Webb, attorney-general of the State of California, and Asa Keyes, district attorney of the County of Los Angeles, State of California, its attorneys, and for cause of action against the above-named defendants, alleges:

I.

That during all the times mentioned in this complaint the defendant, Isao Date, was and he now is a Japanese person and native citizen and subject of the Empire of Japan and was and is not eligible to citizenship under the laws of the United States.

II.

That at no time mentioned in this complaint was there, nor is there now, any treaty existing between the Government of the United States of America and the Government of the Empire of Japan, under and by virtue of which any native-born Japanese and subject of the Empire of Japan could acquire possession of, enjoy or transfer the real property hereinafter mentioned, or any interest therein, in the State of California.

III.

That U. S. Webb is the duly elected, qualified and acting attorney-general of the State of California, and Asa Keyes is the duly appointed, qualified and acting district attorney of the County of Los Angeles, in the State of California and they and each of them have been informed and verily believe that the property hereinafter described has escheated to the State of California, through, because of and by reason of the facts in this complaint alleged.

IV.

That on and prior to the 28th day of June, 1923, one Mrs. Dawson, a person whose first name is to the plaintiff unknown, and Dorothy Maclean, and other persons whose true names are to the plaintiff unknown, were the lawful owners in fee and possession of all that certain real property situate in the town of Sherman in the said County of Los Angeles, State of California and described particularly as follows, to-wit:

"The south thirty-two and eight-tenths feet (32.8) of lot 74 of the subdivision of lot 'A' of Larramond Addition to Sherman in the County of Los Angeles, State of California, as per Map recorded in Book 6, p. 70 of Maps in the office of the county recorder of said county."

and that said property was of the value of thirty-five hundred dollars (\$3500.00) and over and now is of said value.

V.

That on said 28th day of June, 1923, the said defendant Isao Date, a

Japanese alien, and F. W. Cook, a citizen and resident of the County of Los Angeles, State of California, wilfully and unlawfully conspired, combined and confederated with each other to prevent, evade and avoid escheat to the State of California of the land hereinbefore described, and to unlawfully effect a transfer of the title to and possession of such real property and of an interest therein to the said Isao Date by causing and procuring the consideration for the purchase of said real property from the said Mrs. Dawson, Dorothy MacLean and other persons whose true names are to the plaintiff unknown, who were then and there the true owners of said real estate in fee and were in possession thereof, to be paid by said Isao Date, such alien Japanese, and by causing and procuring a deed and grant of said real estate and property to be executed by the said true owners of said property and delivered to said F. W. Cook as grantee in said deed, but for the benefit of and the true ownership of the said Isao Date, such alien, and in pursuance of said conspiracy and with the intent to prevent, evade and avoid escheat of said real property, as aforesaid, the said Isao Date did furnish and pay the sum of thirty-five hundred dollars (\$3500.00), lawful money of the United States of the value of thirty-five hundred dollars (\$3500.00) in gold coin of the United States, to the true owners of said property, aforesaid, as and for the consideration of such transfer, grant and deed thereof, and did cause and procure a deed, grant and transfer of the title to the said real property to be executed and delivered to the said defendant F. W. Cook, for the sole benefit and use of the said defendant Isao Date, such alien, on or about the 28th day of June, 1923, which said deed was on July 11th, 1923, duly recorded in Book 2635, p. 66 of official records in the recorder's office of Los Angeles County, California, reference to which is hereby made for greater certainty, and the said defendant, Isao Date, in pursuance of said conspiracy did on or about the 8th day of July, 1923, enter into possession of, and ever since has been, and is now in possession of said real estate and property hereinbefore described, contrary to and in violation of an act of the legislature of the State of California, entitled, "An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this State, providing for escheats in certain cases, prescribing the procedure therein and repealing all acts or parts of acts inconsistent or in conflict herewith," Adopted and approved November 2, 1920, and the acts supplemental thereto.

That by reason of the facts hereinbefore alleged the said title and interest in and said real property is escheated to the State of California.

Wherefore, the plaintiff prays that it be adjudged and decreed:

1. That said title and interest in and to said property of said defendants and either of them, and the whole thereof, has escheated to the State of California; that the court shall determine and adjudge the value of said real estate and property and enter judgment for the state for the amount thereof, together with costs for this action.

2. That the plaintiff have such other and further relief as the facts may warrant.

3. That the plaintiff have and recover its costs herein.

U. S. WEBB,

Attorney-General for the State of California.

ASA KEYES,

District Attorney of the County of Los Angeles, State of California.

By TRACY C. BENDER, Dep.,

Attorneys for the Plaintiff.

TRACY C. BENDER, Of Counsel.

2. ANSWER OF THE DEFENDANT F. W. COOK.

Comes now F. W. Cook, one of the defendants herein, and for answer to the complaint on file, alleges and denies as follows:

I.

Answering the allegations of paragraph II, this defendant alleges that he has not sufficient information or belief to enable him to answer the said paragraph and on such lack of information and belief, denies that there exists a treaty between the Government of the United States and the Government of the Empire of Japan, under and by virtue of which native-born Japanese, subjects of the Empire of Japan, can acquire possession of or enjoy or transfer said real property or an interest therein.

II.

Answering the allegations of paragraph V, this defendant denies that on the 28th day of June, 1923, or at any other time, this defendant conspired with any person whomsoever, or combined or confederated with any person whomsoever, to evade or avoid escheat to the State of California of any land whatsoever or to unlawfully or otherwise effect a transfer of title to or possession of any real property or of an interest therein to the said Isao Date. And denies that the said property was to be delivered to the defendant herein for the benefit of or the ownership of the said Isao Date. And denies that the said Isao Date caused or procured a deed, grant or transfer of the title to said real property to be executed or delivered to this defendant for the benefit of or use of the said Isao Date. And denies that the said Isao Date is in possession of said real estate contrary to or in violation of any act of the legislature of the State of California. And denies that the interest or title to said real estate is escheated to the State of California.

Wherefore defendant prays that plaintiff take nothing by this action and that defendant have such other and further relief as may seem meet to the court.

MOOTE & PATTERSON,

By F. D. R. MOOTE,

Attorneys for Defendants.

CHAPTER XIV.—C. KOSAI CASE (ESCHEAT CASE).

STATE OF WASHINGTON, Plaintiff, vs. CHUSKI KOSAI and JANE DOE KOSAI (whose true Christian name is to plaintiff unknown), his wife; FRANK KOSAI, a minor; S. OSAWA, Trustee, and S. OSAWA, individually; PIERCE LONERGAN, Trustee, and PIERCE LONERGAN, individually, and JULIA JANISCH, Defendants.

IN THE WASHINGTON SUPERIOR COURT.

No. 166905.

1. COMPLAINT.

Comes now the plaintiff and for cause of action against the defendants, and each of them, states and alleges as follows, to-wit:

I.

That the defendants Chuski Kosai and Jane Doe Kosai (whose true Christian name is to the plaintiff unknown) are and were at all times herein mentioned husband and wife, and that said defendants, and each of them, are aliens, to-wit, subjects of the Empire of Japan, and they, and neither of them, have in good faith declared their intention to become citizens of the United States; that the defendant Frank Kosai is a minor, but this plaintiff states that it has no knowledge or information as to the nationality of said minor, or as to whether said minor has a duly appointed, qualified and acting guardian.

II.

That the defendant S. Osawa, as this plaintiff is informed and verily believes, and so alleges the fact to be, is a citizen and subject of Japan who has not in good faith declared his intention to become a citizen of the United States.

III.

That tracts three (3), four (4), five (5), six (6), seven (7), and eight (8), in block three (3), Christopher Garden Tracts, excepting therefrom a strip of land across the south end of tracts seven and eight (8), and the southeast corner of tract six (6), in block three (3), which said strip of land is more particularly described as follows:

Beginning at a point 491.5 feet north of the southeast corner of said tract eight (8) on the east marginal line of said tract eight (8) running thence west 844.61 feet to a point 485.5 feet north of the south marginal line of tract six (6), thence south 485.5 feet more or less to the south marginal line of said tract six (6) at a point 844.61 feet west of the southeast corner of said tract eight (8); thence east along said south marginal line of tracts six (6), seven (7) and eight (8) to the southeast corner of said tract eight (8); thence north along the east marginal line of said tract eight (8), to the place of beginning
is agricultural land, located within King County, Washington, capable of and now being used for agricultural purposes only.

IV.

That the record title to said land now stands in the defendants Pierce

Lonerger and S. Osawa, as trustees, the nature of said trust being to this plaintiff unknown, excepting that this plaintiff is informed, verily believes and so alleges the fact to be, that the defendants Chuski Kosai and Jane Doe Kosai, his wife, who are now in actual occupation of said land, managing and controlling the same, are the real and true owners thereof, subject to sec. 33 of art. II of the constitution of the State of Washington, and chap. 50 of the session laws of 1921 of the State of Washington, and that the said defendants S. Osawa and Pierce Lonergan claim to hold said land in trust for the defendant Kosai, but in truth and in fact are holding said land in trust for said defendants Chuski Kosai and Jane Doe Kosai, his wife.

V.

That Chuski Kosai and Jane Doe Kosai, his wife, have owned said land for a period of time unknown to this plaintiff, but always in violation and evasion of sec. 33, article II, of the constitution of the State of Washington, and since June 10, 1921, in evasion and violation of chap. 50 of the session laws of 1921.

VI.

That the defendant Julia Janisch holds a mortgage on the property described in paragraph III hereof, for the sum of seven thousand five hundred dollars (\$7,500.00), which said mortgage is to secure a note given by one Harvey C. Street, who at the time held the record title to said land by connivance of the defendants Chuski Kosai and Jane Doe Kosai, his wife, S. Osawa and Pierce Lonergan for the purpose of obtaining said mortgage.

Wherefore, this plaintiff prays that this court enter its decree herein, declaring said land to have escheated to the State of Washington under the constitution and statutes thereof, for the use and benefit of the permanent common school fund, and that it be further decreed that the defendants Chuski Kosai and Jane Doe Kosai, his wife; Frank Kosai, Pierce Lonergan and S. Osawa as trustees and individually, have no right, title or interest in and to said land, and that all right, title or interest of said parties defendant, and all persons and parties holding by, through or under them, be decreed forfeited to the State of Washington, and that the plaintiff do have and recover its costs and disbursements herein incurred to be taxed by the clerk.

MALCOLM DOUGLAS,

EWING D. COLVIN,

Attorneys for Plaintiff.

2. AMENDED ANSWER.

Comes now the defendants Chuski Kosai (whose true name is T. K. Kosai) and "Jane Doe" Kosai, his wife (whose true name is Sumi T. Kosai) and Frank Kosai, a minor, by his guardian *ad litem* Pierce Lonergan, and S. Osawa as trustee and individually, and Pierce Lonergan, as trustee and individually, by their attorney, Pierce Lonergan, and in answer to the complaint of the plaintiff deny, allege and state as follows:

I.

Answering paragraph I, these defendants allege and state that the defendant Chuski Kosai's true name is T. K. Kosai, and that the name of his wife is Sumi T. Kosai. Further answering said paragraph said defendants T. K. Kosai and Sumi T. Kosai, his wife, admit that said T. K. Kosai and Sumi T. Kosai, his wife, are aliens and that they have not declared their intention to become citizens of the United States; and that the defendant Frank Kosai is a minor, born in the United States,

and a resident of the State of Washington; that Pierce Lonergan is the duly appointed, qualified and acting guardian *ad litem* of said minor.

II.

Answering paragraph II, defendants deny each and every allegation, matter and thing therein contained.

III.

Answering paragraph III, these defendants admit that the tract of land therein described is located in King County, Washington, but deny that the same is suitable for agricultural purposes only.

IV.

Answering paragraph IV, these defendants admit that the record title to said land is in Pierce Lonergan and E. Osawa, as trustees, under declaration of trust dated the 7th day of June, 1921, and that said trust is for the benefit of Frank Kosai, a minor. These defendants deny each and every other allegation in said paragraph contained.

V.

Answering paragraph V, these defendants deny each and every allegation therein contained.

VI.

Answering paragraph VI, these defendants admit that the defendant Julia Janisch holds a mortgage upon said property for the sum of \$7500.00 secured by a note of Harvey C. Street; but deny each and every other allegation in said paragraph contained.

Wherefore, having fully answered, these defendants pray that the complaint of the plaintiff be dismissed, and that they have judgment for their costs and disbursements herein incurred.

PIERCE LONERGAN,
Attorney for Defendants Kosai, Osawa and Lonergan, etc.

3. MEMORANDUM DECISION.

I have examined the briefs of plaintiff and defendant submitted to me after the trial, considered the propositions of law advanced and the respective citations thereunder and find there is no serious difference between counsel for plaintiff and counsel for defendant as to the principles of law governing this case.

The burden of proof finally devolves upon plaintiff to establish fraud as alleged in its complaint. The statute, chap. 70 of the laws of 1923, it is true, says that when certain facts are proven the court may presume fraud. This I take it to mean that by proving certain facts unexplained that the law presumes the fact of fraud to be established. But when evidence is given which overcomes the *prima facie* case so made the burden of proof shifts and is finally on the plaintiff to establish fraud. In the absence of fraud the things done by defendants in the disposition of the real estate involved was legal. Defendant, Frank Kosai, to whom the land was deeded, was born in this country and was at the time the property was deeded to him a citizen of the United States.

As to the legal phases of this case, the propositions of law advanced by defendants I believe to be established by the authorities cited, that is to say: (1) "An alien may transfer a good title to real estate to any person entitled to hold it; if no proceeding has been taken by the state for the purpose of setting aside the deed to the alien."

(2) "All persons born in the United States are citizens thereof."

(3) "The gift being beneficial, an acceptance is presumed."

(4) And the fact that the father secured the transfer to his minor child, for the reason that he could not hold title himself on account of being an alien, in itself is not fraudulent, the minor being at the time a citizen. I am led to believe that these propositions of law are not controverted by counsel for the state.

The question remaining is, was the transaction, legal on its face *bona fide*? While the legal title stands in the name of defendant minor, Frank Kosai, by the declaration of trust, the management of the property is vested in the defendants, S. Osawa and Pierce Lonergan as trustees. The father and mother of defendant, Frank Kosai, according to the evidence, have been employed by the said trustees since the transfer was made to farm the land involved and during said time have lived upon said land and worked the same under the supervision and direction of the trustees and has accounted to the trustees for any produce he may have personally disposed of. I will state here that practically all the testimony given on this phase of the case or in fact all phases of the case was given by defendants, both the state and the defendants using them.

The state's contention being that Chuski Kosai and wife were farming the land as their own and receiving all revenue therefrom, and defendants contending that they were mere employees of the trustees and working for a fixed salary per month.

I have considered this testimony with as much care as possible and conclude that the authority given to and exercised by the father and mother were no more than is ordinarily given to the foreman of a ranch, and that the activities of said Chuski Kosai are not inconsistent with such character of employment.

Counsel for the state contend that the deed of gift from Chuski Kosai and wife to defendant Frank Kosai, not having been acknowledged and recorded, is invalid. This contention might be considered, if Chuski Kosai and wife had held the legal title to the land. The only purpose of this paper is to show that Kosai and wife gave their consent to the transfer of the legal title and whether acknowledged or not, the writing forever estops them from questioning the transfer.

One more question is raised by counsel for the state by which they question the *bona fides* of the transaction for the reason that the deed and declaration of trust were not filed until a few weeks before the case came on for trial. While this is a circumstance to consider, and which I have considered, I feel that that alone should not stamp the transfer as fraudulent.

"Fraud is never presumed. It must be proved by clear and convincing testimony and it is the duty of the court to harmonize all of the facts with honest intention and honest conduct, if that can be done." I think this rule is firmly and fully established. Testimony uncontradicted and unimpeached cannot be disregarded by the court. More suspicions and speculations without tangible evidence are not acted upon in determining grave questions between litigants. I am thoroughly in accord with cases on fraud cited by counsel for the state from our own supreme court and courts of other jurisdictions. I am also in accord with an excerpt of a decision rendered by my distinguished brother, Judge Hall, of the superior bench of King County, contained in the brief of counsel for the state, as a pronouncement of abstract law and ethics. I consider it sound and able and well worthy of such an able, conscientious jurist. Not having the facts of that case before me, I cannot apply it to the instant case.

For the foregoing reasons, I find for the defendants, and recalling the request made by counsel for defendants, that they be permitted to amend the prayer of their answer for a decree quieting title to the lands in defendant, Frank Kosai, I grant that request and direct that the decree be drawn to conform therewith.

Dated this 2nd day of April, 1924.

JOHN B. DAVIDSON, Judge.

CHAPTER XV.—S. KATSUNO CASE (ESCHEAT CASE).

STATE OF WASHINGTON, Plaintiff, vs. WHITE RIVER GARDENS, INC.,
a Corporation, S. KATSUNO ET UX. ET AL., Defendants.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON.

No. 159585.

1. COMPLAINT.

Comes now the plaintiff, State of Washington, by Malcolm Douglas, prosecuting attorney for King County, Washington, and for causes of action against the defendants, and each of them, states and alleges as follows, to-wit:

I.

That at all times herein mentioned the defendants Taka Hirabayashi and Jane Doe Hirabayashi (whose true name is unknown) were and now are husband and wife, and that each of said defendants is a subject of the Japanese Empire, neither of them having declared his or her intention to become a citizen of the United States, and are aliens residing within the United States.

II.

That the White River Gardens, Inc., is a corporation organized under and by virtue of the laws of the State of Washington.

III.

That the northeast quarter (NE $\frac{1}{4}$) of the southeast quarter (SE $\frac{1}{4}$) of section thirty-five (35), township twenty-two (22) north, range four (4) east, W. M., is located within the County of King, State of Washington, and is agricultural land and is suitable for and used only as agricultural land and for general farming purposes. That Taka Hirabayashi and Jane Doe Hirabayashi, his wife, are the owners of the said land, having acquired the same by purchase, but that the legal title to said land stands in the name of the defendant, White River Gardens, Inc., a corporation, which holds the same for the use and benefit of the said Taka Hirabayashi and Jane Doe Hirabayashi, his wife, said corporation having no real interest in said land and the title vested in said corporation is in trust for said Taka Hirabayashi and Jane Doe Hirabayashi, his wife; that said Taka Hirabayashi and Jane Doe Hirabayashi, his wife, are in actual occupation of said land.

IV.

That said Taka Hirabayashi and Jane Doe Hirabayashi, his wife, acquired title to said land in violation of the constitution of the State of Washington, and are holding the same as hereinabove set out, in violation of the constitution of the State of Washington and in violation of the statutes of the State of Washington; that under and pursuant to said constitution and statutes of the State of Washington said land is escheated to the State of Washington.

Wherefore, plaintiff prays for an order of this honorable court, declaring said property to have escheated to the State of Washington, as provided by the statutes of the State of Washington, and further decreeing that the

defendants, and each of them and those holding under, by or through them, have no right, title or interest in and to said property.

MALCOLM DOUGLAS,
EWING D. COLVIN,
Attorneys for Plaintiff.

2. ANSWER OF DEFENDANTS.

Come now the defendants Taka Hirabayashi and Jane Doe Hirabayashi, his wife, White River Gardens, Inc., a corporation, S. Katsuno and Jane Doe Katsuno, his wife, Yoshiko Katsuno, a minor, and Nora Murphy, as guardian of Yoshiko Katsuno, a minor, and for answer to the amended complaint herein, allege:

I.

Answering paragraph III of said amended complaint, these defendants admit that Yoshiko Katsuno is minor, but deny that she is an alien who has not in good faith declared her intention to become a citizen of the United States, but allege that said Yoshiko Katsuno is an American citizen, born in the State of Washington.

II.

Answering paragraph IV of said amended complaint, these defendants admit that the real estate therein mentioned is located in King County, Washington, and that it is agricultural land and suitable for and used only as agricultural land and for general farming purposes; admit that the legal title to said land stands in the name of the defendant, White River Gardens, Inc., a corporation; deny that the defendant Yoshiko Katsuno claims any right, title or interest in or to said property, except as resulting from her ownership of the majority of the capital stock of said White River Gardens, Inc.; admit that said Yoshiko Katsuno claims some right, title and interest in and to the capital stock of the defendant White River Gardens, Inc., and that she has such interest; but deny each and every other allegation in said paragraph contained.

III.

Answering paragraph V of said amended complaint, these defendants deny each and every allegation therein contained.

IV.

Answering paragraph VI of said amended complaint, these defendants admit that the defendants D. K. Welt and Jane Doe Welt, his wife, claim some right, title or interest in and to said land, but deny each and every other allegation in said paragraph contained.

And for a first affirmative defense to plaintiff's amended complaint, these defendants allege:

I.

That chapter 50 of the Session Laws of the State of Washington for the year 1921 is in violation of section 3 of article I of the constitution of the State of Washington, in that it deprives the defendants of life, liberty and property without due process of law, and these defendants specially invoke the protection of said section 3 of article I of said constitution of the State of Washington.

And for a second affirmative defense, to plaintiff's amended complaint, these defendants allege:

I.

That chapter 50 of the Session Laws of the State of Washington for the

year 1921 is in violation of section 12 of article I of the constitution of the State of Washington, in that it grants to citizens, classes of citizens and corporations other than municipal privileges and immunities which upon the same terms do not equally belong to all citizens or corporations, and these defendants specially invoke the protection of said section 12 of article I of the constitution of the State of Washington.

And for a third affirmative defense to said amended complaint these defendants allege:

I.

That chapter 50 of the Session Laws of the State of Washington for the year 1921 is in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it abridges privileges and immunities of citizens of the United States, and deprives these defendants of life, liberty and property without due process of law, and denies to these defendants the equal protection of the laws, and these defendants specially invoke the protection of said section 1 of the Fourteenth Amendment to the Constitution of the United States.

And for a fourth affirmative defense to said amended complaint, these defendants allege:

I.

That chapter 50 of the Session Laws of the State of Washington for the year 1921 is in violation of the existing treaty between the United States and Japan, and these defendants specially invoke the protection of said treaty.

Wherefore, having fully answered, these defendants pray that they go hence dismissed with their costs and disbursements herein to be taxed.

RALPH H. HIGGINS,

GUIE & HALVERSTADT,

Attorneys for said Defendants.

AMENDED ANSWER.

Come now the defendants Taka Hirabayashi and Jane Doe Hirabayashi, his wife, White River Gardens, Inc., a corporation, S. Katsuno and Jane Doe Katsuno, his wife, Yoshiko Katsuno, a minor, and Nora Murphy, as guardian of Yoshiko Katsuno, a minor, and for answer to the amended complaint herein, allege:

I.

Answering paragraph III of said amended complaint, these defendants admit that Yoshiko Katsuno is a minor, but deny that she is an alien who has not in good faith declared her intention to become a citizen of the United States, but allege that said Yoshiko Katsuno is an American citizen, born in the State of Washington.

II.

Answering paragraph IV of said amended complaint, these defendants admit that the real estate therein mentioned is located in King County, Washington, and that it is agricultural land and suitable for and used only as agricultural land and for general farming purposes; admit that the legal title to said land stands in the name of the defendant White River Gardens, Inc., a corporation; deny that the defendant Yoshiko Katsuno claims any right, title or interest in or to said property, except as resulting from her ownership of the majority of the capital stock of said White River Gardens, Inc., admit that said Yoshiko Katsuno claims some right, title and interest in and to the capital stock of the defendant White River Gardens, Inc., and that

she has such interest; but deny each and every other allegation in said paragraph contained.

III.

Answering paragraph V of said amended complaint, these defendants deny each and every allegation therein contained.

IV.

Answering paragraph VI of said amended complaint, these defendants admit that the defendants D. K. Welt and Jane Doe Welt, his wife, claim some right, title or interest in and to said land, but deny each and every other allegation in said paragraph contained.

Wherefore, having fully answered, these defendants pray that they go hence dismissed with their costs and disbursements herein to be taxed.

GUIE & HALVERSTADT,
Attorneys for said Defendants.

3. MEMORANDUM DECISION.

This is an action brought by the State of Washington against the White River Gardens, a Washington corporation, and S. Katsuno and wife, Japanese aliens, to escheat an interest in forty acres of land in this county, the legal title to which is in the name of said corporation, but which interest the state claims is held by it in secret trust for Katsuno and wife.

The facts concerning the purchase of said land and its subsequent possession and control are as follows:

Katsuno and wife, being Japanese aliens, are incapable of becoming American citizens under our present law. On February 11, 1919, Alfred T. White, a citizen of this country and a friend of the Katsunos, entered into a written contract with one Maltby for its purchase for \$15,000, \$5,000 down and balance of \$10,000 in five annual installments of \$2,000 each. While the contract was taken in White's name, Katsuno furnished the initial payment of \$5,000, and it is not disputed that he was buying it for Katsuno.

Katsuno stated on the stand, and Mr. White testified that he so stated to him at the time of the purchase, that he (Katsuno) intended to make this country his home for the balance of his days and wanted this land for his children.

Immediately after the purchase Katsuno caused his attorney to form the corporation, The White River Gardens, Inc., with a capital stock of 2,000 shares of the par value of \$10.00 each. The first trustees, three in number, were said attorney, said White, and Rev. U. G. Murphy, none of whom gave anything for the one share of stock they held to qualify them as trustee, and the latter two being much interested in and very friendly to the Japanese. The rest of the stock was taken in the name of Katsuno and there is an item in the one account book of the company, under date of June 10, 1921, "money advanced to corporation by S. Katsuno, \$18,222.30," which Katsuno testified he gave for the stock, \$5,000 of which was the first payment on the land. Said contract was assigned by White to the corporation in September, 1919.

In June, 1919, Katsuno became trustee in place of his attorney, and from that time and until June, 1921, he, White and Murphy were the trustees.

From the date of its incorporation in February, 1919, to June 10, 1921, said corporation kept no records whatsoever. Katsuno farmed the 40 acres without accounting to or being called to account by the corporation

or anyone else, and he had as exclusive possession and as complete control of it as if he had owned it in fee, and said interest in said land during all of said time could have been escheated on the ground, if no other, that said corporation was an alien corporation, for the reason that Katsuno, an alien, owned a majority of its capital stock.

On March 8, 1921, the governor approved the "Alien" Act which had been theretofore passed by the legislature, but which act did not go into effect until June, 1921. This act was an amplification of the constitutional provision prohibiting aliens from owning lands or an interest therein.

On May 17, 1921, after the passage of said "Alien" Act, and before it went into effect, Katsuno and wife assigned said 1997 shares of stock in said corporation to their native-born daughter, Yoshiko Katsuno, a minor of the age of ten, and Mrs. Nora Murphy, wife of the trustee, Rev. U. G. Murphy, was appointed and qualified as guardian of the estate of said minor, at the same time becoming an officer of said corporation and trustee in place of White, who resigned. She, together with her husband and Katsuno, have constituted the board of trustees ever since.

On June 10, 1921, which was about the time said "Alien" Act became effective, and shortly after the assignment of said stock to said minor daughter and the appointment of Mrs. Murphy as guardian, there was a pretense made of keeping a book of account, but from its appearance and from the testimony it is evident that it was only a pretense, for it was incomplete, incorrect and inefficiently kept. Even this pretense was abandoned during the year. Katsuno ran the place to suit himself and, while he made prefatory reports to said guardian, they were not in writing. There was no way of checking him up and said guardian accepted his statements of receipts and expenditures without question. She knew nothing about farming and Katsuno had exclusive control of said land.

A bank account for a time was kept in the name of the corporation, the funds being checked out by Katsuno, whose right to do so was exclusive. Finally this account, in a Kent bank, was closed and Katsuno kept whatever funds were in his own name subject to his own check. Mrs. Murphy did have an account in different Seattle banks in the name of the corporation, the only use of which was for the deposit of money that Katsuno gave her with which to pay taxes and to make payments on the land, and she drew checks on these accounts for such purposes.

One year, as shown by the book of account, a profit of \$1500 was made, which went to Katsuno, though he afterwards made the explanation that this money did not in fact belong to him but was used to repay a loan he had made from a countryman to carry on his farming operations. The book of account does not show a profit for any other year, but, as Katsuno furnished all the items that went in the book, the wonder is that it showed a profit for even that one year. Whether there were profits or not, neither the minor nor the government participated in them.

Ever since said real estate contract was entered into Katsuno has had exclusive possession of said land, has resided on the land with his family, has gotten his and their living from it and, while an attempt was made to show that he was a salaried manager, the evidence fails to establish such fact, but the preponderance of the evidence is to the contrary.

Under the common law an alien could not, and under our constitution and statutes he cannot, own or exclusively control real property except under certain conditions which are not here involved, and there is a reason for his not being able to do so. The land, which is often the chief source of wealth of a state, is for its own loyal citizens who owe their allegiance to such state, and it would be dangerous to its existence to have its land

owned or exclusively controlled by aliens who owe allegiance to a foreign government. Our supreme court, and the Supreme Court of the United States have never permitted this inhibition against aliens owning or controlling real property to become ineffective by any subterfuge, and anyone who knowingly assists an alien in circumventing this provision of our constitution and statutes, thereby working an injury to the state, is not only dishonest, but disloyal as well.

While Katsuno states he was purchasing the land for his child, his actions speak louder than his words, to the contrary.

It is admitted that White purchased the land with his money and for him. I believe the evidence warrants me, and I will make a finding that the corporation was formed by him so that he could and did have the exclusive control of the land and received the profits from it; that the assignment of the stock to the daughter was induced by passage of the "Alien" Act of 1921, and that such assignment did not in law or in fact change the status of the interest in the land, which at all times and is now, though standing in the name of the corporation, really owned by the Katsunos, contrary to our constitution and statutes, and is subject to escheatment to the state, and I will decree the same so escheated.

CALVIN S. HALL, Judge.

CHAPTER XVI.—NOJI AND CARTER CASES (BONUS TEST CASES).

In the Matter of the Application of K. NOJI for Writ of Habeas Corpus.

SECTION A. IN THE CALIFORNIA SUPERIOR COURT.

No. 147. DEPT. 2.

1. PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable Judge of the Superior Court of the State of California, in and for the County of Imperial:

The petition of K. Noji, respectfully shows:

That your petitioner is confined, detained, imprisoned, and restrained of his liberty by C. L. Gillett, the sheriff of said County of Imperial, State of California, at El Centro, in the County of Imperial, State of California.

That said imprisonment, confinement, detention and restraint are illegal and unlawful and that said illegality and unlawfulness consists in this, to-wit:

That your petitioner is a native-born Japanese, now is, and for more than ten years last past due has been, residing in the County of Imperial, State of California, and that on or about the 12th day of March, 1924, he entered into a contract of employment with Geo. E. Mann & Company for the purpose of performing labor on certain agricultural land in the said County of Imperial, State of California, a copy of which said contract is hereto attached, marked "Exhibit A", and made a part of this petition the same as though set out in full at this place.

That on the 16th day of April, 1924, E. R. Utley, the duly elected, qualified and acting district attorney of said County of Imperial, State of California, caused defendant to be arrested and held in custody by said Gillett on a complaint charging him with a misdemeanor and violation of the Initiative Act, adopted by the electors of the State of California on November 2, 1920, Statutes 1921, page lxxvii, and known as the Alien Land Law and the amendments thereto, a copy of which complaint is hereunto annexed, marked "Exhibit B", and made a part hereof the same as though set out in full at this place.

That said California Alien Land Law, Statutes of 1921, page lxxvii, as amended by act of legislature of the State of California, approved June 20, 1923, Statutes of 1923, page 1020, is unconstitutional on the following grounds, to-wit:

1. That it is in conflict with section 1 of the Fourteenth Amendment to the Constitution of the United States;

2. That it is in conflict with:

- (a) Section 1 of article I of the constitution of the State of California;
- (b) Section 13 of article I of the constitution of the State of California;
- (c) Subdivision second of section 25 of article IV of the constitution of the State of California;
- (d) Subdivision nineteenth of section 25 of article IV of the constitution of the State of California;
- (e) Subdivision thirty-third of section 25 of article IV of the constitution of the State of California.

3. That the amendments of sections 2, 3, 4 and 5 of said Initiative Act adopted and approved by the electors of the State of California, November 2, 1920, Statutes of 1921, are unconstitutional as the amendments do not comply with section 1 of article IV of the constitution of the State of California.

That entering into and performing said contract hereto attached marked "Exhibit A" is not in conflict with said Initiative Act (Alien Land Law), Statutes of 1921, page lxxvii.

That entering into and performing said contract hereto attached marked "Exhibit A" is not in conflict with said Initiative Act (Alien Land Law) Statutes of 1921, page lxxxvii, as amended by the act of legislature of the State of California, Statutes of 1923, page 1020.

That the complaint in this action does not state facts sufficient to constitute an offense or a crime.

That no other writ of *habeas corpus* has been applied for, by or for your petitioner in regard to the restraint complained of in this petition.

That your petitioner is entitled to bail and he therefore asks that an order be made upon the issuance of the writ, fixing his bail and that he may be released, pending the hearing of this petition.

Wherefore your petitioner prays that a writ of *habeas corpus* may be granted, directed to C. L. Gillett, sheriff of the County of Imperial, State of California, commanding him to have the body of your petitioner, K. Noji, before your Honor, at the time and place therein to be specified, to do and receive, what shall then and there be considered by your Honor, concerning him, together with the time and the cause of his detention and the said writ; that he may be restored to his liberty pending the hearing of said writ your petitioner may be admitted to bail; for such other and further relief as to the court may deem meet.

K. NOJI,
Petitioner.

HICKCOX, CRENSHAW & TRADE,
Attorneys for Petitioner.

"EXHIBIT A," EMPLOYMENT CONTRACT.

This agreement made and entered into in duplicate this 12th day of March, 1924, by and between Geo. E. Mann & Company of Los Angeles, County of Los Angeles, State of California, hereinafter called the employer, and K. Noji, of the County of Imperial, State of California, hereinafter called the employee,

Witnesseth: That whereas the employer is lessee of certain real property situate in the County of Imperial, State of California, described as follows, to-wit: The west half of the west half of the north eighty acres of tract one hundred eighty, in township seventeen south, range fifteen east, containing twenty acres more or less, and is desirous of employing the said employee for a term of five months commencing on the 15th day of March, 1924, to perform all the labor on said described premises, in preparing ground for planting, caring for, irrigating and harvesting crops.

1. It is therefore agreed, between the said employer and the employee that the said employee will perform all the said labor on said described premises under the supervision and direction of said employer, except employer will furnish any additional labor necessary to harvest said crops, for a period of five months commencing on the 15th day of March, 1924, and ending on the 15th day of August, 1924, for the wage of \$75.00 per month, payable at the expiration of each of said months.

2. It is agreed that the said employee shall give all his time during the said term of employment to his employer on said premises and shall actu-

ally labor thereon not less than nine hours per day for six days per week in the cultivation and caring for and harvesting the crops the employer shall grow thereon.

3. It is further agreed that the employer will as an incentive to the said employee, to be industrious and efficient, pay to the said employee as an additional wage, a sum equal to 50% of the net profits of each crop grown and harvested on said premises during the performance of this contract by the employee, within 80 days after said crop is harvested and sold.

4. It is further agreed that in the event that the employee is discharged for cause or shall abandon this contract the employer shall be relieved from all liability for said additional wage.

Witness our hands.

GEO. E. MANN & COMPANY,

By GEO. E. MANN, Employer.

K. NOJI, Employee.

EXHIBIT B.

Personally appeared before me, this 16th day of April, 1924, in the County of Imperial, State of California, E. R. Utley, district attorney of the County of Imperial, State of California, who, being first duly sworn, makes complaint and deposes and says, that in this, the County of Imperial, State of California, on the 13th day of March, 1924, and before the filing of this complaint, the crime of a misdemeanor was committed by K. Noji, as follows, to-wit:

That said K. Noji, at the time, aforesaid, and at the county and state aforesaid, did then and there wilfully and unlawfully enter into a conspiracy with Geo. E. Mann to enter into and execute the following contract for the purpose of acquiring, possessing, using, cultivating, occupying and having the beneficial use of the land therein described:

"EMPLOYMENT CONTRACT.

"This agreement made and entered into in duplicate, the 18th day of March, 1924, by and between Geo. E. Mann & Company of Los Angeles, County of Los Angeles, State of California, hereinafter called the employer, and K. Noji, of the County of Imperial, State of California, hereinafter called the employee.

"Witnesseth: That whereas the employer is lessee of certain real property situated in the County of Imperial, State of California, described as follows, to-wit:

"The west half of the west half of the north eighty acres of tract one hundred eighty, in township seventeen south, range fifteen east, containing twenty acres more or less, and is desirous of employing the said employee for a term of five months, commencing on the 15th day of March, 1924, to perform all the labor on said described premises, in preparing ground for planting, caring for, irrigating and harvesting crops.

"1. It is therefore agreed, between the said employer and the employee that the said employee will perform all the said labor on said described premises under the supervision and direction of said employer, except employer will furnish any additional labor necessary to harvest said crops, for a period of five months commencing on the 15th day of March, 1924, and ending on the 15th day of August, 1924, for the wage of \$75.00 per month, payable at the expiration of each of said months.

"2. It is agreed that the said employee shall give all his time during the said term of employment to his employer on said premises and shall actually labor thereon not less than nine hours per day for six days per week in the cultivation and caring for and harvesting the crops the employer shall grow thereon.

"3. It is further agreed that the said employer will as an incentive to the said employee, to be industrious and efficient, pay to the said employee as an additional wage a sum equal to 50 per cent of the net profits of each crop grown and harvested on said premises during the performance of this contract by the employee, within 60 days after said crop is harvested and sold.

"4. It is further agreed that in the event that the employee is discharged for cause or shall abandon this contract the employer shall be relieved from all liability for said additional wage."

POINTS AND AUTHORITIES.

The petitioner in this case, K. Noji, a Japanese subject, lawfully in the United States, and a resident of the County of Imperial, State of California, for more than ten years last past, was arrested on the complaint of the district attorney of Imperial County, charged with a conspiracy to violate the Initiative Act of 1920, as amended by the act of the legislature, Statutes 1923, p. 1020. The contract is set out in *haec verba* in the complaint and in the petition.

The petitioner alleges many reasons in the petition for the writ, to which inference is made.

I.

The courts of the United States are bound to follow the construction placed upon statutes and constructions of the states, by the courts of the last resort of the states, when no federal question is involved.

Elmendorf vs. Taylor et al., 10 Wheaton 150, 6 Law Ed. 289. Opinion of Chief Justice Marshall. This decision has been cited in the Federal courts with approval over one hundred times.

This rule has been upheld and applied by the supreme court of California. (*People vs. Linda Vista Irri. Dist.*, 128 Cal. 477; *Crocker vs. Scott*, 149 Cal. 575.)

The following decisions of the United States courts are in point: *Rialto Irri. Dist. vs. Stowell*, 246 Fed. 294; *Leffingwell vs. Warren*, 2 Black 599, 17 Law Ed. 261; *Fallbrook Irri. Dist. vs. Bradley*, 163 U. S. 142; 41 Law Ed. 107.

The Supreme Court will follow decisions of the states court in a non-federal question, even so far as to give similar statutes different constructions, according to the decisions of courts of last resort of the respective states. (*Union Central Bank vs. Bank of Kan. City*, 136 U. S. 323, 34 Law. Ed. 341.)

II.

What right have aliens in California?

The right to hold and dispose of personal property by aliens is a proposition so self-evident as to hardly need the citation of authorities. (1 R. C. L. 805.)

Under international law aliens are capable of acquiring, holding and transmitting personal property the same as citizens. (*Hughes vs. Edwards*, 9 Wheaton 489; 6 Law Ed. 142-144; *Ruckgaber vs. Moore*, 104 Fed. 947; *Cosgrove vs. Cosgrove*, 38 Alt. 219 [Com.]; *C. C. C. & St. L. R. R. vs. Osgood*, 73 N. E. 285; *Grenia vs. Grenia*, 14 Mo. 356.)

III.

The right to labor is the personal property of all persons in the United States whether citizens or aliens.

An alien has the right to engage in the common occupations of life, and this right cannot be taken from him by any state legislature, and is fully protected by the Fourteenth Amendment to the Constitution of the United

States. (*Yick Wo. vs. Hopkins*, 118 U. S. 373-30 Law Ed. 220; *Meyer vs. Nebraska*, 262 U. S. 690, 67 Law Ed. Ad. Op. 698; *Terrace vs. Thompson*, 68 Law Ed. Ad. Op. 35; *Fraser vs. McConway T. Co.*, 82 Fed. 257; *Coppage vs. Kansas*, 236 U. S. 1, 59 Law Ed. 441; *Juanita Limestone Co. vs. Fogley*, 187 Pa. 193; 67 A. S. R. 579; *Truax vs. Raich*, 239 U. S. 33, Ann. Ca. 1917 B, 283; *Ex parte Kuback*, 85 Cal. 274; *In re Ah Chong*, 2 Fed. 733; *In re Parrott*, 1 Fed.)

IV.

The right of an alien to labor is protected in California by secs. 1 and 13 of art. I of the constitution, and is similarly protected in other states by their respective constitutions.

Ex parte Kuback, 85 Cal. 274, Cited with approval in *Johnston vs. Good-year Mining Co.*, 129 Cal. 12; *Ex parte Sing Lee*, 96 Cal. 354; *In re Kotta*, 187 Cal. 2; *State vs. Montgomery*, 47 A. 165 (Mo.), 80 U. S. R. 386; *Templar vs. State*, 90 N. W. 1058, 100 A. S. R. 610.

V.

The Alien Land Law as amended by the Statutes of 1923 is in contravention of sub. 2 of sec. 25 of art. IV of the constitution of the State of California.

Ex parte Westerfield, 55 Cal. 550.

VI.

The legislature is prohibited, both by the Fourteenth Amendment to the United States Constitution and secs. 1 and 13 of art. I of the constitution of California, from enacting statutes which interfere with the terms of contracts of employment.

The right to acquire property by honest labor on the conduct of a lawful business is as much entitled to the protection as the right to guard property already acquired.

International News vs. Associated Press, 63 Law Ed. 211-219.

This right is preserved to every person within the jurisdiction of the state. (*Meyer vs. Nebraska*, 262 U. S. 390; 67 Law Ed. Ad. Op. 698; *Terrace vs. Thompson*, 68 Law Ed. Ad. Ops. 35.)

Statute forbidding contracts for mining coal to exclude any provision for weighing after screening is unconstitutional. (*Remsey vs. Illinois*, 17 L. R. A. 853.)

A statute prohibiting contracts to be made whereby employers could fine weavers for imperfect work is unconstitutional. (*Commonwealth vs. Perry*, 155 Mass. 325; 14 L. R. A. 325.)

The legislature cannot enact a statute providing method of payment for labor by money only. (*Stimson Mill Co. vs. Braun*, 136 Cal. 122; 89 A. S. R. 116.)

Nor can the restriction to the right of contract go beyond the farm; the constitutional protections preserve any further interference. ([*Mec. Lien*] *Snell vs. Bradbury*, 139 Cal. 379-382.)

Trading Stamps contracts; *Ex parte Drexel*, 147 Cal. 763.

Architects. (*Binford vs. Boyd*, 178 Cal. 458-461.)

Payments to building contractors. (*People vs. Holder*, 53 Cal. App. 42-51, sub. 4.)

VII.

While the entire police power is vested in the legislature of a state, yet the right to labor is such a property right that it cannot be taken away by a statute under the guise of the exercise of the police power. (*Coppage vs. Kansas*, 59 Law Ed. 441.)

The classification of ineligible aliens in regard to labor contracts cannot

be upheld under police power. (*Truax vs. Raich*, 239 U. S. 33, Ann. Cas. 1917 B 283.)

The classification attempted in the *Truax vs. Raich* case was void because there was no authority to deal with that at which the legislature is aimed. (*Tanner vs. Little*, 60 Law Ed. 701.)

Again the Supreme Court of the United States said, referring to the statements that the right to work at the common occupations of life for a livelihood is fully protected by the Constitution, and referring to the opinions in *Truax vs. Raich*, and *Farmer vs. Little*:

"It is not our purpose to qualify or weaken either of those declarations in the least." (*N. Y. Cen. R. Co. vs. White*, 61 Law Ed. 667-676.)

"The police power is universally conceded to include everything essential to the public safety, health and morals, and to justify by abatement by summary proceedings of whatever may be regarded as a public nuisance. To justify the state in thus interposing its authority in behalf of the public it must appear (1) that the interest of the public generally, as distinguished from those of a particular case, requires much improvement; and (2) that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals." (*Lawton vs. Steele*, 52 U. S. 133, 38 Law Ed. 385.)

"Definitions of the 'police power' must, however, be taken subject to the condition that the state cannot, in its exercise for any purpose whatever, encroach on the power of the general government, or rights granted or secured by the supreme law of the land." (*N. E. Gaslight Co. vs. Louisiana Lt. Co.*, 5. U. S. 650; 29 Law Ed. 516.)

"The due exercise of police power is limited to the preservation of the public health, safety and morals, and that legislation which transcends these objects, whatever other justification it may claim for the existence, cannot be upheld on a legitimate police regulation." (*Ex parte Dickay*, 144 Cal. 234-236.)

The police power in regard to lawful occupation may be used to regulate, but not to prohibit. (*In re Quarg*, 149 Cal. 79; *In re Farb.*, 178 Cal. 592; *Ye Gee vs. S. F.*, 233 Fed. 757; *Ex parte Hayden*, 147 Cal. 649, 109 A. S. R. 183; *Ex parte Dickey*, 144 Cal. 234; *Frot vs. City of L. A.*, 181 Cal. 22-28.)

VIII.

The act of the legislature of California, Statutes 1923, page 1020, in attempting to amend the Alien Land Law, adopted as under the Initiative, is void. It does not comply with the provisions of section 1 of article IV of the constitution of California, as follows:

"No act, law or amendment to the constitution adopted by the people at the polls under the initiative provisions of this section, shall be amended or repealed except by a vote of the electors, unless otherwise provided in said initiative measure."

The Alien Land Law provides as follows for its amendment:

"Sec. 13. The legislature may amend this act in furtherance of its purpose and to facilitate its operation." (Statutes 1921, p. XC.)

2. MEMORANDUM DECISION.

These cases both concern the same matter, namely the construction of the Alien Land Law of California, and each of the legal matters at issue are substantially the same, and therefore both were argued and will be considered together. The question to be determined in each is, can an alien not eligible to citizenship be employed to cultivate a farm under a contract, which, either by a division of produce or of net profits, makes the wages

of the alien to depend in whole or in part upon the efficiency of the work of such alien—that makes him interested in the amount and value of his product?

In the first case the petitioner seeks release from imprisonment upon a charge of entering into such a contract. In the second the plaintiff, Carter, seeks to enjoin the district attorney from maintaining criminal prosecution, or escheat proceedings, on account of his making a similar contract.

By the provisions of the Alien Land Law of 1920, aliens not eligible to citizenship "may acquire, possess, enjoy and transfer real property or any interest therein in this state in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a subject and *not otherwise*."

The scope and construction of this law, especially with reference to contracts of this character now before this court was fully considered by the supreme court of our state in *Ex Parte Okahara*, 216 Pac. 614.

In that the court in its decision used this language: "The purpose of the Alien Land Law, as is well said in *O'Brien vs. Webb* (279 Fed. 117), was apparently to prevent ownership and legal interest in farming lands from passing to aliens who never could become citizens."

And again, after an exhaustive review of the law as to cropping contracts like the one now before the court, as follows:

"It is the law of this and most of the states of our Union that contracts of the character of the one before us do not transfer or convey any interest in real property. Neither do they constitute an agreement to do so. * * * The right of entry or access is not as is contended equivalent to possession, as that word is used in a prohibitive sense. Access to the place upon which labor is to be performed is necessary for the execution of any conceivable contract of employment. Petitioner here is merely given access to the premises at all convenient times for the purpose of performing service. The situation in this respect is precisely as it would be if he were paid a daily or monthly wage. Under such employment no one could question his right to physically go upon and remain upon the premises. Every agreement or contract to perform farm labor must, of necessity, give the right to go upon the premises upon which the labor is to be done. * * * The fact that the crops are to be converted into money by the employer and divided on a net basis with the contractor could not make a transfer of any interest in the soil to the latter any more than the payment of wages made with moneys divided from the sale of the products of the soil, under the most formal contract of employment, would convey an interest in the soil to an employe who assisted in the labor of production * * * and then there is nothing from which it can be legitimately inferred that the design of the law is to prevent an alien from entering into a cropping agreement whereby he gives his labor for a share of the crops to be raised."

The court then quoted with approval the decisions of other states, and earlier decisions of this state, holding that cropping contracts were agreements for employment only and that they created, not the relation of landlord and tenant, but only that of master and servant.

This court is now urged to disregard this, the decision of the highest court of the state, for the reason that it is claimed that this decision has been overruled, or at least distinguished, and the language above quoted declared to be mere *dictum* by the decision of the Supreme Court of the United States in the case of *O'Brien vs. Webb*, — U. S. —, 68 Law Ed. 109.

It is true that the Supreme Court of the United States in that case, speaking through Mr. Justice Butler, used language apparently disagreeing with the language we have quoted from the supreme court of our state. When, however, such distinguished courts apparently disagree, the respect owing to each tribunal by an inferior court requires a close examination of their decisions with an attending strong presumption that no such disagreement exists. In making this examination, however, a trial court in California, if such disagreement actually exists in matters like this concerning only a construction of California laws, must follow the supreme court of California, as being the highest authority on that matter. The Supreme Court of the United States, itself, has repeatedly declared that with respect to the construction of a state's own laws, the decision of the supreme court of the state is a higher authority than a decision of their own on the same point. In other words, in respect to disputes involving the laws and Constitution of the United States, the decisions of the United States Supreme Court are the highest law of the land, while with respect to disputes involving the laws and constitution of the state, the supreme court of the state is the highest authority. It sometimes happens, however, as in the case of *O'Brien vs. Webb*, *supra*, that a matter of the construction of state laws comes first into the United States district court by reason of a claim of a violation of the United States Constitution or laws, which is there decided and taken on appeal to the Supreme Court of the United States, with the result that it is called on incidentally to construe the law of the state. When this happens the Supreme Court of the United States always follows the decisions of the highest state court if the same point has been by that court decided.

For instance, in the case of *Suydam vs. Williamson*, 65 U. S. 427, the identical same matter of law had been before the United States Supreme Court several years before in the case of *Williamson vs. Berry*, 8 Howard, 549, and been decided by it one way, but later came before the highest court of New York (*Cochran vs. Van Surley*, 20 Wend. 1365), and was decided directly to the contrary. When again the same point came before the United States Supreme Court in *Suydam vs. Williamson*, *supra*, the court without any hesitation overruled its own previous decision and followed that of the New York court. However, as previously stated, the presumption is that the two courts are not in disagreement. It is perhaps unfortunate that expression "cropping contract" should ever have been used. The two words "tenancy" and "employment" cover the whole case and cover every possible case. When a man tills the soil of land not his own for a reward paid or promised or permitted to be taken he is either a tenant or a laborer, and cannot be both, nor is there any hermaphroditic relation known to the law ever created by any such contract. While there may seem to those unfamiliar with the law a similarity between the two, there really is none. We have known men to work in coal mines both for a wage based on production and even for a share of the coal, but no one thought of considering such miners tenants of the land. The confusion that exists in the minds of some is only because of the general prevalence of crop leases. With respect to these our supreme court has repeatedly said that a man may pay his rent in anything agreed on just as a man may pay his laborer in anything agreed on. The distinction then does not lie in how the crop is divided or whether divided at all, or in who holds the title between times, but rather in whether the relation created by the contract, in case of disagreement, is to be determined by the law of landlord and tenant or by the law of employer and employee. And this difference is sharp, distinct and decisive. In the event of dispute between landlord and tenant the landlord cannot,

whether in the right or not, by aid of peace officers or otherwise, invade the premises or eject the tenant. If he does so he is guilty of a crime, and may be punished criminally for a forcible entry, and besides he is liable civilly for treble damages. On the other hand, the tenant is liable to treble damages if he remains in possession after default. And no matter how much the landlord may desire possession, and even if he be willing to pay damages, the tenant, if not in default, may stand his ground, and the courts will keep him in possession until the end of the term agreed.

How different in the case of employer and employee. Because a contract to labor which could not be broken at will by the employee would be human slavery, it has always been held that there is no way of compelling performance of a labor contract. And the law of mutuality, on the other hand, makes it equally impossible to compel an employer to perform his contract of employment. Either may dissolve the relation at will. The only liability incurred is one for damages, and even then the one claiming to be aggrieved must do all in his power to minimize the damage by seeking—the one, other employment, and the other, another servant. Should the employee see fit to leave, he could not be enjoined from leaving, and should the employer see fit to discharge the employee, whether he be at fault or not, he must leave, and should he fail, the employer has only to call the police, or even himself use sufficient force to expel the reluctant employee. Even the jurisdiction of the court with respect to such disputes follows different lines. In the case of employee and employer the jurisdiction is transitory. In the case of landlord and tenant, with respect to the right of possession, it is entirely local wherever the land is situate.

The acid test, therefore, of whether or not a man working on the land of another under contract is there as a tenant or as a laborer is whether or not in the event the owner ordered him off he would be obliged to go, whether in default or not, and whether if forcibly ousted he could maintain an action of forcible entry, or if threatened could secure an injunction. If these distinctions seem obtuse to the layman they have not been so to courts or lawyers, nor to those who have followed the farming industry. It has been a part of the current farm law, well known and generally acted upon. Early in the history of this county there came before Hon. J. W. Curtis, now justice of the court of appeals of this state, in another department, the case of *Germain Seed and Plant Company vs. Turner*, in which the plaintiff sought an injunction requiring defendant to abstain from coming or remaining on certain farming lands. The defendant answered, setting up a contract with plaintiff whereby he, the defendant, was to go upon these lands and there plant, raise and harvest a crop of Sudan grass seed, and should receive for his labor one-half of the net profits thereof. He further showed that he had in all respects complied with his contract, that the season for harvest was at hand, but not completed, and that it was necessary for him to remain on this land in order to complete his contract. The court granted plaintiff's motion for judgment on the ground that the answer stated no defense, holding the contract to be one of employment, and that the employed had no interest in the land of his employer, nor a right of possession, and that the employee must in all cases leave the land when discharged. In making this ruling the court, beyond any doubt, was following the repeated decisions of the supreme court of this state. This case is mentioned not as authority technically binding on the court, but to show that this distinction between the essentials of employment and leases was well known and understood long before the Alien Land Law was thought of.

Now, in the case of *O'Brien vs. Webb*, *supra*, the Supreme Court of the United States had before it on appeal from the United States district court

of the Northern District of California, a case wherein, as in the case of *Carter vs. Utley* now under consideration, the plaintiff sought to enjoin prosecution by the state authorities by reason of a contract about to be entered into by the plaintiff with an alien subject of Japan. The United States Supreme Court held that injunction should be denied because the contract violated section 2 of the Alien Land Law, in that it gave to the alien "the use, control and benefit of the land for agricultural purposes substantially similar to that granted to a lessee." That distinguished tribunal had before it, and considered, the decision of our supreme court in *Ex parte Okahara, supra*, and said concerning that decision, not that it was erroneous, but it said:

"The decision of the supreme court of California, in *Ex parte Okahara, supra*, does not support the appellant's contention * * *. The contract in that case differs in important particulars from the one before us, but in the view we take of this case we need not determine whether within the meaning of the act the contract between O'Brien and Inouye, if executed, would effect a transfer of an interest in real property, the question in this case is not whether the proposed contract is prohibited by section 10, but it is whether appellants have shown that they have a right under the constitution or treaty to make and carry out the contract, and are entitled to an interlocutory injunction against the officers of the state. A negative answer must be given. The privilege to make and carry out the proposed cropping contract, or to have the right to the possession, enjoyment and benefit of land for agricultural purposes, as contemplated and provided for therein, is not given to Japanese subjects by the treaty. The act denies the privilege because not given by the treaty. No constitutional right of the alien is infringed. It therefore follows that the injunction should have been denied."

The case then before the court was commenced as stated by O'Brien, an American citizen and resident of California, in the United States district court, and the sole and only ground of jurisdiction in the United States court was his claim that the Alien Land Law was contrary to the Constitution of the United States and the treaty with Japan.

Whatever the language used therefore by the court (and the court there plainly said that a contract of the kind before it was in legal effect a lease and a violation of section 2 of the act), the legal effect of the decision is simply and only that that alien had no constitutional right in the matter entitling him to go into the Federal court for relief. The court, as quoted above, so stated. Since the Supreme Court of the United States is the supreme authority upon the matter of the construction and effect of the United States Constitution, treaties and laws, it follows that it must now be conceded that a law passed by the State of California forbidding such a contract as that proposed by O'Brien and Inouye would be valid. That was the only point before the court to be decided, and it must be all that was in fact decided. Further the court in that decision said in speaking of the decision of the supreme court of California in *Ex parte Okahara, supra*:

"The contract in that case differs in important particulars from the one before us."

This difference is well stated in the opinion of District Judge Bledsoe in the O'Brien case when before the district court, *O'Brien vs. Webb*, 279 Fed. 124.

Said Judge Bledsoe:

"If the contract is one merely of employment, a cropping contract, why did the parties find it necessary to agree that the owner of the land should

not interfere with him (the cropper) in the planting, cultivating and harvesting of the crop *in any way* and that he should protect the cropper during the existence of this contract against interference by any person whatsoever? Why, also, if it was to be an ordinary cropping contract, did the owner specially agree to grant the cropper the right to carry out the terms of this agreement by employing such agents and employees as he shall see fit, and give to such agents or employees free ingress or egress from said property or the right to live thereon without let or hindrance? In the light of this positive, specially noted covenants on the part of the owner of the land how much substance is there in the formal reservation by him of the general possession of the land. * * *

"We have in this case actual possession, uninterfered with and unhindered for a full period of four years of a particularly described tract of agricultural land being granted to the alien and to his agents and employees by a contract in writing together with a further right within a reasonable period after the termination of the contract to return upon the land for the purpose of removing his half of the crops to be grown thereon."

While the privilege of living on the farm is one common to almost all agricultural laborers, and in all countries, still the contract then before the court was apparently a mere sham and manifestly intended to secure to the alien the right to himself assert in court, if need be, his possession and right of possession. Such being the case, the contract was not a cropping contract, but a lease. In any event, the United States court could not have appropriately decided that the California supreme court had wrongly construed the California law or contract, and certainly this court will not presume for a minute that the Supreme Court of the United States has done that which it many times said it would not do, namely, overrule the decision of the highest court of the state upon a matter of construction of a state statute. This court is bound, therefore, to follow the decision of the supreme court of this state and hold that a cropping contract which is a cropping contract, a contract to work on a farm for a part of the crop or an interest in the crop is not a lease and gives the cropper neither possession of land nor an interest in land and did not violate the Alien Land Law of 1920.

Up to this point the court has not considered the effect of any of the amendments to the Alien Land Law of 1920 adopted by the state legislature of 1923.

The language of the 1923 Act differs materially from that of the Act of 1920, and it is claimed by the attorney-general that even if not interdicted by the 1920 Act the contracts in question are forbidden by the Act of 1923. It has been necessary, however, to ascertain first the meaning of the Act of 1920. That act was an initiative act passed and adopted, not by the legislature, but by the people themselves at the election of 1920. By the provisions of the constitution of California, article IV, section 1, laws thus adopted by vote of the people may not be repealed or amended by the legislature, except as provided in the initiative measure.

The only pertinent provision of the 1920 Act permitting an amendment is section 13, which reads as follows:

"Sec. 13. The legislature may amend this act in *furtherance of its purpose* and to *facilitate its operation*."

Any amendment, therefore, which goes beyond the mere matter of a furtherance of the purpose of the Act of 1920, and matters of procedure in enforcement, is and must be unconstitutional and void. If any effect is to be given to the initiative feature of our constitution most certainly the

one forbidding amendment by the legislature of a law enacted directly by vote of the people must be strictly enforced.

Now, the "purpose" of the law of 1920 has already been declared by our supreme court to be to prevent ineligible aliens owning land or an interest therein, and the same court has held that a cropping contract is not an interest in land.

Now, the construction and meaning as well as the declaration of purpose of the Act of 1920 as declared by the supreme court is a part of the law of the state, and after the decision of our court in *Ex parte Okahara, supra*, there must be deemed written and read into the law of 1920 the meaning and construction given its language by the supreme court. The decision of the court in *Ex parte Okahara* became a rule of property in the state. (*Suydam vs. Williamson, supra.*)

Relying upon it, the usual three-year cropping contracts have been entered into from time to time ever since.

What then can be said of the amendment to section 8 of the Act of 1920 adopted by the legislature of 1920 to the effect that "Cropping contracts are hereby declared to constitute an interest in real property."

This is not an amendment in furtherance of the purpose of the law enacted by the people, but is a bold attempt to put something new in the act, to make something criminal which was not criminal before. It is an attempt of the legislature to substitute their construction of the purpose of the Act of 1920 for that of the supreme court.

The people who adopted the law of 1920 must be deemed to have known what a cropping contract was, and that it did not constitute an interest in real property, not only because it was a matter of common knowledge, but because the expression "cropping contracts" was used in the law of 1920 itself, not as a thing forbidden, but along with contracts for the sale of products of land and other agreements worthy only of inspection and examination to make sure that in some such guise an attempt might not be made to cover up a lease.

The other amendments attempted are all of the same character. They forbid this class of aliens to occupy or even cultivate agricultural land.

It was admitted by the attorney-general and district attorney upon the argument that the provision of the amendment forbidding the employment of a Japanese upon a farm to cultivate the soil is contrary to our state constitution. But, says the attorney-general here, as in his printed brief filed in the Supreme Court of the United States: "The labor of the Oriental paid for by *fixed compensation as wages* is not destructive," but that where the compensation is, by the contract, to be increased whether by crop sharing or a bonus depending on the effectiveness of the labor, then the competition is of a character that breaks down American standards, etc. They contend that there is no legal objection and no economical objection to the employment of an Oriental alien by the day simply, but that if his wages are increased in proportion to his zeal, effectiveness and efficiency, then it is both illegal and economically unfair competition. This method of putting premium on efficiency is characterized as "Oriental habit and custom." It must be apparent at once that all "piece work" has this same alleged "vice" and that if the police power of the state can be invoked to suppress such "unfair competition" as making a laborer's wages depend on what the laborer accomplishes, there will be opened speedily a new and great field for special legislation along such lines. As a matter of history, labor contracts of this character, relative to farming, are far from being something of "Oriental habit and custom." While not unknown in other

states, the great use has been in the cotton, rice, corn and vegetable lands of the Southern States, and there the use of the same has been almost universal, and without any discrimination as to race, color or previous condition of servitude, and based solely on crops and farming conditions. For instance, it is entirely impractical and from a standpoint of financial profit impossible to raise and harvest cotton by day labor. If this method of employing farm labor were a new thing devised by shrewd lawyers to meet the Alien Land Law the court would look upon them with great suspicion as simply a means of avoidance. As a matter of historical fact they, are strictly an American institution in general use for more than fifty years, and the law concerning same was well known and commonly understood in California long before the Alien Land Law was considered. I am unable, therefore, to agree with the state's contention relative to the intent of the law being to prevent this class of competition, or that even if it is desirable to prevent the competition which results from a bounty on efficiency. Many modern manufacturers have found it advisable to resort to "profit sharing" in various ways to increase efficiency of their labor, and I can see no danger to the state lurking therein.

When the state concedes as here that it is not unlawful to employ Japanese on the farms it only concedes that which must be conceded.

It would approach the ridiculous to say that such persons may be employed around wharves, munition factories, lumber camps, mines, etc., but that there would be grave danger to the state should one be employed to raise cucumbers or onions. The constitution of the state forbids special legislation, and employing farmers cannot constitutionally be placed in a class by themselves and forbidden to employ laborers lawfully employable by others who employ labor.

An employee working on a farm with a bonus for efficiency in production has no more the "beneficial use" of the farm land than has one working in the factory, mine or lumber camp with a bonus for efficiency in production the "beneficial use" of the factory land, the mining land or timber land. Such a laborer "enjoys" the farm land only in the same way that laborers in the factory or mine can be said to enjoy the factory or the mine. An employing farmer cannot constitutionally be debarred from employing any laborer lawfully in the country.

With respect to the character of a labor contract and the form in which wages are to be paid it has already been decided by our supreme court that the legislature cannot legally say in what manner an employer must pay his laborer. In the *Mechanics Lien Law* of 1887, sec. 1184, C. C. P., the legislature undertook to provide that the compensation in a contract for building a house must be payable in money. The matter came before our supreme court in the case of *Stimson Mill Company vs. Broun*, 136 Cal. 122, in which the builder agreed to take as part of his compensation old lumber. The contract was attacked as illegal on that account. The court held the law to be unconstitutional and void in that respect contravening the provisions of section 1, article I, of the state constitution. Any attempt on the part of the legislature to require a farmer to pay his labor in cash would be equally open to the same objection as would any other interference with the free right to contract on whatever terms might be agreed on by employer and employee.

It must follow that unless a cropping contract is an interest in land within the meaning of the Act of 1920 the legislature cannot make it so and that matter having been decided by the supreme court in *Ex parte Okahara, supra*, it cannot now be held to be such interest in lands or illegal in any way.

The court's order herein in the case of *Ex parte Nogi* will be that the petitioner be discharged from custody. In the case of *Carter vs. Utley* the demurrer will be overruled, but since the form of the contract is not conclusive upon the state as to the relation between the parties, as pointed out by the Supreme Court in *Ex parte Okahara, supra*, the state may be allowed to show that while on its face it is legal the contract is in fact sham and the relations of landlord and tenant intended; the state will be allowed ten days in which to file answer to the complaint. A temporary injunction will be allowed and will be made permanent if no issue of fact is raised as to the character and intent of the contract.

M. W. CONKLING, Judge.

Endorsed: Filed May 28, 1924.

C. G. MOUSSEAU, County Clerk,

By N. C. WILBY, Deputy.

SECTION B. IN THE CALIFORNIA SUPREME COURT.

L. A. No. 8237.

1. CARTER CASE.

A. APPELLANTS' OPENING BRIEF, BY U. S. WEBB.

STATEMENT OF FACTS.

In this case plaintiffs brought an action for injunction against the enforcement of the Alien Land Act of this state by the district attorney of Imperial County and the attorney-general of the state, and in particular against the enforcement of the escheat provisions thereof. George A. Carter, plaintiff, is a citizen landowner, and Hakam Singh, plaintiff, is a Hindu ineligible alien. (See *U. S. vs. Bhagat Singh Thind*, 261 U. S. 204.)

The citizen landowner is the owner of certain farming lands located in Imperial County, and the Hindu ineligible alien desires to enter into a certain contract with the citizen landowner for the planting, cultivation and harvesting of farm crops thereon. The said landowner desires to have planted upon said property a crop of lettuce to be grown and harvested during the cropping season for the year 1924-1925. An application for an injunction was brought against the attorney-general and the district attorney of Imperial County taking any proceedings to interfere with the entering into and carrying out of this contract. We filed a general demurrer to this petition for injunction. The demurrer was overruled. We refused to answer and judgment was rendered for plaintiffs. We have appealed from this judgment.

ARGUMENT.

The contract is designated as an "employment contract".

It is provided that:

"The party of the first part" (that is the landowner) "hereby employs the party of the second part together with the tools and equipment of said party of the second part for the preparing of the soil, planting, cultivating, growing and harvesting of said crop and such other crops as the first party may designate upon said land, and the party of the second part hereby lets and hires to the party of the first part all of said tools and equipment of the party of the second part, and agrees to furnish his own labor and such other labor, services and equipment as may be necessary to prepare the soil, plant, cultivate, grow and harvest said crop upon the above described land for the cropping season of said crop during the year 1924-1925."

The above provisions are practically the same as what we have in the case of *Porterfield et al. vs. U. S. Webb etc. et al.*, Los Angeles No. 8214, which case is submitted and argued along with this case and in our brief, to which case we hereby refer.

It is further provided in the contract in this case that:

"It is understood and agreed that the party of the second part has no right, title or interest of any nature or extent in and to said real property or to said crop, or any part thereof, and that the relation of the parties hereto is that of employer and employee and that the second party is to prepare the soil, plant, cultivate, grow and harvest said crop as directed and in the manner and at the times as directed by the party of the first part, and that if the party of the second part shall fail or neglect to properly care for or perform the services required to properly prepare the soil, raise and harvest said crop that the party of the first part may employ other or additional services necessary therefor, and any costs thereof may be deducted from the compensation of the party of the second part, or the second party's employment may be terminated at the option of the party of the first part.

"For and in consideration of the services to be rendered by the party of the second part, the party of the first part hereby agrees to pay to the party of the second part the sum of fifty dollars (\$50.00) per month during the term of this employment from the date of commencement of work upon the preparation of said soil until the crop is harvested, and to make such other cash advances as the first party may deem warranted in, and after said crop is harvested and sold by the party of the first part, the party of the first part will pay to the party of the second part an amount equal to eighty per cent of the highest sale price of said crop obtainable upon a *bona fide* sale by the party of the first part, less such sums as may be or as have been already paid or advanced by the party of the first part to the party of the second part."

These above quoted provisions from the contract are practically and for all our purposes identical with the provisions which we found in the Porterfield contract, and which are fully set forth in our brief filed in the said case of *Porterfield et al. vs. U. S. Webb etc. et al.*, Los Angeles Number 8214, and to which brief we again refer.

It is respectfully submitted that the judgment of the trial court should be reversed.

Dated, July 16, 1924.

U. S. WEBB,
Attorney-General of the State of California,
FRANK ENGLISH,
Deputy Attorney-General of the State of California,
ERNEST R. UTLEY,
District Attorney of the County of Imperial,
Attorneys for Appellants.

b. BRIEF OF AMICUS CURIAE.
(SEE CHAPTER XVIII-B-2.)

c. DECISION OF THE COURT.
(PENDING.)

CHAPTER XVII.—F. S. JONES AND T. MAKIMOTO CASE (BONUS TEST CASE).

F. S. JONES and TAKEO MAKIMOTO, Plaintiffs, vs. U. S. WEBB, as Attorney-General of the State of California, and ASA KEYES, as District Attorney of the County of Los Angeles, State of California, Defendants.

SECTION A. IN THE CALIFORNIA SUPERIOR COURT.

No. 140734.

1. COMPLAINT FOR INJUNCTION.

Plaintiffs complain of the above-named defendants and for cause of action allege:

I.

That plaintiff F. S. Jones is a citizen of the United States of America and of the State of California, and a resident of the County of Los Angeles, in said state; that plaintiff Takeo Makimoto is a Japanese alien, born in Japan and a subject of the Emperor of Japan and is ineligible to citizenship in the United States of America or the State of California; that said Takeo Makimoto is a resident of the County of Los Angeles, in said state; that said plaintiffs sue herein on behalf of themselves and of all others similarly situated.

II.

That the defendant U. S. Webb is the duly qualified and acting attorney-general of the State of California, and is sued herein as such; that Asa Keyes is the duly qualified and acting district attorney of the County of Los Angeles, State of California, and is sued herein as such; that said Asa Keyes is a resident of the said County of Los Angeles, in said state.

III.

That plaintiff F. S. Jones is now and for a number of years last past has been the owner of the following described real property, situated in the County of Los Angeles, State of California, to-wit: Lot fifteen (15) tract forty-one (41) as per map thereof recorded in said county, and consisting of ten acres of land; that said real property is particularly adapted to raising berries and vegetables and for a number of years has been devoted to that and agricultural purposes; that said plaintiff Takeo Makimoto is a capable farmer and has for many years been employed in farming and raising berries and vegetables in the said County of Los Angeles, in said state.

IV.

That plaintiffs, F. S. Jones and Takeo Makimoto, desire to enter into a contract of employment with respect to the said land hereinabove described, whereby said F. S. Jones shall employ said Takeo Makimoto to plant, cultivate and harvest berries and other crops on said land for a compensation in money in an amount consisting in part of a fixed sum per month and the balance in the form of a bonus, the amount of which shall depend upon the success and value of his work as measured by the net profits realized by the employer after deducting all costs and expenses incurred or paid by said employer. A copy of said proposed employment

contract is hereto annexed, marked "Exhibit A" and by such reference is made a part hereof the same as though set forth at length herein.

V.

That on November 2, 1920, the people of the State of California, by initiative, enacted a law known as the "Alien Land Law" forbidding the ownership, transfer and leasing by aliens ineligible to citizenship of agricultural lands within the State of California;

That on June 20, 1923, the legislature of the State of California enacted an amendment to said Initiative Act entitled "An act to amend an act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith"; that said amendment aforesaid provided in part that cropping contracts should constitute an interest in real property within the meaning of said Initiative Act and subject to the penalties therein provided for a transfer of such an interest.

VI.

That the said defendants, U. S. Webb as attorney-general of said state, and Asa Keyes as district attorney of said county, contend that the said contract of employment and all contracts of employment similar thereto in the manner of fixing the compensation constitute cropping contracts within the meaning and intent of the said amendment to said Initiative Act; that the said defendants in their respective official capacities have threatened to and will enforce the said amendment of said Initiative Act and each and all of its terms and the whole thereof against the plaintiffs and each of them and against any other persons similarly situated if they or any of them enter into said, or any similar, employment contracts with respect to said or any land in the State of California used for agricultural purposes and will cause to escheat or attempt to cause to escheat to the State of California the said interest in said real property and the proceeds to be paid to said Makimoto from the cultivation of said land, and will prosecute or attempt to prosecute said plaintiffs and each of them criminally for an alleged violation of said amendment to said Initiative Act aforesaid.

VII.

That but for said contention and said threats and purpose of the said defendants and each of them said plaintiffs would enter into said employment contract; that there are many citizens of the State of California and many owners of agricultural and farm lands therein and many other Japanese aliens, residents of the State of California and heretofore employed in farming, who desire to make employment contracts with respect to agricultural lands situated in said state similar to the contract hereinbefore referred to and not forbidden by the said amendment aforesaid to said Initiative Act, and would do so but for the drastic penalties and provisions thereof.

VIII.

That said amendment is in its terms so drastic and the penalties attached to a violation thereof are so great that neither of these plaintiffs, nor any other persons similarly situated, may enter into said or similar employment contracts with respect to land in said state, even for the

purpose of testing the validity of said amendment to said Initiative Act or the application thereof to the said, or any similar, employment contract except at the risk of confiscation of his or their property and imprisonment for a long period in the penitentiary and the payment of heavy fines, and unless this court shall determine the validity of said amendment to said Initiative Act and its applicability to said contract of employment or contracts similar thereto, the said plaintiffs herein and all other persons similarly situated will be compelled to submit to said amendment to said Initiative Act and the application and interpretation thereof contended for as aforesaid by said defendants and will thereby suffer a great and irreparable damage and injury to their personal and property rights, and plaintiffs have no adequate or other proper remedy at law, but are reliev-able only in a court of equity.

Wherefore, plaintiffs pray that said defendants, U. S. Webb, as attorney-general of said state, and Asa Keyes, as district attorney of said Los Angeles County, and each of them, be enjoined and restrained provisionally, preliminarily and perpetually by the order and injunction of this court from bringing or attempting to bring either directly or indirectly and from permitting to be brought, directly or indirectly, any proceedings at law or in equity for the purpose of enforcing said amendment to said Initiative Act against these plaintiffs or either or any of them, or against any other person or corporation similarly situated, upon their executing or attempting to execute the said employment contract, or any employment contract similar thereto in its legal effect, and from causing said plaintiffs or either of them, or any other person or corporation similarly situated, to be arrested for violating the terms and provisions of said amendment to said Initiative Act in so far as it is attempted to be enforced against any similar employment contract, and from taking any other action in any other manner to prevent or interfere with plaintiffs or either or any of them, or any other person or corporation similarly situated, in executing said or any similar employment contract not forbidden by the terms of said amendment and the said Initiative Act with respect to said or any other agricultural land in said state;

That an order to show cause issue herein upon application of the plaintiffs directed to the above named defendants requiring said defendants and each of them to show cause why a temporary injunction should not issue as prayed for herein and that a temporary restraining order may issue pending the hearing of said order to show cause;

That said employment contract and employment contracts similar thereto with respect to agricultural lands in said state be declared to be valid and that a perpetual injunction be issued restraining and enjoining the enforcement of said amendment of the said Initiative Act as hereinabove prayed for, and that plaintiffs have all proper relief in the premises.

EDW. W. TUTTLE,

CHAS. W. FOURL,

Attorneys for Plaintiffs.

EXHIBIT. "A," CONTRACT OF EMPLOYMENT.

This agreement, entered into by and between F. S. Jones, hereinafter called "employer," and Takeo Makimoto, hereinafter called the "employee;"
Witnesseth:

Whereas, the employer is the owner of a certain tract of land situated in the County of Los Angeles, State of California, known and described as follows, to-wit:

Lot fifteen (15), tract forty-one (41), as per map of record in said county, and consisting of ten acres; and

Whereas, the said employer, being himself unable to devote the time and efforts required, desires to hire and employ the said employee to plant and raise certain crops thereon as hereinafter described, and deliver the same at any place designated by the said employer, and the said employee is willing to undertake said employment on the terms and conditions hereinafter named.

It is now agreed by and between the respective parties as follows, to-wit:

1. The employer does hereby hire and employ the said employee to properly, and according to the most approved custom of the neighborhood, plant, cultivate and take proper care of the said land and the crops to be grown thereon, and to properly harvest and pack all merchantable crops grown during the term of this agreement, at the proper time and season. The said employee does agree to do all of said work in a good and farmer-like manner and to furnish all machinery, horses, tools and equipment required in the performance of said work of cultivating, planting, harvesting and packing of the crops upon the said land for the compensation hereinafter mentioned.

2. The employee agrees, under the direction of the employer, which shall be given from time to time, to plant, cultivate and harvest the following specified crops, to-wit: berries, vegetables and such other crops as the employer may hereafter designate.

3. The said employer agrees to pay the said employee as compensation for his services twenty-five dollars (\$25) per month on the last day of each and every month, and in addition thereto give to the said employee as a bonus an additional sum sufficient to make the total compensation equal to sixty-six and 2-3 per cent (66 2-3%) of the net profit realized by the employer from the operation of said property, after deducting all costs and expenses paid or incurred by the employer in the planting, cultivation, harvesting and marketing of said crops, said net profit to be determined at the end of each year of the continuance of this agreement.

4. The employee shall have no right, title or interest of any kind whatsoever in or to said land, or in or to any of the crops, or any crop of any kind whatsoever grown upon same, or in or to the real property above described, and it is further distinctly understood and agreed that this employment agreement does not, and shall not, constitute a partnership of any kind. It is further distinctly understood and agreed that nothing herein shall be construed to be or is intended to be an agreement for the cropping or working of said land on shares, and this is not intended to be, nor is same, a cropping contract.

This contract shall continue for a period of three years from the date of its execution.

2. DECISION OF THE COURT.

(COURT GRANTED DEMURRER.)

SECTION B. IN THE CALIFORNIA SUPREME COURT.

L. A. No. 8215.

1. BRIEF FOR RESPONDENT, BY U. S. WEBB.

By stipulation of counsel it will be agreed that our reply brief which we filed in the case of *Porterfield et al. vs. Webb etc. et al.*, L. A. No. 8214, may be considered by the court in connection with this case. It will therefore be

unnecessary for us to here repeat several of the arguments made therein or to again print copies of the California Alien Land Act as amended in 1923 and of the O'Brien contract passed on by the United States Supreme Court in the case of *O'Brien vs. Webb*, 263 U. S. 213.

In this case the sole question to be decided is the validity of the so-called bonus contract. This contract has a provision that the employer does hire and employ the employee "to plant, cultivate and take proper care" of the land described in the contract and "the crops to be grown thereon." Further "to properly harvest and pack all merchantable crops grown during the term of this agreement," etc. Further, the "employee" does agree to do all of the said work in a good and farmer-like manner and to furnish machinery, horses, etc., required "in the performance of said work of cultivating, planting, harvesting and packing of the crops." Further, the "employee" agrees "to plant, cultivate and harvest the following specified crops, to-wit:" etc.

The above language is practically the same as that contained in the Porterfield contract and also in the O'Brien contract. Again it is provided that "the employee shall have no right, title or interest whatsoever in or to said land, or in or to any of the crops, or of any crop whatsoever grown upon same." This language is similar to that found in the Porterfield and O'Brien contracts with the exception that the reference to the crops is added. Again, there is the further provision added that the contract shall not be considered to constitute a partnership of any kind. Again, "it is further distinctly understood and agreed that nothing herein shall be construed to be, or is intended to be, an agreement for the cropping or working of said land on shares, and this is not intended to be, nor is same, a cropping contract."

This provision, of course, does not add anything to the contract if, in fact, the contract read as a whole is a cropping contract. The parties to an agreement cannot effect a certain result and then escape the penalties provided by law because of the result effected, by merely using words to intimate that no such result was intended. It is a familiar principle of law that an instrument may not be designated as a mortgage, and, still, in law, be a mortgage. The mere fact that the parties write into such an instrument the expression "this is not a mortgage" would not be material. A court will determine the legal effect of instruments. Parties cannot determine this in the face of a clear general intention that a certain end be accomplished.

So, also, the statement that "the employee shall have no right, title or interest whatsoever in or to said land, or in or to any of the crops," etc., is of no importance. We find that the United States Supreme Court in construing the O'Brien contract was not concerned as was the district court with the expression used by the parties to the effect that "the general possession of the land above described being reserved to the owner." Nor was the same court concerned with the other proviso "that the cropper shall have no interest or estate whatsoever in the land described herein."

The controlling provision in this contract is paragraph 3 thereof (Tr., fol. 29). This paragraph provides for paying to the cropper

"* * * as a bonus an additional sum sufficient to make the total compensation equal to sixty-six and $\frac{2}{3}$ per cent ($66\frac{2}{3}\%$) of the net profit realized by the employer from the operation of said property, after deducting all costs and expenses paid or incurred by the employer in the planting, cultivation, harvesting and marketing of said crops, said net profit to be determined at the end of each year of the continuance of this agreement."

The "employer" is to pay "the employee" twenty-five dollars per month as compensation. So far the contract would be valid. But the parties are

not satisfied with such a valid contract. They find language in our Alien Land Act and particularly as amended in 1923 which prohibits the ineligible alien from acquiring any interest in real property. It further prohibits him from "using, cultivating, or occupying" the same and it further prohibits to him the right "to have in whole or in part the beneficial use thereof."

Further, these parties, in reading the amendment to section 8 adopted in 1923, find an express prohibition against cropping contracts "which are hereby declared to constitute an interest in real property less than the fee."

And so, in order to avoid these prohibitions, the parties state that the instrument that they drew is not a cropping contract. And then in lieu of providing for an actual division of the crop itself, they provide indirectly for the identical practical result by contracting for a division of the net cash proceeds of the crop.

What is the difference between dividing one hundred crates of berries or vegetables and selling the one hundred crates and dividing the net cash proceeds therefrom? Law is supposed to be founded on reason. We must here assume the general right of the state in the exercise of its police powers to prohibit the division between a citizen landowner and an ineligible alien of one hundred crates of vegetables grown by the ineligible alien.

So assuming, would it not lead to an absurdity to hold that the law would permit by subterfuge the same practical result through the sale of the one hundred crates of vegetables and the division of the cash derived therefrom? We cannot contemplate the courts permitting the defeat of the purposes of our act by any such device.

Counsel refer to the fact that every business contemplates, and if the business is a successful one necessitates, the payment of wages from profits realized or to be realized. This, of course, is true and, generally speaking, bonus contracts in factory work, such as we are familiar with, are probably valid. But the state is well within its police power when it deals with the subject matter of the dominion, control, occupation and use of the lands of the state. Particularly is this so of its agricultural lands. As a foundation to this entire discussion we must always keep in mind the rule enunciated over and over again and elaborated on in the different alien land decisions by the federal, district and United States Supreme Court. This rule is that public safety demands that there be reserved in the states the right to control by this character of legislation with reference to the enjoyment of the lands of the state.

Counsel refer to the fact that the contract in the case at bar gives the employee no interest in or control over the land or crops or even the profits. This argument is based upon the proposition that the cropper could not legally require an accounting of the profits. It is stated that his sole remedy in case of a breach would be an action for damages consisting of the sum which he has earned or would have earned as wages or bonus. It is further pointed out in elaboration of this distinction that the same distinction has been made in the law of partnership. It is stated that it was formerly a well-settled rule that any sharing in the profits of a business constituted a partnership, or at least subjected the parties so sharing profits to the liability of partners, as to third persons. It is urged that the modern doctrine does not make profit sharing the conclusive test of partnership.

These technicalities and artificial distinctions take us back to our brief filed in the case of *Porterfield vs. Webb*, *supra*, to which we again refer the court. We now have in mind that portion of the said brief that deals with the various cropping contract cases that we found in the books in our effort to point out that all of the cases were based on technical rules

in the law of the landlord and tenant with which the state was in no way concerned when adopting the policy of its alien land legislation. The right of the so-called "employee" in this case to acquire an accounting of the profits is something in which the state is in no way interested at all. We may assume, as stated by counsel, that he could not require an accounting of the profits. Of what interest is this to the state in determining its policy of the right of the so-called "employee" to enjoy the product resulting from his actual cultivation of the soil of the state? What the state is interested in preventing is the use of the means and methods, customs and living conditions of the Orient in competition with our American farm labor in such a way as to bring about serious conflicts and differences that a wise statesmanship will avoid by making it impossible for such conditions to prevail.

With reference to the argument of counsel concerning the power of the legislature to adopt the 1923 amendments specifically prohibiting cropping contracts, we refer to our brief filed in the case of *Porterfield vs. Webb*, *supra*.

It is respectfully submitted that the judgment of the trial court should be reversed.

Dated, July 16, 1924.

U. S. WEBB,
Attorney-General of the State of California,
FRANK ENGLISH,
Deputy Attorney-General of the State of California,
ASA KEYES,
District Attorney of the County of Los Angeles,
TRACY CHATFIELD BECKER,
Deputy District Attorney of the County of Los Angeles,
Attorneys for Respondent.

2. BRIEF OF AMICUS CURIAE.

(SEE CHAPTER XVIII-B-2.)

3. DECISION OF THE COURT.

(PENDING.)

CHAPTER XVIII.—PORTERFIELD AND MIZUNO CASE.

W. S. PORTERFIELD and YOSHITARO MIZUNO, Plaintiffs, vs. U. S. WEBB, as Attorney-General of the State of California, and ASA KEYES, as District Attorney of the County of Los Angeles, State of California, Defendants.

SECTION A. IN THE CALIFORNIA SUPERIOR COURT.

1. COMPLAINT FOR INJUNCTION.

Plaintiffs complain of the defendants above named and for cause of action allege:

I.

That W. L. Porterfield is a citizen of the United States of America and of the State of California, and a resident of the County of Los Angeles, in said state; that plaintiff, Yoshitaro Mizuno, is a Japanese alien and a subject of the Emperor of Japan, and is ineligible to citizenship in the United States of America or the State of California; that said Yoshitaro Mizuno is a resident of the County of Los Angeles, in said state; that said plaintiffs sue herein on behalf of themselves and of all others similarly situated.

II.

That the defendant, U. S. Webb, is the duly qualified and acting attorney-general of the State of California, and is sued herein as such; that Asa Keyes is the duly qualified and acting district attorney of the County of Los Angeles, State of California, and is sued herein as such; that said Asa Keyes is a resident of the said County of Los Angeles, in said state.

III.

That plaintiff, W. L. Porterfield, is now and for a number of years past has been, the owner of the following described real property situated in the County of Los Angeles, State of California, to-wit: The north one-half ($\frac{1}{2}$) of the southeast one-quarter ($SE\frac{1}{4}$) of section twenty-six (26), township one north, range nine (9) west, S. B. B. & M., and containing eighty acres of land; that said real property is particularly adapted to raising vegetables and for a number of years has been devoted to that and agricultural purposes; that said plaintiff, Yoshitaro Mizuno, is a capable farmer and has for many years engaged in the business of farming and raising of vegetables in the said County of Los Angeles, State of California, prior to the enactment of the attempted amendment of June 20, 1923, to the Initiative Act of November 2, 1920 (Stats. 1921, lxxxiii) known as the "Alien Land Law," hereinafter referred to.

IV.

That said plaintiffs, W. L. Porterfield and Yoshitaro Mizuno, desire to enter into a cropping contract whereby the said Yoshitaro Mizuno shall agree to cultivate and farm said land and receive from said W. L. Porterfield as compensation therefor a portion of the crops to be raised thereon in accordance with the terms and conditions of a proposed agreement, a copy of which said agreement is hereunto annexed, marked "Exhibit A," and is by such reference made a part hereof the same as though said agreement were set forth at length herein.

V.

That on November 2, 1920, the people of the State of California by initiative, enacted a law known as the "Alien Land Law," forbidding the ownership, transfer and leasing by aliens ineligible to citizenship of agricultural lands within the State of California;

That on June 20, 1923, the legislature of said state enacted an amendment to said Initiative Act entitled "An act to amend an act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith;" that said attempted amendment aforesaid provided in part that cropping contracts should constitute an interest in real property within the meaning of said Initiative Act and subject to the penalties therein provided for a transfer of such an interest.

VI.

That but for said attempted amendment of June 20, 1923, and the penalties incident to a violation thereof, the said plaintiffs herein would enter into said cropping contract with respect to said real property; that there are many citizens in the State of California and many owners of agricultural and farm lands herein, and many other Japanese aliens, residents of the State of California, and heretofore engaged in the business of farming, who desire to enter into cropping contracts with respect to real property situated in said state similar to the contract hereinabove referred to and not forbidden by the said Initiative Act, and would do so but for the drastic penalties and provisions of the said attempted amendment aforesaid.

VII.

That said defendants, U. S. Webb, as attorney-general of said state, and Asa Keyes, as district attorney of said county, and each of them, have threatened to and will enforce the said attempted amendment of said Initiative Act and each and all its terms and the whole thereof against the plaintiffs and each of them and against any other persons similarly situated if they or any of them enter into said or any cropping contract with respect to said, or any, land in the State of California used for agricultural purposes and will cause to escheat or attempt to cause to escheat to the State of California the said interest in said real property and the proceeds to be paid to said Mizuno from the cultivation of said land, and will prosecute or attempt to prosecute said plaintiffs and each of them criminally for an alleged violation of the said attempted amendment to said Initiative Act aforesaid;

That said attempted amendment is in its terms so drastic and the penalties attached to a violation of the terms thereof are so great that neither of these plaintiffs, or any person similarly situated, may enter into said or any cropping contract with respect to land in said state, even for the purpose of testing the validity of said attempted amendment to said Initiative Act, except at the risk of confiscation of his or their property and imprisonment for a long period in the penitentiary and the payment of heavy fines, and unless this court shall determine the validity of said attempted amendment in this proceeding said plaintiffs herein and all other persons similarly situated will be compelled to submit to said attempted amendment to said act, whether same be valid or invalid, and will thereby suffer a great and irreparable damage and injury to their personal and

property rights, and plaintiffs have no adequate or other proper remedy at law, but are relievable only in a court of equity; that said attempted amendment to said Initiative Act of November 2, 1920, is illegal and void and beyond the power of the said legislature to enact.

Wherefore, plaintiffs pray that U. S. Webb, as attorney-general of the State of California, and Asa Keyes, as district attorney of the County of Los Angeles, in said state, and each of them, be enjoined and restrained, provisionally, preliminarily, and perpetually by the order and injunction of this court from bringing or attempting to bring, either directly or indirectly, and from permitting to be brought, directly or indirectly, any proceedings at law or in equity for the purpose of enforcing said attempted amendment to said Initiative Act of November 2, 1920, hereinbefore mentioned, against these plaintiffs, or either or any of them, upon executing or attempting to execute a cropping contract, or the contract set forth and marked "Exhibit A" to this complaint, or any other person or corporation similarly situated, and from causing the plaintiffs or either of them, or any other person or corporation similarly situated, to be arrested for violating the terms and provisions of said attempted amendment to said Initiative Act aforesaid in so far as it attempts to forbid cropping contracts and from taking any other action in any other manner to prevent or interfere with the plaintiffs or either of them in executing said or any cropping contract not constituting a lease, with respect to said or any real estate in said state, and that an order to show cause issue herein upon application of the plaintiffs herein, directed to the above-named defendants requiring them and each of them to show cause why a temporary injunction should not issue as prayed for herein, and that a temporary restraining order may issue pending the hearing of said order to show cause; and

That the aforesaid attempted amendment to said Initiative Act of November 2, 1920, be declared to be unconstitutional in so far as it attempts to forbid cropping contracts and that a perpetual injunction be issued restraining the enforcement thereof as hereinabove prayed for, and for all further relief in the premises.

EDWARD W. TUTTLE,
CHAS. W. FOURL,

Attorneys for Plaintiffs.

EXHIBIT "A," CROPPING CONTRACT.

This amendment, made and entered into by and between W. L. Porterfield, hereinafter called owner, and Yoshitaro Mizuno, hereinafter called cropper:

Witnesseth:

That whereas, owner is the owner of a certain tract of land situated in the County of Los Angeles, State of California, and particularly described as follows, to wit:

The north one-half of the southeast quarter of section twenty-six, township one north, range nine west, S. B. B. & M., and

Whereas the parties hereto wish to enter into a contract, one as owner and the other as an independent contractor or cropper, for a period of one year from and after the execution hereof, for the planting, cultivating and harvesting of crops to be grown on the land above described; and whereas it is the purpose and intent of said parties to make a contract in harmony with the law governing the rights of aliens ineligible to citizenship;

Now, therefore, in consideration of the premises said parties agree as follows:

Cropper agrees:

1. After the execution and delivery of this agreement, and at the proper time, to plant, cultivate and harvest lettuce, cabbages, cauliflower, and such other crops as owner may hereafter designate, upon said land aforementioned in a good and farmer-like manner;

2. To furnish all necessary tools and farming implements and all labor necessary or proper for the carrying out of the terms of this contract;

3. To keep the banks and bottoms of irrigation ditches on, adjacent to and tributary to, said land free from weeds and foul growths; to repair and maintain all levees, to prevent losses of irrigation water, and in particular to prevent the overflow thereof into driveways and roads, and to guard against fires of all kinds;

4. To harvest all crops when ripe, to pack the same in accordance with best standards, to prepare the same for shipping, and to haul the same to the packing house, market or nearby station.

Owner agrees:

A. Owner agrees to permit the cropper to plant said land during said period to the crops herein specified, or such other crops as owner may hereinafter designate, and to permit him to work the said land upon the terms and conditions herein provided;

B. To give to cropper sixty per cent of all crops grown on the above-described land during the period of this agreement, as compensation to the cropper for his services;

C. To grant to the cropper his right to a division of the crop or crops after it is or they are harvested and before the removal thereof from the land, provided that the cropper exercises his option thereunto, and in the event of the exercise of such option, to grant to cropper the right to remove from the land his share of the crops within a reasonable time, even though said time should extend beyond the term of cropper's employment as herein provided for.

It is mutually understood and agreed by the parties hereto that this contract is not intended to create a lease nor to give to the cropper any interest whatever in, or possession of, any of said land, except the right of ingress and egress as shall be necessary and proper for the purpose of carrying out the terms and conditions of this contract during the continuance thereof.

2. DECISION OF THE COURT.

(COURT GRANTED DEMURRER.)

SECTION B. IN THE CALIFORNIA SUPREME COURT.

L. A. No. 8214.

1. BRIEF FOR RESPONDENTS.

INTRODUCTION AND ANALYSIS OF THE CROPPING CONTRACTS IN THIS CASE AND IN THE CASE OF O'BRIEN VS. WEBB.

It is our purpose to present to the court two arguments in this case. First, we shall attempt to show that prior to the 1923 amendment to the California Alien Land Act, such a cropping contract as is before the court in this case was prohibited by the Initiative Act of 1920. This discussion will involve an answer to the interpretation of this court's decision in the

case of *In re Okahara*, 216 Pac. 614, as contended for by counsel for appellants in their opening brief.

Second, we shall urge that even though the 1920 Act did not prohibit such a cropping contract, it was clearly within the power of the legislature of 1923 to prohibit such contracts, as they did by the amendments of that session.

We will first analyze the contract before the court in this case, as compared with the contract before the United States Supreme Court in the case of *O'Brien vs. Webb*, 263 U. S. 313, in which case the United States Supreme Court decided that the cropping contract there considered was prohibited by our Alien Land Act as it read prior to the 1923 amendments. It will be found that the contract here being considered is practically identical with the O'Brien contract. If anything, it is more clearly a violation of our act than was the O'Brien contract.

In paragraph 1 of the Porterfield contract in the case at bar (Tr., fol. 26) the cropper agrees "after the execution and delivery of this agreement, and at the proper time, to plant, cultivate and harvest" certain crops.

This language is identical with the language of paragraph I of the O'Brien contract.

In paragraph 2 (Tr., fol. 27) the cropper agrees to furnish all necessary tools and farming implements, etc. In the O'Brien contract, on the other hand, the owner of the land was to furnish necessary tools, farming implements, etc. If anything, this difference would indicate that the O'Brien contract was more in the nature of an employment contract than is the present Porterfield contract.

In paragraph 3 of the Porterfield contract (Tr., fol. 27) the cropper agrees "to keep the banks and bottoms of irrigation ditches on, adjacent to and tributary to, said land free from weeds and foul growths; to repair and maintain all levees, to prevent losses of irrigation water, and in particular to prevent the overflow thereof into driveways and roads and to guard against fires of all kinds;"

This language is identical with that found in paragraph K of the O'Brien contract.

In paragraph 4 (Tr., fol. 27) of the Porterfield contract the cropper agrees "to harvest all crops when ripe, to pack the same in accordance with best standards, to prepare the same for shipping and to haul the same to the packing house, market or nearby station."

This language with the exception of the proviso for hauling to the packing house, market or nearby station is identical with that found in paragraph L in the O'Brien contract. In the O'Brien contract it was provided that O'Brien, the owner of the land, was to do the necessary hauling.

In paragraph B of the Porterfield contract the owner agrees "to give to the cropper sixty per cent of all crops grown on the above described land during the period of this agreement, as compensation to the cropper for his services."

This language is identical with paragraph F of the O'Brien contract except that fifty per cent is the cropper's share in the O'Brien contract and instead of saying "as compensation to the cropper for his services," the O'Brien contract reads "as compensation for the services and labor of the cropper, as herein set forth."

Paragraph C of the Porterfield contract reads as follows:

"Owner agrees * * * to grant to the cropper his right to a division of the crop or crops after it is or they are harvested and before the removal thereof from the land, provided that the cropper exercises his option thereunto, and in the event of the exercise of such option, to grant

to cropper the right to remove from the land his share of the crops within a reasonable time, even though said time should extend beyond the term for cropper's employment as herein provided for."

This is identical with paragraph G of the O'Brien contract with the exception that the O'Brien contract refers only to "the crop", while the Porterfield contract refers to "the crop or crops".

There is further in the Porterfield contract the following provision:

"It is mutually understood and agreed by the parties hereto that this contract is not intended to create a lease nor to give to the cropper any interest whatever in, or possession of, any of said land, except the right of ingress and egress as shall be necessary and proper for the purpose of carrying out the terms and conditions of this contract during the continuance thereof."

In the O'Brien contract there is the provision, first, that "the general possession of the land above described being reserved to the owner", and, second, "provided that the cropper shall have no interest or estate whatsoever in the land described herein".

We also have in the O'Brien contract some general provisions that are not in the Porterfield contract and which, if anything, would tend to give the O'Brien contract more of the characteristics of mere employment than we have in the Porterfield contract. We are referring to the closing provisions to the effect that in case of the land being sold during the term of the agreement the owner shall have the option to terminate the agreement by paying the cropper for his services at the rate of one hundred dollars per month, together with moneys expended, etc.; and also that in case of any breach in the contract on the part of the owner he will pay to the cropper within a designated time all money expended by the cropper with a certain percentage added as liquidated damages for the cancellation of the agreement.

ARGUMENT.

I.

The 1920 Initiative Alien Land Act, prior to the 1923 amendments, prohibited such a cropping contract as we have in the case at bar.

Counsel for appellants criticize the decision of the United States Supreme Court. It should be borne in mind that there was a petition for rehearing filed by counsel for respondents in the case of *O'Brien vs. Webb*, and the United States Supreme Court denied this petition for rehearing. In substance, the petition for rehearing set up the claim that the decision of the supreme court of this state in the Okahara case (216 Pac. 614) was conclusive upon the United States Supreme Court in the matter of construction of our state statute. The point was presented very fully in this petition, as it had theretofore been presented to the United States Supreme Court after the decision in the Okahara case. The United States Supreme Court decided the O'Brien case on the identical theory that this office has urged from the very beginning, first, in the United States district court, where the O'Brien case was first argued, and, second, in our state supreme court in the Okahara case.

It is true that from an abundance of caution, amendments to our act were drafted and adopted in 1923 after the decision in the United States district court. We, however, then had on appeal to the United States Supreme Court this very question and we felt confident of our position and we now feel that the sensible and natural construction to give to the act, having in view the purposes thereof, is the construction which was given by the United States Supreme Court.

In spite of the dissatisfaction expressed by counsel in this and other cases with the United States Supreme Court's decision, it appears to us that that decision is logical and that the distinction made between that case and the Okahara case is clear and unanswerable. We certainly do not fail to appreciate the fact that there is language in the decision rendered by our supreme court in the Okahara case which, when considered by itself, points to a different construction of our act than that placed upon the act by the United States Supreme Court. That language, however, is dicta pure and simple, and we feel that we have every right to urge this court that in finally deciding upon the construction of our act the court should give due weight and respect to the conclusion of the United States Supreme Court in any case where it was necessary for that court to construe the act, independent of the penal section 10 thereof. Now, for the first time, is this court asked to so construe the general sections of the act which the state claims are being violated by Porterfield and the ineligible Japanese alien. That is, those sections that relate to the rights of ineligible aliens, and to the right of the state to bring escheat proceedings, and independent of the penal section 10 which was before this court in the Okahara case. This court in the Okahara decision clearly stated the only question before the court. At page 616 of volume 216, Pacific Reporter, our supreme court says:

"The only question before us therefore is whether the acts, purposes and objects as shown upon the face of the instrument are, in fact, such acts, agreements, purposes and objects as are forbidden by subdivision 10 of the Alien Land Law. * * * It is the law of this and most of the states of our Union that contracts of the character of the one before us do not transfer or convey any interest in real property."

At page 617 this court says:

"The fact that the crops are to be converted into money by the employer and divided on a net basis with the contractor *could not work a transfer of any interest in the soil to the latter* * * *." (Italics ours.)

This court said at page 618 that:

"The argument that the law forbids the making of a contract of employment or agreement to till the soil on shares can only be sustained by adopting the theory that the particular agreement under consideration transfers an interest in land."

We respectfully submit that this language of the court must have been used with reference to section 10 of the act. Again at page 618 this court says:

"We can only say that we have examined the questions presented with care and feel convinced that we are not authorized by the *language of the act under which the charge is laid* to hold that the facts as presented are sufficient to justify us in holding that petitioner *has committed a public offense*." (Italics ours.)

At page 115 of 44 Supreme Court Reporter, the United States Supreme Court said, in the O'Brien case:

"The decision of the supreme court of California in *In the Matter of Okahara, supra*, a *habeas corpus* case, does not support the appellee's contention. In that case an ineligible Japanese was held on a warrant charging him with conspiracy to effect a transfer of real property in violation of section 10 of the Alien Land Law. The gravamen of the offense charged was that Okahara, in furtherance of the conspiracy, executed a contract with another, whereby the latter transferred to him for a term of five years an interest in 20 acres of agricultural land. *The only question before*

the court in that case was whether the contract amounted to a transfer of real property or of an interest therein in violation of section 10. The court said:

*" * * * The instrument before us cannot be characterized as a lease or transfer of any interest in real property because it lacks many of the essential elements of a lease, while, on the other hand, it bears all the characteristics of an agreement of hiring. But if it cannot be said to be an agreement of employment, pure and simple, it cannot under any rule of construction be held to be more than a cropping contract."*

"After referring to the terms of the contract and reviewing authorities, it said:

"The argument that the law forbids the making of a contract of employment or agreement to till the soil on shares can only be sustained by adopting the theory that the particular agreement under consideration transfers an interest in land."

"The court held that the contract did not violate section 10 and discharged Okahara. The contract in that case differs in important particulars from the one before us; but, in the view we take of this case, we need not determine whether, within the meaning of the act, the contract between O'Brien and Inouye, if executed, would effect a transfer of an interest in real property. The question in this case is not whether the proposed contract is prohibited by section 10, but it is whether appellees have shown that they have a right under the Constitution or treaty to make and carry out the contract, and are entitled to an interlocutory injunction against the officers of the state. A negative answer must be given."

"The privilege to make and carry out the proposed cropping contract, or to have the right to the possession, enjoyment and benefit of land for agricultural purposes as contemplated and provided for therein, is not given to Japanese subjects by the treaty. The act denies the privilege because not given by the treaty. No constitutional right of the alien is infringed. It therefore follows that the injunction should have been denied."

"The order appealed from is reversed." (Italics ours.)

Section 10 of the act then read as follows:

"If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

There would appear to be a clear distinction between "effecting a transfer of real property or an interest therein", and giving to the ineligible alien such right "to enjoy" real property as is guaranteed only to those that can claim this privilege under a treaty. The United States Supreme Court gives a practical and sensible construction to our act when it decides that such "enjoyment" as is prohibited by the act in sections 1 and 2 thereof may not amount to such a "transfer of real property, or of an interest therein", as is prohibited in section 10 of the act. The United States Supreme Court, at page 114 of this report, first describes the nature of the O'Brien contract. The court then goes on to say:

"Assuming that the proposed arrangement does not amount to a leasing or to a transfer of an interest in real property, and that it includes the elements of a contract of employment (In the Matter of Okahara, supra), we are of the opinion that it is more than a contract of employment, and that, if executed, it will give to Inouye a right to use and to have or share

in the benefit of the land for agricultural purposes. And this is so, notwithstanding other clauses of the contract to the effect that the general possession of the land is reserved to the owner, that the cropper shall have no interest or estate whatever in the land, that he is given one-half of all crops grown as compensation for his services and labor, and that division of the crops is to be made after they are harvested and before their removal from the land." (Italics ours.)

The above language which we have italicized shows that the court was distinguishing between such a transfer of an interest in real property as is prohibited in section 10, and the enjoyment generally of the benefit of the land for agricultural purposes which the act prohibits.

Counsel for appellants refer to the well known rule of statutory construction that we must find the purpose of legislation in the language of the act itself. There can be no denying this principle of law. The United States Supreme Court finds this purpose in the general language of the act as used in sections 1 and 2 and in other provisions thereof. That purpose is to prohibit the privilege of enjoyment of lands such as is attempted to be given in these cropping contracts. The court goes on to say, after discussing section 2 (p. 114):

"The act as a whole evidences legislative intention that ineligible aliens shall not be permitted to have or *enjoy* any privilege in respect of the *use or benefit of land for agricultural purposes.*" (Italics ours.)

That is, the court considers this word "enjoy", as found in sections 1 and 2, as including such rights as are attempted to be accorded by these cropping contracts whereby the croppers are in fact receiving "the benefit of land for agricultural purposes".

The court continues as follows, at page 114:

"The right to make and carry out cropper contracts such as that before us is not safeguarded to ineligible aliens by the Constitution. A denial of it does not deny the ordinary means of earning a livelihood or the right to work for a living. The practical result of such contract is that cropper has use, control and benefit of land for agricultural purposes substantially similar to that granted to a lessee. Conceivably, by the use of such contracts, the population *living on and cultivating the farm lands* might come to be made up largely of ineligible aliens. The allegiance of the farmers to the state directly affects its strength and safety. (*Terrace et al. vs. Thompson, supra.*) We think it within the power of the state to deny to ineligible aliens the privilege so to use agricultural lands within its borders." (Italics ours.)

Here we find the United States Supreme Court construing the statute prior to the 1923 amendment and using language identical with that which we have incorporated in the 1923 amendments, as being the natural and proper construction of the act, before the amendment. We find the United States Supreme Court referring to "*the benefit of land for agricultural purposes*"; also to the cropper having the "*benefit of land for agricultural purposes*"; also denying to ineligible aliens permission to have the "use, control, and the benefit of" lands.

In our 1923 amendments we prohibited to the ineligible aliens the right "to have in whole or in part the beneficial use thereof". That is, the United States court read the act as containing the very language that we incorporated in our 1923 amendments. Again, to the same point, we find the United States Supreme Court saying, at page 114:

"Conceivably, by the use of such contracts, the population living on and

cultivating the farm lands might come to be made up largely of ineligible aliens."

In the case of *Frick vs. Webb*, 44 Supreme Court Reporter 115, p. 117, the United States Supreme Court says:

"The state has power, and the act" (the California act) "evidences its purpose to deny to ineligible aliens permission to own, lease, *use, or have the benefit of* lands within its borders for agricultural purposes." (Italics ours.)

In our 1923 amendments we refer to the prohibition against ineligible aliens to the effect that they cannot "use, cultivate, occupy, * * *" these lands.

All law is supposed to be fundamentally an expression of common sense. Having in mind the purposes of our act, as so well described by the United States Supreme Court, what will have been accomplished if we prohibit agreements that are admitted leases, and permit cropping contracts which accomplish the very same results, from a practical standpoint? Counsel for appellants says that we "confuse the *legal purpose* of the act with the *motive*, social and economic, which may or may not have animated some or even all of the voters or sponsors of the act".

We answer that these motives, social and economic, are clearly supported and expressed in the very language of the act as originally adopted. We are fortunate in having the United States Supreme Court agree with this view when they say that "the practical result of such contract is that the cropper has use, control and benefit of land for agricultural purposes substantially similar to that granted to a lessee." (44 Sup. Court Rep., at p. 114.)

II.

This court must be governed by the interpretation and construction placed upon the Japanese treaty by the United States Supreme Court in the O'Brien case, even though this court should conclude that it has adopted a different interpretation and construction of that treaty in the Okahara case.

We believe that the necessity of applying this doctrine of the finality of federal adjudication, whenever a difference of opinion arises between the federal courts and the state courts as to the determination of a purely federal question, may not have to be invoked in the cases now under consideration. Nevertheless, this doctrine obtains in cases involving the construction of acts of Congress and the treaties between the United States and foreign powers.

Two prime factors are involved in the determination of the rights of a Japanese alien to enter into a cropping contract. One is whether he is eligible to become an American citizen. The other is whether the Japanese treaty permits him to acquire such an interest in land as is created by his becoming a cropper. Both of these questions are, we think, purely and entirely federal questions which have been finally determined by the decision of the highest federal tribunal.

The Alien Land Law of California does not in terms confer any rights or destroy any rights as such to the ownership or occupation of land by ineligible aliens. It simply declares that any alien who is ineligible shall be privileged to have only such an interest in land as the treaty with his nation grants to him. It may well be argued that if the California law had not been passed at all, nevertheless the ineligible alien who is granted certain rights of ownership and occupation of land by the treaty between the

United States and his country would have been entitled to those rights, and the state could not have prohibited him from having them.

Suppose that the California law had declared that no alien, whether eligible or ineligible to American citizenship, could have any interest in land or any right to own or lease houses, shops and stores for any purpose. The Japanese treaty grants to him the right to lease land and own houses, shops, warehouses and stores for residential and commercial purposes.

Suppose that this court determined to follow the one time vigorously asserted doctrine that a sovereign state of the Union has absolute control over the lands within its borders, and had decided that the above suggested statute was a valid exercise of the sovereign power of the state notwithstanding the treaty grant. Suppose then that the United States Supreme Court had held to the contrary, and had decided that the treaty, being "the supreme law of the land", rendered the California statute invalid. Would not this court in any later cases be bound to yield obedience to the supreme federal authority?

Fortunately many such conflicts of authority have not arisen in this country. But some have, and the principle is clear and sound and now universally admitted. It is the very cornerstone of the federal structure and the basis of the relation of the Federal Union with foreign powers. A few cases only illustrating this principle need be cited now. In the day of Chief Justice Marshall, and his conflicts with Chief Justice Roane of the supreme court of Virginia and with other state's rights advocates, so graphically portrayed in Beveridge's "Life of Marshall", the discussion of this principle rocked the very foundation of the Republic. (*Haunstein vs. Lynham*, 100 U. S. 483; *Geofroy vs. Riggs*, 133 U. S. 258; *Blythe vs. Hinckley*, 180 U. S. 333; *Mackenzie vs. Hare*, 165 Cal. 776, affirmed 239 U. S. 299; *In re Terui*, 187 Cal. 20; *Estate of Romaris*, 66 Cal. Dec. 259; *Holland vs. Missouri*, 252 U. S. 416, 432.)

Perhaps the utmost that can be urged to countervail the application of this doctrine to the case at bar is that both the statute of this state and the treaty of the United States must be interpreted and construed.

But even so, we respectfully insist that the determination of the Federal Supreme Court as to the meaning and scope of the treaty is final, and must prevail on principles of judicial comity, if for no other reason.

That the United States Supreme Court in the O'Brien case understood and applied that principle is evident from its treatment and consideration of the Okahara case in the opinion in the O'Brien case, which we have heretofore endeavored to show. That court, in considering the Okahara case, and in effect distinguishing it, declared, in the O'Brien case:

"The question in this case is not whether the proposed contract is prohibited by section 10, but it is whether appellees have shown that they have a right under the constitution or a treaty to make and carry out the contract and are entitled to an interlocutory injunction against the officers of the state. A negative answer must be given.

"The privilege to make and carry out the proposed cropping contract or to have the right to the possession, enjoyment and benefit of land for agricultural purposes as contemplated and provided for therein is not given the Japanese subjects by the treaty. The act denies the privilege because not given by the treaty."

Would, we ask, the Japanese alien have any rights to own or occupy land, or houses resting upon land, in this state if this treaty had not granted such a right to him? And, finally, we ask if the treaty had granted it to him, and the act had forbade him to have it, which would prevail?

III.

Analysis of the different cropping contract cases that are found in the book.

We realize that in the law of landlord and tenant there has been a clear distinction drawn by the courts between the title of a lessee and the mere right of compensation of a cropper. We also understand that this distinction has been developed in consideration of the mutual rights of the parties to these agreements and the rights of third parties other than the state. The interest of the state in its control and possession and dominion and enjoyment of its land has never been considered in connection with this development of the law. We receive no help from the common law on landlord and tenant, because cropping contracts were unknown to the common law. They were a development of our American law and came into being in the early years of our government, particularly in the Southern states, where contracts were entered into as for the growth of tobacco, the tobacco crop to be divided between the landowner and the cropper.

In every case which we have read the question of title to the land or to the crops had to do with the relationship between the landowner and the cropper or between some third person, as a creditor, and either the landowner or the cropper. In no single case has the question of the cropper's interest in the land been discussed by the court from the standpoint of the rights of the sovereign state. These rules developed in the law of landlord and tenant were, of course, intended to be a guide to parties, either owner, or cropper, or employer, or employee, or third persons such as creditors loaning money to the owner or to the cropper or to the employer or to the employee. It was seen that the question of title in any of these parties must be fixed and determined so that they all might deal one with another with a clear understanding of what their mutual rights are. From such a viewpoint the courts have said that certain croppers have no interest in the lands, but no court has said that such croppers have not such an interest in the land that the state could prohibit.

We find certain fundamental tests laid down to distinguish a so-called "lessee" from a so-called "cropper".

A lessee pays "rent"; a cropper receives "compensation".

A lessee ordinarily has the property for a certain "term". A cropper ordinarily would only have a right to possession for such time as to produce and harvest a certain crop.

A lessee has what is called "general possession" of the land. A cropper is not considered to have such "general possession". The landowner has it.

A lessee has complete title to the crop before division. A cropper sometimes by express agreement has no title to the crop until division. In the absence of such express agreement some jurisdictions hold that the cropper is a tenant in common to the crop with the landowner, prior to division. In other jurisdictions it is held that in the absence of an agreement the title to the crop is in the landowner only, prior to division.

A lessee would generally be required to keep the premises in repair, etc. In the case of a cropping agreement the more usual undertaking would be for the owner of the land to keep the premises in repair.

These rules which have been thus established for the guidance of persons entering into these different agreements and also for the guidance of third parties have been expressed in many cases, of which we will now give some typical examples.

A cropper cannot execute or create a lien on the crop before division in those jurisdictions where title to the crop is said to be in the landowner.

There can be no execution by a sheriff on a judgment against a cropper

by seizing the crop prior to division, where by the agreement between the landowner and the cropper complete title to the crop was vested in the landowner until certain harvesting and other conditions had been complied with by the cropper.

Neither a cropper nor a landowner can maintain an action in detinue against the other, because in order to maintain such an action the plaintiff must have the right to immediate possession. So where by agreement or by the law of any particular state the cropper and the landowner were tenants in common to the crops, no such action in detinue could be maintained by the one against the other.

Some cases hold that a cropper has no such interest in the land as to entitle him to bring trespass against a third party.

In many cases the point involved was whether as between the owner and the cropper the relationship of landlord and tenant existed so as to permit a legal action by the one against the other, which could only be brought when this relationship of landlord and tenant existed. As an example: If a cropper desires to bring trespass against the landowner he must show legal possession and right thereto in himself. If the owner had the right to enter, the cropper could not bring such an action in trespass.

A defendant in a suit for rent by the landowner plead a superior title to the land in a prior lessee. This prior lessee was a crop contractor. It was held that under such a plea the crop contractor was not such a lessee as to permit this plea to avail the defendant.

Title to the crop may be in the owner of land until certain advances paid by the owner have been repaid by the cropper. This, of course, would render ineffective as against the landowner any assignment or mortgage of the crop by the cropper to a third person before these advances had been repaid. And similarly such an assignment or mortgage might be ineffective until final division of the crop.

A landowner as plaintiff may sue in trover for the crop converted by a third person, the cropper not having fulfilled his contract and the title to the crop therefore still being in the landowner.

A cropper with no title until division has no lien on the crop for fertilizing ingredients sold by him to the landowner and used on the land.

After a division of the crop the cropper has title to his share, and so the owner of the land could not bring trover for it.

A cropper is guilty of a criminal offense in unlawfully removing the crop before division, such taking being a larceny, robbery or other offense, according to the circumstances of the case.

A defendant is guilty of an assault and battery if he forcibly removes a cropper from the premises which cropper had the right to enter in order to grow a crop thereon.

A landowner may have such exclusive title to the crop until he is reimbursed for advancements as to justify him while collecting his advancements, on being assaulted by the cropper, in knocking him down, and may not therefor be held guilty of an assault and battery.

We are inclined to the view that the cropper in this case is sufficiently interested in the land, irrespective of the state's interest therein, to permit of his protecting himself by legal proceedings in the event of certain contingencies arising. As an example, we might assume that parties are threatening to destroy an irrigation ditch on this land while the landowner is in Europe. Would the tenant be in such a position of a mere employee as to bar him from bringing an action in his own name and for the benefit of himself and also the landowner to enjoin the threatened destruction?

However, the primary consideration is that the state in its paramount and sovereign right to declare the law of ownership, possession and enjoyment of its land is not interested in all of these questions between the landowner and the cropper and third parties.

A cropper by reason of his agreement with the landowner or by reason of the law of the particular state where the land is located may have no such title to the land as would permit of an execution being levied against the crop or the land on a judgment being obtained against the cropper. But, on the other hand, he might have, in the judgment of the state, such an interest in, possession of and dominion over the land by reason of that identical agreement as to defeat the state's policy in its sovereign control of the agricultural lands of the state.

The state in exercising this sovereignty is not interested in the right of the cropper's judgment creditor to seize upon a crop before division. But the state is vitally interested in another question, which has never been presented to the courts in these many decisions until our recent Alien Land Law cases. That is, the possession and enjoyment of its agricultural lands by such a cropper.

It is this possession and enjoyment of the cropper which is dealt with by the United States Supreme Court in the O'Brien case.

IV.

The 1923 amendments clearly prohibit cropping contracts and are valid and constitutional.

At the 1923 session of the legislature section 8 of the Alien Land Act was amended. The amendments, so far as we are now concerned, consist of the following italicized language:

"Any leasehold or other interest in real property less than the fee, *including cropping contracts, which are hereby declared to constitute an interest in real property less than the fee*, hereafter acquired in violation of the provisions of this act by any alien, must in section two of this act * * * shall escheat to the State of California * * *" (Italics ours.)

If we assume the effect of the decision in the Okahara case to be as contended for by counsel for appellants, we nevertheless have an amendment which unquestionably amounts to a prohibition of cropping contracts.

It is claimed, however, that it was beyond the power of the legislature to adopt this amendment. The theory of counsel for appellants is that our supreme court has decided in the Okahara case that it was not within the purposes of the original 1920 Initiative Act to prohibit cropping contracts. It is therefore argued that to add such a prohibition would be the enactment of a provision not within the purposes of the original act and therefore not authorized by section 1 of article IV of our state constitution.

Section 1 of article IV provides that:

"No act, law or amendment to the constitution, adopted by the people at the polls under the initiative provisions of this section, shall be amended or repealed except by a vote of the electors, *unless otherwise provided in said initiative measure.*"

When we turn to the initiative measure as adopted in 1920 we find in section 13 thereof that "the legislature may amend this act in furtherance of its purpose and to facilitate its operation".

We are not impressed with the rather ingenious argument of counsel to the effect that since the supreme court of our state decided in the Okahara case that it was not the original purpose of the act to prohibit cropping contracts, it is beyond the power of the legislature to so prohibit them,

because section 13 permits an amendment only "in furtherance of the purpose" of the act. We are for the moment of course assuming that the language in the Okahara case to which counsel refer is not mere dicta.

So assuming, is it not clear that the most that can be claimed for this language is that the court decided that cropping contracts were not prohibited by the original act? This has nothing to do with the general fundamental purposes of the act. That general purpose obviously was to bar ineligible aliens from the control, enjoyment, use, possession and occupancy of our agricultural lands.

The particular kinds of occupancy, enjoyment and use of our lands as described in the Initiative Act are of importance only as carrying out that original intention. If, as a result of experience, our legislature found that there was something omitted from the original act which should have been included therein in order to accomplish this fundamental purpose, then would not the legislature be carrying out that original purpose by supplying the omission?

It is for the legislature to determine what is in aid of an act and what will "facilitate its operation". So long as the legislature does not so amend as to prevent the carrying into effect of the original purposes of the act the amendment is valid. This amendment does not make legal what theretofore was illegal. Assuming the argument of counsel for appellants to be sound, it merely makes illegal what theretofore was legal.

In order that the purposes of the act might be carried into effect, it is of no consequence that this form of contract or that form of contract be either permitted or prohibited, except as such a permission or prohibition accomplishes the purposes of the act. It is not the purpose of the act to permit one form of contract or prohibit another form, except as a means to an end. This end is the keeping away from the soil of ineligible aliens, so far as this can be done constitutionally. And, again, of course, we insist that the language in the Okahara decision particularly relied upon by counsel, with reference to the purposes of the act, must be read as referring only to section 10.

It is respectfully submitted that the judgment of the trial court should be affirmed.

Dated July 16, 1924.

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2. BRIEF OF ALBERT H. ELLIOT, AMICUS CURIAE.

We are appearing by permission of the court in the above four cases, and it is our purpose to discuss the important, fundamental, constitutional questions involved. We shall not make any statement of facts of the cases because we assume that this court is fully informed with respect thereto. We think that, underlying the four cases at bar, is at least one very important proposition of law which may be succinctly stated as follows:

NEITHER THE STATE OF CALIFORNIA BY STATUTORY LEGISLATION NOR THE PEOPLE THEREOF BY INITIATIVE DIRECT LEGISLATION CAN ENACT ANY LEGISLATION WHICH DENIES TO AN INELIGIBLE ALIEN, RESIDENT OF CALIFORNIA, THE RIGHT TO ENGAGE IN THE COMMON EMPLOYMENTS OF THE COUNTRY.

It is but elementary to say that an employment contract may be either oral or written and landowners who choose to make written contracts with alien employees should not be criticized for indulging in a practice which heretofore members of the bar and judges on the bench have commended. If people generally would reduce their contracts to definite writing, there would be less troublesome litigation, and in view of the litigation involving ineligible aliens and the uncertainty which seems to surround the entire subject matter, it seems to us that California landowners who wish to employ ineligible aliens are justified in making their contracts of employment in writing definite, precise and clear.

It is a comparatively easy matter to define what is meant by an employment contract. The essential elements of such a contract are that one person, called the employer, purchases the services of another person, called the employee, for a fixed or indefinite time, and at a given wage or compensation. The employee may sell to the employer either muscle work or brain work or both. The employer may pay the employee in coin, or produce of the farm, or products of the factory. It is customary to pay for services in coin and admeasurement of wages or salary is usually made upon a chronological basis. There cannot be any objection, however, in law, to admeasuring wages or salaries, as the case may be, on some other basis than a day or a month or a year period, and we are unable to understand how an employer can be prevented from entering into a contract to pay his employee either in money or produce or products, upon a day, a month, or a year basis. We recognize the existence of a mass of beneficial labor legislation, affecting the method and amount of wage payments, but we do not understand that this legislation changes in any way the general principles which we are trying to state.

We think that an employment contract suggests a very broad classification, so broad that we might speak of a general employment contract as the genus and any special form of employment contract as a species. If we bear in mind that it is of the essence of an employment contract that the employee is selling to the employer either muscle or brain service rather than goods or wares or merchandise, we think there is no particular difficulty in determining the classification of any particular contract, though it is very possible that a contract may be an employment contract, and also a contract at the same time for the sale of merchandise. A simple employment contract, so to speak, would call for services, flowing from employee to employer, and the only thing flowing from the employer to the employee would be wages or salary.

We believe that crop contracts, as such, are a species of employment contract and the history of the law of crop contracts reaching back in this country for fifty years will show that, wherever a characterization has been made by the courts, crop contracts have been called employment contracts, the peculiar feature of which is that the wages of the employee under such a contract are commuted into a portion of the crop grown. Never have we heard a lease contract characterized as an employment contract, and within the broad circle of employment contracts as such, we have never been able to find a lease contract. It is true that some crop contracts do partake of the nature of leases and there undoubtedly is between a crop contract and a lease contract a twilight zone where there will be found

pale contracts which are difficult to characterize either as a lease contract or a crop contract. We are more than willing to concede that if there is any doubt about whether any particular contract is by its terms an employment contract or a lease contract, the doubt should be resolved in favor of the state and the contract should be characterized as a lease.

The distinction, however, between a lease and an employment contract, *incidentally* involving land, agricultural or otherwise, is so broad that a statement of the distinction ought not to be necessary. Antiposing the rights secured by a lessee under a contract of lease to the rights secured by an employee under a contract of employment on agricultural land, the lessee holds an estate in the land while the employee has a mere *physical* occupancy of the land, solely for the purpose of carrying out the terms of his employment. The lessee may sell his estate or it may be seized upon execution; the employee has no interest in the land which he can either sell or which can be seized on execution. Antiposing the remedies of the lessee to the remedies of an employee on land, we find that the lessee can bring a suit in trespass or a suit in ejectment while the employee can do neither. The employee is relegated to his suit for breach of contract. He cannot bring suit against the employer for specific performance for the very simple reason (aside from the Code prohibitions) that there is a total lack of a reciprocal right of employer to urge specific performance against the employee.

Putting, therefore, a lease contract and an employment contract involving land side by side and viewing the rights and remedies possessed by the contracting parties, we can readily understand the vast distinction between these two forms of contract, and we think we are conservative when we say that in the large zone of employment contracts a lease contract is not found.

A contract wherein the employer employs the employee as an independent contractor is likewise an employment contract, if the essence of the contract is that the employee either as an independent contractor or otherwise agrees to furnish labor as a major part of the contract, whether it be the labor of himself or of others. If an independent contractor agrees in his contract to furnish goods, wares and merchandise, the contract should not obviously be classified as an employment contract, and while such contract might be somewhat hybrid in character, an analysis of such a contract ought to determine whether we should characterize it as an employment contract as such, or a renting contract or a sales contract.

With these general principles in mind, the first thing to be done is to characterize the four several contracts which are now before this court, and we shall make this survey as brief as possible.

The Jones-Makimoto contract (Los Angeles No. 8215) is an employment contract by its very terms and *sui generis*. It provides that Makimoto shall render farm work service to Jones, furnishing his own machinery, horses, tools and equipment and Jones shall pay him therefor twenty-five dollars a month wages and also sixty-six and two-thirds per cent of the net profits realized by Jones from the operation of the property. A portion of the wages are fixed on a chronological basis and are payable in money of the land, while the larger portion of the wages is fixed on the basis of the net profits, not of the crop, but arising from the operation of the property.

The Carter-Singh contract (Los Angeles No. 8237) provides by its terms that Carter employs Singh as a farm worker together with his tools and equipment and agrees to pay Singh fifty dollars per month cash and a

further sum equal to sixty per cent of the highest sale price of the crop, less sums advanced.

In the Nose contract (Criminal No. 2713) we do not have the contract before us, but we are advised that a fixed sum is payable as wages and an additional sum equal to fifty per cent of the net profits of the crop grown and harvested on the premises.

The Porterfield-Mizuno contract (Los Angeles No. 8214) is a cropping contract, as such, under the terms of which Mizuno agrees to perform farm labor for Porterfield, furnishing the tools and implements necessary therefor and Porterfield agrees to pay Mizuno in lieu of specific wages sixty per cent of all crops grown on the land.

We have not attempted to set forth all of the terms of these various contracts, but we have tried to describe their essence. So far as the Porterfield-Mizuno crop contract is concerned, we venture the assertion, without pausing to cite authorities at this time, that crop contracts in essence similar to the one at bar have been characterized for many years as essentially employment contracts.

We submit to the court that for the purposes of a logical presentation of the questions involved herein we are justified in placing all of the four contracts at bar in the general zone of employment contracts, and we venture to assert upon the authority of the Okahara case (*In re Okahara*, 216 Pac. 614) that at least so far as the so-called Alien Land Act, as it stood in 1920, is concerned, *it is the law of California* that an employment contract, as such, is not prohibited by the terms of said act. Because so much controversy has raged about the Okahara case since it was placed in our law books, we may be pardoned for trying to state the exact situation with respect to that case. (*In re Okahara*, 216 Pac. 614.)

The thesis of this decision, as we read it, is that the Okahara contract was par excellence and *ex necessitate* an employment contract. The case clearly decides that an employment contract as such was not included within the general prohibitions provided by the Alien Land Act of 1920 and more specifically was not within the terms of the special prohibition provided by section 10 of the act. It is obvious that the general prohibitions of the act are broader than the special prohibition provided by section 10 of the act. This point is not important except that it accounts for the attempt made by the learned justice who wrote the opinion in the Supreme Court of the United States in the O'Brien case (*O'Brien vs. Webb*, 263 U. S. 313) to distinguish between the contract in the O'Brien case and the contract in the Okahara case with respect to the provisions of the Alien Land Act of 1920 so far as they affect or were affected by the respective contracts in the two cases.

It is our contention that the learned justice who wrote the opinion in the Okahara case was confronted with these alternatives. Since the court was of the opinion that the Okahara contract was *sui generis* an employment contract, either it was prohibited by the specific language of the Act of 1920, or it was not. If it were not prohibited, that was the end of the matter and *this court so construed the Act of 1920 as not to include within its prohibition an employment contract like the contract in the Okahara case*. If, on the other hand, the court was of the opinion that the Okahara contract as an employment contract was prohibited by the terms of the Act of 1920, then it is our contention that this court would have been driven to the conclusion that the Act of 1920 was, so far as it attempted to prohibit employment contracts like the Okahara contract, fundamentally unconstitutional as contrary to the Fourteenth Amendment to the Constitution of the United

States. The background, therefore, of the decision in the Okahara case is that the Okahara contract must either as an employment contract be without the terms of the Act of 1920, or a construction of the Act of 1920 which would have included in it a prohibition against the Okahara contract would have rendered that portion of the Act of 1920 contrary to the Constitution of the United States. It is true that the learned justice who wrote the opinion in the Okahara case reasoned upon the foundation, to some extent at least, of the decision by the United States district court in the O'Brien case, which decision was subsequently reversed, but in no way does that affect the soundness of the reasoning unless we are prepared to say that the Okahara contract is not an employment contract. It may well be (though we hasten to say that we cannot see it) that the Okahara contract is an employment contract and the contract in the O'Brien case was not an employment contract. The learned justice who wrote the opinion in the Supreme Court of the United States thinks there is a difference between the Okahara contract and the O'Brien contract (*Webb vs. O'Brien*, 44 Sup. Ct. at p. 115), and while it is regrettable that this difference was not specifically pointed out, surely we cannot affirm that the Okahara case ought to be overruled because it rested in part somewhat on the foundation of the O'Brien case.

DOES THE O'BRIEN CASE (O'BRIEN VS. WEBB, 263 U. S. 313) OVERRULE THE OKAHARA CASE (IN RE OKAHARA, 216 PAC. 614)?

This question suggests a storm center of controversy. We must, however, conclude either that the O'Brien case does not and was not intended to overrule the Okahara case; or if the learned justice who wrote the opinion in the O'Brien case intended to overrule the Okahara case, the Supreme Court of the United States to that extent exceeded its jurisdiction. The interpretation put by the state supreme court of California in the Okahara case on the statute of 1920 is the law of this state and must be accepted as such by the Supreme Court of the United States.

It is exceedingly regrettable that a reading of the opinion in the O'Brien case does not make the matter clear as to whether the learned justice intended or not to overrule the Okahara case, and yet we submit to the court that confusion does exist. We should have hesitated very much to make this statement, as we felt that we have been so close to these cases that our perspective might possibly have been awry, but we are emboldened somewhat in our view by reading an article by Professor Thomas Reed Powell of the School of Jurisprudence of the University of California, found in the California Law Review for May, 1924, volume 12, No. 4.

It is but fair to assume that Professor Powell, who has no direct connection as counsel or otherwise with these cases, made a more or less impartial survey of the matter and we commend the article as a very clear, incisive and logical analysis of the entire situation so far as the O'Brien and Okahara cases are concerned.

Professor Powell says in part:

"This case came to the Supreme Court of the United States on appeal from the district court, and in *Webb vs. O'Brien* Mr. Justice Butler ordered the reversal of the decision below. It is difficult to tell what was the basis of his action. He considers the California decision in the Okahara case and undertakes to distinguish it on two grounds. Both grounds seem wholly untenable. Without analysis he says that 'the contract in that case differs in important particulars from the one before us'. The California supreme court, however, in the Okahara case had declared:

"'In form and in substance this contract follows closely a contract considered and upheld by the United States district court, Northern District of

California, in the case of *O'Brien vs. Webb*, *supra*, and we entertain no doubt but that it was patterned after that contract and its drafters were aided by the discussion of the question therein made.'

"Clearly, therefore, the California supreme court thought that the O'Brien contract and the Okahara contract were alike immune from the California statute. No one contests that a state court's interpretation of a state statute is to be accepted and followed by the Supreme Court of the United States."

We submit this statement as well as the rest of the article to this court as proof of the general statement that the O'Brien case neither overruled nor could have overruled the Okahara case, and in addition thereto we submit the following proposition:

The interpretation of the Alien Land Act of California by the supreme court of the state prior to the decisions by the Supreme Court of the United States in the O'Brien case is controlling, and therefore on the authority of Ex parte Okahara, 216 Pac. 614, the Supreme Court of the United States is bound by the interpretation of the Alien Land Law, as set forth in the Okahara case.

In the leading case of *Elmendorff vs. Taylor*, 10 Wheat. 159, Mr. Chief Justice Marshall said:

"This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of that state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the court of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction of the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the Constitution, laws and treaties of the United States."

This doctrine has been applied in many cases: *Commercial Bank of Cincinnati vs. Buckingham*, 5 How. 317, 325; *Morley vs. Lake Shore Ry. Co.*, 146 U. S. 162, 166; *Wade vs. Travis County*, 174 U. S. 499, 508; *Johnson vs. New York Life Ins. Co.*, 187 U. S. 491; *Blackstone vs. Miller*, 188 U. S. 203; *Carstairs vs. Cochran*, 193 U. S. 10; *Lindsley vs. Natural Carbonic Gas Co.*, 220 U. S. 61, 73; *Quong Ham Wah Co. vs. Industrial Commission*, 255 U. S. 445, 448.

"The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." (*Lefingwell vs. Warren*, 2 Black 599, 603.)

"The meaning of a state statute declared by the highest court of a state is conclusive upon this court." (*Morley vs. Lake Shore Ry. Co.*, *supra*.)

"Coming to the provision in question, it is necessary to inquire what construction has been put upon it by the highest court of the state, for that construction must be accepted by the courts of the United States and be regarded by them as a part of the provision when they are called upon

to determine whether it violates any right secured by the Federal Constitution." (*Lindsley vs. Natural Carbonic Gas Co.*, *supra*.)

"In determining what the laws of the several states are, which will be regarded as rules of decision, we are bound to look, not only at their constitutions and statutes, but at the decisions of their highest courts giving construction to them." (*Wade vs. Travis County*, *supra*.)

"But it is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state." (*Quong Ham Wah Co. vs. Industrial Commission*, *supra*.)

In *Terrace vs. Thompson*, decided November 12, 1923, and which involved the Washington Alien Land Law, Mr. Justice Butler employed the language last quoted in support of the proposition that the question as to whether or not a state statute conflicts with the constitution of the state is settled by the decision of its highest court.

WHAT IS THE EFFECT OF THE AMENDMENTS OF 1923 TO THE ACT OF 1920?

The amendments of 1923 to the Acts of 1913 and 1920, so far as the particular question under review is concerned, increase the scope of the prohibitions of the act so far as they affect ineligible aliens by adding the words "use", "cultivate", "occupy", "transfer". Also, we are furnished with a legislative definition of a cropping contract which defines a cropping contract as "an interest in real property less than the fee". (We pass without comment this unique legislative device of changing the nature of a thing by mere definition. If black can be made white by legislative legerdemain, then all there is left to us is to exclaim "O Mores! O Tempora!") Also, section 10 of the Act of 1920 is broadened in scope so as to include amongst the penalties any violation of any of the provisions of the act.

THE CONSTITUTIONALITY OF THE AMENDMENTS OF 1923.

While we do not wish as *amicus curiae* in any way to interfere with the arguments made by the various learned counsel in the above cases as to the constitutionality under the California constitution of the amendments of 1923, and while it is our opinion that the said amendments are unconstitutional because in conflict with the prohibition contained in the Initiative Act itself, we are not particularly urging this argument, for the following reason: We realize that if this court should hold the amendments of 1923 unconstitutional in respect to the specified provisions which form the basis of counsel's argument, no final solution of the difficulties which confront a very large number of alien Japanese is accomplished. We believe that should the amendments of 1923 be declared to be in conflict with the state constitution on the grounds specified, the legislature of 1925 will pass another independent statute which would contain all the prohibitions found in the amendments of 1923. Therefore, unless this court shall decide that the State of California, through its legislature, is without power to pass any such legislation because such legislation is in conflict with the Fourteenth Amendment to the Constitution of the United States or the Japanese treaty, nothing final and conclusive has been accomplished.

In other words, the fundamental question involved in the instant case is not whether the particular legislation conflicts with the Act of 1920, but rather whether any legislation which denies to ineligible aliens the right to engage in the common occupations of the country, included in which is agricultural occupations, is against the Fourteenth Amendment to the Constitution of the United States or the Japanese treaty of 1911. We state

to this court very frankly that if the sole question involved herein were as to whether the amendments of 1923 are in conflict with the Initiative Act of 1920 on the grounds argued here, we should not be appearing in these cases *amicus curiae*, because a decision upon that question is not determinative of the fundamental and constitutional rights of ineligible aliens.

If we concede that the contracts at bar are essentially employment contracts, then the ultimate, fundamental and constitutional question involved may be stated as follows:

Granted that the State of California may under its police power, by appropriate legislation, prevent ineligible aliens from owning or possessing land in California, or any interest therein, can California, in the furtherance of its expressed and implied policy with respect to the ownership and possession of land, prohibit ineligible aliens from entering into employment contracts with private owners for the working of land?

Behind this question is the further question, the answer to which, in our judgment, furnishes the crux of the entire situation.

What is the police power of the state, and what are the limitations, if any, SO FAR AS INELIGIBLE ALIENS ARE CONCERNED, upon the exercise of that power?

Both judges and textbook writers have had difficulty in defining the police powers of the state, but it is generally conceded that a definition must be built up by the principle of what is called judicial exclusion and inclusion. We cannot attempt within the scope of this brief to set forth all of the definitions of police power, but we have tried to find a definition which would, at least, include the matters under consideration.

"The term police has never been clearly circumscribed. It means at the same time a power and function of government, a system of rules, and an administrative organization and force. Blackstone couples public police and economy which he defines as 'the due regulation and domestic order of the kingdom, whereby the individuals of the state, like the members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective stations.' * * * In the decisions of the courts we find the term police coupled with internal commerce and domestic trade; health and safety measures are commonly ascribed to it; but it is also made to include the establishment of courts of justice and the punishment of offenses, and the general tendency is to identify it with the whole of internal government and sovereignty, and to regard it as an undefined mass of legislation."

"* * * As soon as the idea of the police became the center and foundation of a governmental power, the exercise of which had to justify itself in the face of constitutional limitations, the courts were bound to use the term with greater care, and to attempt to define it. From the mass of decisions in which the nature of the power has been discussed, and its application either conceded or denied, it is possible to evolve at least two main attributes or characteristics which differentiate the police power: It aims directly to secure and promote the public welfare, and it does so by restraint and compulsion. * * *"

"* * * If the constitutions were narrowly construed they would furnish no safeguard against laws restraining the freedom of occupation, and of migration and settlement within the state, prohibiting organized associations, or limiting the power of individuals to acquire or dispose of property or to make contracts. * * *"

"General Limitations.—To prevent oppressive legislation of this kind the courts must rely upon the general clauses of the Constitution.

"Of these the duty of the equal protection of the laws enjoined upon the states by the Federal Constitution is perhaps the greatest safeguard of justice. * * *." (Freund, *Police Power*, pp. 2, 3, 13, 14.)

We think we are able to state quite clearly at least two well-established concrete limitations on the exercise of the police powers of a state which affect the questions under discussion. We are not at all certain as to where lie *all* of the exterior boundary lines of the domain of the police power, but we think we can mark out for the court two of the boundary lines and specify quite clearly the established monuments to which said lines are tied and furnish the court with some of the surveyor's field notes.

First.—In exercising its police power, a state is limited by the specific prohibitions contained in the Fourteenth Amendment to the Constitution of the United States.

Second.—In exercising its police powers SO FAR AS ALIENS ARE CONCERNED, the state is limited by the terms of any treaty in existence between the United States and the country of which said aliens are nationals.

Referring to the first proposition above stated, we recognize that the boundary line to which we have referred is very broad and very long, and it will be necessary in the case at bar only to define and survey a comparatively small portion of the line.

Under the Fourteenth Amendment, a resident alien in any state has the fundamental, constitutional right to engage in the common occupations of the country and no state under its police powers can pass legislation which will interfere with that fundamental right. There is, however, what some writers improperly call a limitation upon this general proposition and that introduces into the problem the whole theory of legislative classification. We regret that we shall be unable within the limits of this brief to discuss thoroughly this question of classification and its relation to the police powers of a state, but we think it obvious that so far as aliens are concerned, and their relation to the common occupations of the country, to admit that the state may make an arbitrary classification which would prevent them from entering into all of the occupations of the country or any number of such occupations, would be conceding that the state might override the prohibitions of the Fourteenth Amendment.

A state can prohibit all persons from entering into the business of vending narcotics as being legislation within the scope of the police power, but an arbitrary classification which would allow some persons to vend narcotics and others not, would be a totally different matter, and we must not confuse the general principle herein stated with certain so-called qualifications which when properly analyzed are not qualifications at all.

The state may as a *proprietor* under the "proprietor theory" discriminate with respect to employees and may provide by legislation that no aliens ineligible or otherwise can work on public work. In this regard the state is acting not as a political agent, so to speak, but rather as an economic agent, and just as any private citizen may discriminate as he pleases in employing persons to do work for him so the state in *respect of its own property* may discriminate by an arbitrary classification. (See *Heim vs. McCall*, 36 Sup. Ct. 78; also, *People vs. Crane*, 108 N. E. 427.)

Also, the state may discriminate against aliens in the matter of permitting the hunting of game which in theory belongs to the state, and to the people thereof. (*Patson vs. Pennsylvania*, 34 Sup. Ct. 283; *State vs. Pheanne* [N. H.], 116 Atl. 758.)

The state may withhold licenses from aliens ineligible or otherwise to hunt by an arbitrary classification.

This court recently held that the state may discriminate against aliens in the matter of having firearms. (*Ex parte Ramirez*, 226 Pac. 914.)

We shall not take time to specify any more of these so-called exceptions which give the state the right in the exercise of its police powers to make arbitrary classifications but in every case which we have investigated the classification made is sought to be justified on the ground that

"Police power is the power inherent in a government to enact laws within *constitutional limits* to protect the order, safety, health, morals and general welfare of society." (12 C. J. 904.) (*Italics ours.*)

We cannot refrain in concluding this summary of cases in which the principle of classification has been applied under the Fourteenth Amendment from quoting again from Professor Powell's article at page 272, as follows:

"These judicial affirmations of the 'obvious' need to be supplemented by some demonstration or assertion that ineligible aliens and nondeclarant eligibles are more of a menace on the land than in the factory, shop and kitchen. Such assertion appears a little later when Mr. Justice Butler observes that 'the quality and allegiance of those who own, occupy and use the farm lands within its border are matters of highest importance and affect the safety and power of the state itself.' Again we are not told why. One sees readily that allegiance has a close relation to matters within the scope of national authority, but its peculiar relation to fruit raising is less evident."

Aside, however, from general analysis and reasoning it is our contention that the particular question involved in the cases at bar has been decided by the Supreme Court of the United States.

"* * *; but with regard to other occupations, even those requiring special skill, or moral qualifications, discrimination against resident aliens ought not to lie in the discretion of the states. The analogy of the disability to hold land, a survival of feudal conceptions, should not be extended.
* * *"

"* * * For otherwise a state might close all profitable avocations to them, and by preventing them from earning a livelihood, drive them away. Such a result would bring about international complications and can therefore be only a matter of national action. The federal adjudications in the matter of discrimination against Chinese in the laundry business, while involving also treaty rights, seem to support this position. * * *"

Freund, Police Power, pp. 728, 729.

The leading case on this question is *Truax vs. Raich* (decided November 1, 1915), 213 U. S. 33, 36 Sup. Ct. Rep. 7:

"* * * It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of personal freedom and opportunity that it was the purpose of the amendment to secure. * * * If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens, unless restrained, was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary field of labor, is necessarily involved. It

must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. (*Fong Yue Ting vs. United States*, 149 U. S. 698, 713, 37 L. Ed. 905, 913; 13 Sup. Ct. Rep. 1016.) The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.”

We have quoted from this case more fully than we should otherwise have done were it not for the fact that we understood the learned attorney-general to say on the oral argument of the instant cases (and if we did not hear correctly, we hope that our statement will be promptly corrected) that the State of California under its police powers could, if it would, deny to all ineligible aliens resident in the state the right to engage in any or all of the occupations of the state. In a recent case (*Matter of Romaris*, 218 Pac. 421) the learned attorney-general argued with great industry and power, but without avail, that the State of California had certain reserved powers with which even a treaty made between the United States and a foreign country could not interfere, and that a treaty could not take away from California the right to control “the regulation of inheritance of property by aliens”. In view of that contention we are not surprised to hear it argued that there are practically no constitutional checks on California’s police powers or the exercise thereof through the device of arbitrary and discriminatory classification.

It we have quoted the attorney-general correctly with respect to the statement he made on the argument of the instant cases, then we wish to take direct issue with him upon this important and fundamental question. We assert positively that the Fourteenth Amendment to the Constitution of the United States erects a barrier beyond which the State of California cannot go and we are trying to define that barrier as lucidly as we can. While the *Truax vs. Raich* case is a comparatively recent one, our investigation of the law shows that it is but the statement in comprehensive and concrete form of a constitutional principle known for a long time. *Truax vs. Raich* has been cited with approval in nineteen cases and the main constitutional doctrine for which the case stands has never been questioned.

The doctrine of *Truax vs. Raich* is approved in the cases of *Children’s Hospital vs. Adkins*, 284 Fed. 613, and also in the case *Meyer vs. State of Nebraska*, 43 Sup. Ct. 625, and in that connection, we quote from the latter case, as follows:

“The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. * * *

The doctrine of *Truax vs. Raich* is also endorsed in the leading and important case of *Truax vs. Corrigan*, 42 Sup. Ct. 124, and we quote from Mr. Justice Taft’s opinion in that very important case, as follows:

"* * * Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual. We said through Mr. Justice Brewer, in *Muller vs. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957, that—'It is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.'"

In this connection, also, we call the court's particular attention to the following cases: *Ex parte Case*, 116 Pac. 1037; *Poon vs. Miller*, 234 S. W. 573; *Fraser vs. McConway & Torle Co.*, 82 Fed. 257; *Juniata Limestone Co. vs. Flagley*, 187 Penn. State 193.

We cannot understand how agricultural employment where the employee under the terms of his contract has no legal estate whatever, direct or indirect in the land, can be distinguished by arbitrary classification from any other form of employment for the purpose of aiming at ineligible aliens prohibitory legislation. We have heard in the discussion much said about farm land and agricultural land and agricultural employment, but it does not seem to have been pointed out that the amendments of 1923 apply so far as their prohibitions are concerned to *all* land, and the word "agricultural" is not once used in the amendments. It is interesting, also, in this connection to note that the word "agricultural" appears only twice in the Act of 1920, once in connection with corporations and once in section 7 specifying how long land acquired in mortgage sale may be held. We must gather the purpose of the legislature from the language of the various acts and since the Act of 1913 has been on the statute books a long time, and also, the Initiative Act of 1920, if the purpose of the act was not clearly stated in the Act of 1913, it is but fair to assume that its purpose has been clearly stated by repetition in the Acts of 1920 and 1923. The purpose of the act has always been assumed to be the protection of the agricultural lands of the state. The truth is, however, that the prohibitions of the various acts apply to all of the land of the state and were it not for the protection given to the Japanese alien by his treaty of 1911, he might under the language of these various acts be prevented from entering into any employment under the terms of which he was given any kind of *legal* possession of land.

How an ineligible alien could engage in any occupation whatsoever, common, or otherwise, without possessing or occupying land, *as this court is asked to construe the words "occupy" and "possess"*, is a puzzling problem, which is beyond our limited powers of solution! We must leave to the learned attorney-general a method for discovering how ineligible aliens can engage in any occupation without physically at least occupying and possessing real property. Of course, the answer to the puzzle is that the words "possess, enjoy, use, cultivate and occupy" must all be construed as they were in the *Okahara* case "as is consistent with the tenure by which it (the land) is held" (*Ex parte Okahara*, 216 Pac. at p. 618) in order to prevent the entire situation from being reduced to a *reductio ad absurdum*. How an ineligible alien can cut a citizen's grass on his lawn or wash his windows or pick his fruit, or build his house or render janitor service in his office, or do a hundred and one other service jobs without occupying the citizen's land, we cannot understand! It is obvious that if the State of California can prevent by constitutional legislation any kind of occupation of land whatsoever on the part of an ineligible alien then there is nothing

left for the ineligible alien to do but to emigrate from California to some more congenial state, because obviously he cannot "live where he cannot work." Also, as was clearly pointed out in *Truax vs. Raich* (*supra*), if California can set up an immigration policy of its own and by indirection prevent aliens from earning a living here, then we have come upon a very novel proposition of constitutional law.

The second barrier to the exercise by California of its police powers, so far as the question under discussion is concerned, is, as we have stated, the treaty of 1911 between the United States and Japan.

We wish to make it clear that we do not consider the four cases now pending before the court as peculiarly treaty cases. It has been decided definitely that the treaty between the United States and Japan does not give to Japanese aliens any rights in land other than the right to lease land for residential and commercial purposes, and it has been also decided that the right to lease land for agricultural purposes is not within the terms of the treaty. If, however, we are correct in characterizing the four contracts at bar as employment contracts, then surely the right to enter into such a contract which grants to the alien no legal estate in land is fully guaranteed by the language of the treaty. We quote article 1 of the treaty as justifying fully this statement.

"Article 1. The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

"They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions."

As illustrative of how definitely the Japanese treaty of 1911 is a barrier to the exercise by a state of its police powers so-called, we cite the very recent treaty case of *R. Asakura vs. City of Seattle* (decided May 26, 1924, 44 Sup. Ct. 515) as follows:

"* * * The treaty-making power of the United States is not limited by any express provisions of the Constitution, and though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations. (*Geofroy vs. Riggs*, 133 U. S. 258, 266, 267; *In re Ross*, 140 U. S. 453, 463; *Missouri vs. Holland*, 252 U. S. 416.) The treaty was made to strengthen friendly relations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. Treaties for the protection

of citizens of one country residing in the territory of another are numerous. and make for good understanding between nations. The treaty is binding within the State of Washington. (*Baldwin vs. Franks*, 120 U. S. 678, 682, 683.) The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. (*Foster vs. Neilson*, 2 Pet. 253, 314; *Head Money Cases*, 112 U. S. 580, 598; *Chew Heony vs. United States*, 112 U. S. 536, 540; *Whitney vs. Robertson*, 124 U. S. 190, 194; *Maiorano vs. Baltimore & Ohio R. R. Co.*, 213 U. S. 268, 272.) * * *

In this case the Supreme Court of the United States, speaking through Mr. Justice Butler, held an ordinance of the City of Seattle unconstitutional and void as being in conflict with the Japanese treaty. The ordinance in question attempted by indirection to prevent ineligible aliens from entering into or continuing in the pawnbroking business in the said city. The supreme court of the State of Washington held the ordinance to be valid, but the Supreme Court of the United States reversed the action of the Washington court, and, as we have stated, held the ordinance to be void.

The case is particularly interesting, however, because from an examination of the briefs filed by the attorney-general of the State of Washington, we are able to advise this court that the length, breadth, height and depth of the police powers of a state were set forth with learning and eloquence. It was very forcibly argued that the pawnbroking business is a peculiar kind of business permitting essentially of police regulation and that the safety and welfare of the state might be involved in a business like the pawnbroking business which so directly affects and is affected by crime. Notwithstanding the fact that the grip and length of the strong arm of the police power of the state was painted with imagery and with high lights, the Supreme Court of the United States said in effect that here in the treaty is a barrier beyond which that arm could not reach.

Our conclusion, therefore, is that even should your Honors hold that the constitutional barrier of the Fourteenth Amendment does not prevent the exercise of the police power of California in respect of the particular legislation under review, then surely if the language of the treaty means anything, the ineligible alien Japanese, at least, is protected by *his* treaty in the right to engage in the common occupations of the country, and cannot be confronted by an arbitrary classification amongst those occupations which in effect would amount to a breach of his treaty. Surely if the pawnbroking business (which incidentally must involve a lease of land) cannot be prohibited by the police powers of the state under the treaty between Japan and the United States, it is difficult for us to understand how a farmer employee working on farm lands for a wage can be prevented from that sort of employment by legislation. We trust that it is not necessary for us to argue that the word "common" as used in the *Truax vs. Raich* case (*supra*) does not connote inferiority in the grading of employments, but rather is a word used to connote breadth or scope of employments. In other words, the word "common" means the general employments of the country and with that idea in mind it is difficult for us to distinguish between a restaurant worker (*Truax vs. Raich*) and a mere agricultural worker. We cannot see how it would change the problem if the restaurant worker were paid wages in board and lodging and possibly in loaves of bread baked by the restaurant, nor can we understand how the giving of a bonus to an agricultural employee as a part

of his wages is any different in principle from the giving to an industrial worker in an iron foundry, a bonus at the end of the year based upon the net profits of the business. No one has ever argued, so far as we are advised, that a machinist who has the right to a bonus based upon the net profits of the business at the end of the year has any interest whatever in the business or the soil on which the business is located. Are these constitutional and treaty barriers overcome by the altogether unique suggestion that a farm worker is suddenly transformed into a landowner if inducements are given him in the form of a bonus, based either upon net profits or a portion of the crop? This requires not only a stretch of imagination, but an inflation of legal principles to the blow-out point.

THE RIGHT OF PRIVATE CONTRACT WHICH IS GUARANTEED TO A CITIZEN OF THE UNITED STATES BY THE FEDERAL AND STATE CONSTITUTIONS SHOULD NOT BE ABRIDGED WITHOUT A CLEAR AND CONVINCING SHOWING THAT SUCH AN ABRIDGEMENT WAS NECESSARY TO PRESERVE THE PUBLIC PEACE, HEALTH, SAFETY, MORALS OR WELFARE.

We think all of the instant cases should be argued and presented to this court from the angle of the rights and liberties of the citizens involved in the several contracts, rather than from the angle of the rights of the ineligible aliens. Since, however, these cases are known as alien cases, we have not undertaken to change the entire structure of the argument and we cannot prolong this brief by a thorough examination of the almost elementary proposition which we have stated. Much vague talk is indulged in regarding the wonder of liberty and freedom, but we too often forget that liberty and freedom mean concretely the untrammelled right to make and enforce private contracts.

If the right of a citizen to make a private contract concerning his own property is to be either limited or denied under the police powers of a state, clear and convincing reasons must be given therefor, involving the public peace, health, safety, morals and welfare.

In *Meyer vs. State of Nebraska* (*supra*) the entire situation is summed up as follows:

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. * * *"

We concede that in civilized, political communities necessarily the freedom of contract must be abridged in the interests of the public welfare, and many cases may be cited to justify this general statement.

We insist, however, that the sacred right of private contract which is one of the substantial bulwarks of citizens, should not be taken away except upon a clear showing that the public peace, health, safety, morals and welfare are involved.

We submit to the court that if any compelling and convincing reason has been advanced, involving the public welfare, as to why a citizen should be deprived of his right to make an employment contract and choose as his employee an ineligible alien, such reason has not been called to our attention.

CONCLUSION.

In conclusion, will the court pardon us for saying that we are still fatuous enough to believe that the law of the land must be found in statutes, constitutions and decided cases. We, also, have been educated to believe that logic and law are the twin safeguards of human rights and liberties.

We cannot agree with the suggestion made at the oral argument and formerly set forth in several briefs, that the court in deciding these important fundamental questions should gather the law from the life that flows about us. In the interpretation of a statute it is one thing to employ as a principle of interpretation the manners and customs of the people, but quite another thing to interpret a statute from an examination of the opinions, the passions, the prejudices, or the temporary whims or foibles of the people who make up the tide that is ebbing and flowing about us.

While we grant freely that the law is not "a whited sepulchre filled with dead men's bones" neither is it an *ignis fatuus* to lead us in a dancing race amidst the swamps and morasses of temporary popular opinion. Any lawyer who, like the writer of this brief, went through the anti-Chinese riots in San Francisco in 1878, and then later has examined the laws (subsequently declared to be unconstitutional) enacted as a result thereof, is of the firm faith that the courts of the land stand like a rock against the invasion of rights and liberties, even of aliens. If aliens, ineligible or otherwise, can be prevented from entering into the common employments of the country, then the Fourteenth Amendment to the Constitution as interpreted by the courts has become a mere scrap of paper, and if agricultural employment is not one of the common employments of the country, then counsel's logic is, indeed, at fault.

Dated, San Francisco, August 11, 1924.

Respectfully submitted,

ALBERT H. ELLIOT,

Amicus Curiae.

APPENDIX.

THE QUESTIONS PROPOUNDED TO COUNSEL BY THE COURT DURING THE ORAL ARGUMENT OF THE INSTANT CASES AND AN ATTEMPT ON OUR PART TO ANSWER SAID QUESTIONS.

We trust we shall be pardoned for pursuing the rather unusual method of trying, as best we can, to answer certain questions asked by members of the instant cases. In order that we might have the questions accurately before us, we have asked the reporter of this court to furnish us with a transcript and we have repeated the questions as accurately as possible. We should like to say in a general way that during the long course of the handling of the so-called Japanese test cases, both in the state and Federal courts, we have had occasion to consider most of these questions. While our answers may not satisfy all interested parties, we shall at least try to be quite definite. We cannot prolong this brief to the extent of citing authorities to justify all the answers which we make. The answers to some of the questions would involve a separate brief and while most of the ground has been covered in a large number of briefs already written and filed, we cannot within the limits of this brief cover the entire ground. In this connection, we, also, wish to say that we shall not raise in our answers any question which we think has been finally decided.

QUESTION.

If we should hold that the amendment adopted in 1923 is valid, nevertheless it is your contention that it is not valid to the extent of proscribing the contract here in issue because of the fact that that would be an infringement of the liberty of contract?

Our answer is that this question clearly states the issue, as we have argued it in this brief and it should be noted that "infringement of liberty of contract" affects a citizen in each of the instant cases, the same as an ineligible alien.

QUESTION.

Granted that it is the expressed, declared policy of this state to prohibit the ownership or occupancy of agricultural lands within the state by ineligible aliens, might not the legislature, perhaps, go beyond that policy for the purpose of seeking its enforcement?

The answer to this question is that for the purpose of seeking the enforcement of a policy valid under the police powers of the state, the State of California might go far in enforcing that policy by ancillary legislation. But at least two limits to the said ancillary legislation are (as we have shown), first, the Fourteenth Amendment to the Constitution of the United States; and second, the treaty between United States and Japan. It is but elementary to say that an end may be lawful and the means employed to secure that end unlawful. It has been decided and is no longer an open question that the end which California in the legislation had in view is lawful, to wit: the protection of its lands (not necessarily agricultural, but all lands) from alien ownership. The state, however, in carrying out that policy cannot overstep constitutional and treaty barriers. In this connection, may we say, that the learned attorney-general, in conceding that the law of crop contracts for fifty years shows that never has a crop contract been held to be a transfer of interest in land, made the point which is somewhat novel that all the litigation covering crop contracts was *inter personas* and in no one of the cases was a state a party. The interesting feature about this point is that private persons are not subject to the restrictions of the Fourteenth Amendment and Congress, also, is not subject thereto, *but a state is*. Therefore, there would seem to be less reason for stretching the law of crop contracts when a state interferes, than in any other kind of a case. Likewise, the court will pardon the suggestion that the illustrative case of the passage of the Eighteenth Amendment and its enforcement does not fit in very closely because Congress is not restricted by the prohibitions of the Fourteenth Amendment and may pass discriminatory legislation (*Yamatoya vs. Fisher*, 23 Sup. Ct. 613). Congress may also enact legislation directly contrary to any treaty. (*Chae Chau Ping vs. U. S.*, 9 Sup. Ct. 623.) A state, however, is limited in its legislation, as we have shown, by the barriers of the Fourteenth Amendment and the treaty.

QUESTIONS.

If the employer under the contract at bar, while the employee was performing all of its conditions, should arbitrarily discharge him and refuse to permit him access to the property during the terms of the contract, would the employee have a right of action for damages for its breach?

The answer to this question is "yes", and so far as we are able to learn from a study of this kind of a case, the only remedy which the employee would have would be the ordinary remedy of damages for breach of contract. In that form of action, the employee could recover any damages which he could prove that he had suffered.

QUESTION.

Under the contracts at bar would the employee have a right to compel his admission to the property?

The answer to this question is "no". By a right to compel admission to the property, we understand the court to have intended to ask whether the employee could bring any form of possessory action. In order to bring a possessory action of any kind, as we understand it, the plaintiff must allege and prove his right to the possession of the property, and under the contracts at bar, the employee is given no right whatever to the legal possession of the property involved. The right to occupy the property for the purpose of working thereon and rendering services to the employer certainly can give no possessory right as such in a legal sense to the employee.

QUESTION.

Do the contracts at bar by reasonable or necessary implication give the employee a right to enter the land under the terms prescribed in the contract?

We think the answer to this question is "no", and an analysis of the situation seems to demonstrate that the answer must be "no". Supposing an employer employs a manager with a written contract for a five-year period to manage his ranch at a fixed salary, and then leaves for Europe. Let us suppose a third person, trespasser, goes on the property and squats thereon under an alleged squatter title. Could the manager in his own name bring a suit in either trespass, ejectment or quiet title, set up his contract and recover possession of the property? We think that the trespasser could demur the manager out of court at once on such a pleading because while the manager might have authority to sue *in the name of the employer* in ejectment, trespass or quiet title, certainly his contract of employment with the employer does not give him such an interest in the ranch property as would entitle him to maintain a possessory action to recover the ranch as against a squatter.

QUESTION.

Would the employee have a right of specific performance of the contract breached by the employer because of uncertainty in the market value or the amount of crops to be obtained or harvested therefrom?

We think the answer to this question is "no", and in that connection, we refer specifically to section 3390 of the Civil Code, subdivisions 1 and 2, as follows:

"Sec. 3390. What cannot be specifically enforced? The following obligations cannot be specifically enforced: 1, an obligation to render personal service; 2, an obligation to employ another in personal service; * * *"

It will be observed that the section of the code specifically prevents either the employer or the employee from specifically performing an employment contract. Even if the code were not so specific upon the question, as was well said by one of the justices on the oral argument, there could not be reciprocity between the contracting parties in the matter of specific performance, and therefore an action in equity for specific performance could not lie.

"Specific enforcement would hardly be practicable without giving the master despotic powers over the servant which would virtually create the condition which the Constitution sought to make impossible." (*Freund, Police Power*, p. 482.)

In a democracy where even the suggestion of peon contract labor causes nervous chills, it would be strange, indeed, to discover that either an em-

ployer or an employee could enforce specific performance of an employment contract.

QUESTION.

Would the situation be, in any way, changed if the employee is given by the contract a third or a portion of the crop?

We think the answer to this question should be "no," because we are unable to understand what difference it makes whether an employee is paid in money, or in peaches or apples or tomatoes. If, under the terms of the contract, an employee is not granted any estate in the land or legal right to the possession thereof, we cannot see that giving him a portion of the crop is anything else but supplying a standard for the measurement of his wages. It is true that the amount of his wages, if the wages are measured on the crop basis, will be increased or decreased somewhat at least by the industry of the employee. This certainly, from the point of view of sound economics, ought to be a valuable part of the contract, not only for the employee but also for the employer and for the public, and if it is economically valuable to the community it should also be legally sound. Certainly it would be a unique situation to find that the police powers of the state should be exercised in demoting an employee from a position of economic efficiency to one of economic deficiency.

"Yet one who is curious about constitutional issues might well wish to speculate on the hypothetical question whether the police power of the state extends to excluding a class from some pursuit for the reason that in that particular calling they have shown themselves unusually efficient." (Prof. Powell, *supra*.)

QUESTION.

Does not the Okahara case hold that the contract in the Okahara case was not within the language of the Act of 1920?

Answer. Yes.

QUESTION.

Are the prohibitory provisions of section 10 of the act narrower than the general prohibitory provisions of the act itself?

Answer. Yes, and undoubtedly the amendments of 1923 broadened out the prohibitions of the act. It is true that the only provision of the Act of 1920 aimed at by a criminal penalty was the prohibition as to a transfer of real property or an interest therein to the ineligible alien. But as we have tried to show in this brief, the Okahara case is of fundamental value, because not only does it construe the Act of 1920, but because it holds the Okahara type of contract to be an employment contract and by implication at least it holds that such a contract cannot be prohibited under the police powers of the state. We think we are justified in this implication because of the very thorough exposition of the law applicable to that particular type of contract which is found in the opinion in the case.

QUESTION.

What rights do the Japanese aliens have under the treaty?

We have already answered that question, but wish to add that we are unable to think of any civil rights (as distinguished from political rights) which citizens of California have, which are not by the treaty guaranteed to resident Japanese aliens of California, except the right to own, lease and legally possess real property for other than residential and commercial purposes.

QUESTION.

Do the Japanese make a written contract when they undertake household work?

Answer. Probably not, but if the interpretation which the learned attorney-general is asking this court to put upon the words "occupy, etc.", in the amendments of 1923, is adopted by this court, then it will be both the part of wisdom and necessity for all citizens employing Japanese to set forth in a written contract the exact character of the employment.

We have already in this brief suggested the reason why ineligible aliens doing any sort of work on land should have a written contract and certainly owners of land ought to have such a contract, so that both owners of land and ineligible aliens may not run foul of the cleverly drawn and unique statutes aimed at them, of which there are many.

QUESTION.

What do you conceive to be the unwritten purpose of the legislation?

The only purpose of the legislation which we can find breathes from the language of the legislation itself. Ninety-nine out of a hundred of the people on Main Street who voted for the Initiative Act of 1920 believe that the purpose of said act was to keep Japanese and Chinese and other ineligible aliens off the farm lands of California. We have surprised hundreds of people and some judges and many lawyers by informing them that the purpose of the act as read out of the language of the act itself is to keep ineligible aliens off *all the lands* of the state, except such land as they might use for residential and commercial purposes. We state to the court very frankly that the purpose of the Act of 1913, the Act of 1920, and the Act of 1923 is to prevent all alien Japanese from earning a living in any way on land except so far as they have a right so to do under their treaty. We know of no other way to get at the purpose of legislation of this character except by reading it. Hundreds of people have told us personally that they had no idea whatever that the purpose of the act was as we have stated it to them. This only proves that the purpose of legislation as determined by the people on Main Street is not always the legal purpose, as expressed in the statutes which they and their representatives enact.

QUESTION.

You do not think, in the exercise of the police power, the legislature would have any authority to go beyond the restrictions upon the use of its land and proscribe employment contracts which in themselves are not inherently an invasion of the rights of the state to protect its lands, or that the public interests require such extra prohibition?

This question is a statement of the crux of the entire situation, as we have tried to show in this brief, and our answer to the question has already been indicated.

QUESTION.

When a regulation validly within the scope of the police power, that is to say, when reasonably necessary or proper for the protection and safety of the state to protect its rights, is thought necessary, must not property rights give way, and if it is deemed necessary to protect land from any class or kind of invasion by ineligible people and the state sees fit to adopt any such legislation, must we not uphold it unless we can say that it is beyond the scope of the police power and so constitutes an unreasonableness exercise of that power?

The answer to this question is "yes", and we wish to commend the question as a complete statement of the situation. In other words, unless

the court holds that the legislation under consideration (amendments of 1923) is beyond the scope of the police powers of the state, and an unreasonable exercise of that power, then the legislation is valid and constitutional. We submit that this question states the issue and we have tried in this brief to argue this fundamental question. The only additional suggestion we have to make is that if the legislation conflicts with the treaty, it must fall regardless of whether otherwise it might be held to be within the police powers of the state.

QUESTION.

Do you think the contract here is probably a contract of hiring?

The answer to this question is "yes". All of the contracts before the court are essentially employment contracts, as we have argued, or contracts of hiring. All that the employee sells is his services, the work of his hands and probably of his head, and in some of the contracts he also furnishes tools to work with, but we consider that only an incident.

QUESTION.

How would the amendments of 1923 aid in the practical enforcement of the act unless they provided some available penalty or available means of enforcement which was not valid before?

There is no doubt that the amendments of 1923 attempted to overcome the effect of the decision in the Okahara case, and if the act itself and the amendments thereto are within the scope of legislative authority in respect of the Federal Constitution and the treaty between Japan and the United States, then we do not know of any objection which could be made to the penalty features of the act.

QUESTION.

Under this cropping contract, does the man and family occupy the land?

We do not think that any of the particular contracts before the court so provide, but we hasten to advise the court that *a Japanese alien and his family can occupy land for residential purposes*, farm land, city land, mining land, forest land or any other kind of land. This is specifically provided by the terms of the treaty between Japan and the United States and nothing has been called to our attention to suggest that Japanese aliens must live in cities. They might live in a house on country land and in a country district if they used the land occupied exclusively for residential purposes. They might, also, occupy many acres of country land if they used that land exclusively for commercial purposes. In other words, a Japanese might establish a factory in the country and on country land and lease the land for that purpose. We cannot see how, if an employment contract of a Japanese alien is valid, the Japanese alien could be compelled to live with his family on some other land in the country than the land of his direct employer. We are of the opinion that a Japanese alien under his treaty could lease a portion of the country land of his employer and use it as a home exclusively, for a period of fifteen years if he and the owner so wished.

QUESTION.

A man may make a lease of property and in effect stipulate to take his rents in products. In other words, he does not have to be paid in money unless he wants to be so paid?

We have already answered this question. He may be paid in money or apples or farm products.

QUESTION.

How can a landlord get an employee off his property if he is living in the house?

Answer. We presume the police might be called in. May we not answer this question by asking another? How would a person get a cook out of his house if he discharged him, and if the cook refused to go? Possibly the police must do it. Certainly the cook has no possessory right to the property, even though he might have been discharged from his job without right.

QUESTION.

Has the employee any rights under these contracts except by a violation of the contract on the part of the landowner?

The answer is that the employee has right just as the employer has and each may enforce his rights by breach of contract and recover damages for violation.

QUESTION.

Is not the whole theory based upon the suggestion that the use or occupancy interferes with the free occupation of the land by the eligible citizen?

We think this is a correct statement of the motive lying behind the alien land legislation and the employment contract does not interfere with either the legal use or legal occupancy of the land by the eligible citizen. It cannot be contended that an employer could not sell his land to any citizen he wished and give that citizen legal possession of the land, notwithstanding an employment contract was in existence involving the land. The citizen so acquiring the land could bring a suit in ejectment against trespassers if there were any and the only right the employee would have would be an action of damages against his employer.

QUESTION.

Suppose the employee (the Hindu) made one of these contracts and had a strawberry crop growing on the land about ready to be harvested and the owner of the land announces that he is going to turn the land into a polo field and prepared to do so, could the Hindu enjoin the owner from doing that if it affected the disposition of the crop and all the crops?

The answer to this question is that under the contract before the court the Hindu could not enjoin the owner. We think this question was directly answered by the lower court in the decision rendered in the very case under consideration and we quote from the opinion as follows:

"The acid test therefore of whether or not a man working on the land of another under contract is there as a tenant or as laborer is whether or not in the event the owner ordered him off he would be obliged to go whether in default or not, and whether, if forcibly ousted he could maintain an action of forcible entry or if threatened could secure an injunction. If these distinctions seem obtuse to the layman they have not been so to courts or lawyers, nor to those who have followed the farming industry. It has been a part of the current farm law well known and generally acted upon. Early in the history of this country there came before Hon. J. W. Curtis, now justice of the court of appeals of this state, in another department, the case of *Germain Seed and Plant Company vs. Turner*, in which the plaintiff sought an injunction requiring defendant to abstain from coming or remaining on certain farming lands. The defendant answered, setting up a contract with plaintiff whereby he, the defendant, was to go upon these lands and there plant, raise and harvest a crop of Soudan grass seed, and should receive for his labor one-half of the net profits thereof. He further showed

that he had in all respects complied with his contract, that the season for harvest was at hand, but not completed, and that it was necessary for him to remain on this land in order to complete his contract. The court granted plaintiff's action for judgment on the ground that the answer stated no defense, holding the contract to be one of employment and that the employed had no interest in the land of his employer, and no right of possession, and that the employee must in all cases leave the land when discharged. In making this ruling the court, beyond any doubt, was following the repeated decisions of the supreme court of this state. This case is mentioned not as authority technically binding on the court, but to show that this distinction between the essentials of employment and leases was well known and understood long before the Alien Land Law was thought of."

QUESTION.

Suppose the owner was growing trees and was about to cut them down and turn the land into a polo field. they are part of the realty, are they not?

Trees are certainly part of the realty and the owner could breach his contract with his employee and cut down all trees on his property. The remedy of the employee would be a suit for breach of contract, but under no one of the contracts at bar has the employee such a possessory right to either the trees or the land as to justify any action other than one for breach of contract.

3. DECISION OF THE COURT.
(PENDING.)

CHAPTER XIX.—NOSE CASE.

In the matter of the application of S. NOSE for a writ of Habeas Corpus.

IN THE CALIFORNIA SUPERIOR COURT.

1. PETITIONER'S OPENING BRIEF.

STATEMENT.

This is an original application by petitioner S. Nose, for writ of *habeas corpus*. Nose was arrested under a warrant issued out of the township court of Los Angeles Township, Los Angeles County, State of California, on a complaint sworn to by deputy district attorney, Becker, charging him with unlawfully entering into a conspiracy with M. T. Bischof, to enter into and execute a contract for the purpose of acquiring, possessing, using, cultivating, occupying and having the beneficial use of the land in the contract described.

The contract in question is as follows:

"EMPLOYMENT CONTRACT.

"This agreement, made and entered into in duplicate this 8th day of July, 1924, by and between M. T. Bischof, of the County of Los Angeles, State of California, hereinafter called the employer, and S. Nose, of the same place, hereinafter called the employee.

"Witneseth:

"That whereas the employer is lessee of certain real property situate in the County of Los Angeles, State of California, described as follows, to-wit:

"A tract of land bounded on the north by Overland avenue, with a frontage of 536.01 feet, thereon, running thence southerly to a width of 627.34 feet, 772.10 feet to the land of Adelia M. Dominquez as shown by map recorded in book 3, page 204, miscellaneous records of Los Angeles County, and owned by Manuella E. Letton, containing eight acres, more or less and is desirous of employing the said employee for a term of six (6) months, commencing on the 15th day of July, 1924, to perform all the labor on said described premises in preparing ground for planting, cultivating, caring for, irrigating and harvesting crops.

"1. It is therefore agreed between said employee and the said employer, that said employee will perform all the said labor on the said described premises under the supervision and direction of the said employer, except employer will furnish any additional labor necessary to harvest said crops, for a period of six (6) months, commencing on the 15th day of July, 1924, and ending on the 15th day of January, 1925, for the wage of one hundred dollars (\$100.00) per month, payable at the end of each month's service.

"2. It is agreed that the said employee shall give all of his time, during said term of employment, to his employer on said premises, and shall actually labor thereon at least nine (9) hours per day for six (6) days per week, in the preparation, cultivation, caring for and harvesting the crops said employer shall grow thereon.

"3. It is further agreed that the said employer will, as an incentive to the said employee to be industrious and efficient, and as an additional

wage, pay to the said employee the sum equal to fifty (50) per cent of the net profits of the crops grown and harvested on said premises during the performance of this contract, within sixty days after said crops have been sold.

"4. It is further agreed that in the event the employee is discharged for cause, or shall abandon this contract, the employer shall be relieved from all liability for said additional wage.

"Witness our hands.

"M. T. BISCHOF,
"S. NOSE."

S. Nose is a native-born Japanese and a subject of the Emperor of Japan and for more than ten years has been and is now lawfully residing in the County of Los Angeles, State of California, and upon his arrest, applied to this court for a writ of *habeas corpus*, which was duly issued, served and return made thereon. He was admitted to bail pending the hearing of this matter. The state has filed a general demurrer to the petition and a motion to remand. All questions of fact are admitted and we are before the court on the legal propositions alone.

The primary question in this case is: Can an ineligible alien enter into a contract such as the one hereinbefore set forth without violating the Alien Land Law of this state? We firmly believe that he can and that such a contract gives the petitioner no interest in, use, enjoyment or control of real property such as is prohibited by the Alien Land Law, either before or after its amendment, or such as may be prohibited by any law that may be enacted by the people of the State of California or their representative in legislature assembled, and therefore, we maintain that the complaint in this action does not state facts sufficient to constitute a crime or offense, and if the Alien Land Law as originally adopted by the Initiative Act or as amended by the legislature purports to prevent the entering into or execution of such a contract, then the constitutional and treaty prohibitions step in and protect him as well as Bischof, an American citizen.

POINTS.

We will present this matter to the court as follows:

First: The right to engage in the common and ordinary occupations of life is inherent in all legal residents of the State of California without regard to citizenship or alienage and this includes the right to enter into and perform contracts in relation thereto, such as the one in question in this action.

Second: This right is protected by the "equal protection" and "due process" clauses of the Fourteenth Amendment to the Constitution of the United States and section 1977 of the U. S. Revised Statutes, enacted in order to carry out the provisions of said amendment.

Third: The Alien Land Law of California in so far as it purports to prevent such labor contracts is in conflict with

(a) Secs. 1 and 13 of article I of the constitution of California;

(b) Subdivisions second, nineteenth and thirty-third of sec. 25 of article VI of the constitution of the State of California;

Fourth: If it should be held that the Alien Land Law does forbid such contracts, then it is in conflict with and superseded by article I of the treaty between the United States and Japan.

Fifth: The amendments to the Alien Land Law adopted by the legislature of the State of California in 1923 (Statutes of 1923, p. 1020), so far as they add to the provision of the original act are void and in conflict with the provisions of the original act, adopted as an initiative measure (Statutes

1921, p. lxxxvii), and are therefore prohibited by sec. 1, article IV, of the constitution of this state.

Sixth: Can it be rightfully said that under the contract in this case the ineligible alien has any control of the real estate upon which he agrees to perform labor?

I.

The right to engage in the common and ordinary occupations of life is inherent in all legal residents of the State of California without regard to citizenship or alienage and this includes the right to enter into and perform contracts in relation thereto, such as the one in question in this action.

The inherent right to labor is one of the fundamental rules of human action and has been protected in every civilized country. It is a right that runs back beyond the time of known history. The right of free men to labor and enjoy the fruits thereof, and that means all men in the United States, has been indelibly imprinted in the jurisprudence of the United States ever since the adoption of the Fourteenth Amendment to our Constitution. We do not for a moment dispute the right of the sovereign State of California to limit the ownership of real property or any interest therein, but we cannot understand how the law to prevent ineligible aliens from owning, acquiring, transferring real property, and any interest therein, can be so twisted and bent to prevent any ineligible alien from entering into purely labor contracts which give him no *control* of real property. In fact, we believe, that that is the true limit of the right of a state in regard to real property, is its right to circumscribe the control of real property and it would be necessary to hold that the contract in this case gives the right of the petitioner herein to *control* the real property described in the contract, before he can be held guilty of an offense against the Alien Land Law, or an Alien Land Law that is constitutional.

The right to enter into and perform a labor contract is purely personal property, and cannot be limited by the state in regard to lawful occupations. Working on agricultural land is a lawful occupation and that petitioner in this case may be so employed at a daily or weekly wage is beyond cavil, and admitted by the attorney-general. Many restrictions have been attempted by the various states on the right of aliens to follow the ordinary occupations of life, but when such legislative provisions have come before the supreme courts of these states, they have invariably been held infringement.

In the State of Maine an act was passed requiring all peddlers to be licensed and allowing licenses to be issued to citizens only. The supreme court of that state, in a decision reviewing at length the various state and federal authorities, held that such discrimination could not be upheld. We quote from the decision:

"While it is true, as a general proposition, that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection, yet it is equally true that such a classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily, and without any such basis. (*Gulf etc. Ry. Co. vs. Ellis*, 165 U. S. 150, Sup. Ct. Rep. 255. See *Pearson vs. Portland*, 69 Me. 278, 31 Am. Rep. 276.)

"In the light of these interpretations of the Fourteenth Amendment, we are compelled to conclude that a statute which forbids peddling except under a license, and which provides that citizens of the United States may be licensed, and that aliens shall not be, is a denial of the 'equal protection of the laws.' It is an unconstitutional discrimination against aliens. It does more than impose unequal burdens and charges upon the alien. It absolutely denies him the privilege of an occupation open to citizens which is more than a discrimination in burdens. It does not permit the alien within our jurisdiction to pursue a business occupation and to acquire and enjoy property on equal terms with the citizen. (*Yick Wo vs. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064.)

"Nor can this discrimination be sustained as a constitutional exercise of the police power of the state. It must be noticed that the discrimination is not against a class, as criminals, as paupers, as intemperate, as disqualified by character or habits, or as harmful to society; but against a class solely as aliens. Such a discrimination is forbidden. (*Gulf etc. Ry. Co. vs. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255.)"

State vs. Montgomery, 80 A. S. R. 386-394, 47 Atl. 165 (Me.).

An attempt to so discriminate against aliens' right to labor was made by the legislature of Michigan in 1899. An act was passed which prevented aliens from following the occupation of a barber. The validity of such a prohibition was soon presented to the supreme court in the case of *Templar vs. State Board of Examiners for Barbers*, 90 N. W. 1058. This decision was given by a united court and it was said:

"Speaking generally, Mr. Tiedeman, in his work on *State and Federal Control of Persons and Property*, at page 331, says: 'States have, by legislation, undertaken to protect native labor against alien labor; but in each case the legislation has been declared to be an invasion of the jurisdiction of the United States Government, and an unconstitutional interference with the rights of resident aliens.'

"The attorney-general contends that, under the police power, the legislature may regulate callings, trades, and professions, and that it is not for the courts to pass upon the wisdom of their regulations, and that if such regulations result in excluding aliens from the privileges which citizens enjoy, it still should be held within the power of the legislature. Attention is directed to the cases of *People vs. Moorman*, 86 Mich. 433, 49 N. W. 263; *People vs. Phippin*, 70 Mich. 6, 37 N. W. 888, and *Metcalf vs. State Board of Registration in Medicine*, 123 Mich. 661, 82 N. W. 512. The language in *People vs. Moorman* is cited as sustaining the position of the attorney-general. Mr. Justice Moore, referring to the case of *People vs. Phippin*, declares in *People vs. Moorman* that 'in that case it was substantially held that no person, no matter how long he had been in the practice of his profession, had a vested right to practice medicine in Michigan.' We do not hesitate to reiterate that doctrine. We think it must be considered as settled that, in the protection of the public health, the legislature has the right to provide for an examination of all persons who seek to engage in the practice of medicine, and to have their qualifications passed upon by a properly constituted board. But the practice of medicine is no more an incident of citizenship than the practice of the trade of a barber. All persons are entitled to enjoy the equal protection of the law, and while it may be competent for the legislature, in the exercise of its police powers, to provide for an examination and licensing of barbers, as was held in *State vs. Zeno*, 79 Minn. 80, 79, Am. St. Rep. 422, 81 N. W. 748, and *Ex parte Lucas*,

160 Mo. 218, 61 S. W. 218, would it be contended that the legislature might provide that only white persons should be licensed? The learned attorney-general, in his brief, makes this statement of the true rule: 'When legislation applies to particular bodies or associations, imposing upon them additional liabilities and restrictions, under the police power of the state, which are not purely arbitrary, the law does not violate the equal protection clause of section 1 of the Fourteenth Amendment to the Federal Constitution, if all persons brought under its influence are treated alike under the same conditions and circumstances.'

"We discover nothing faulty in this statement of the rule. But the difficulty with this enactment is that all persons brought under the influence of this legislation are not treated alike under the same conditions and circumstances. Before the enactment of this statute the relator had the undoubted right to ply his trade in Michigan. In the exercise of police power, the legislature had the undoubted right to require, as a prerequisite to his plying his trade, that he submit to an examination. But had it the right to require citizenship? If it had the right to couple that with other requirements, it would have the same right to make that the only requirement. In other words, it would have the right to exclude alien labor wholly. We think the cases cited demonstrate that it had not this power.

"A very different question is presented than in a case of the requirements for admission to the bar, for example, as in such case the statute confers upon the applicant who is admitted to the profession and office. He becomes an officer of the court. So, too, a different question is presented than was before the court in *Trageser vs. Gray*, 73 Md. 250, 25 Am. St. Rep. 587, 20 Atl. 905—a case much relied upon by the attorney-general. In that case the question presented was whether aliens could be excluded from engaging in the business of retailing liquors. This is a business peculiar to itself, which might be wholly prohibited by the legislature, and licenses might be confined to a limited number. We need not, therefore, inquire whether such legislation is an infraction of the rights of the individual not a citizen. But in the present case the relator's business is in no way injurious to the morals, the health, or even the convenience of the community, provided only he has the requisite knowledge upon the subjects prescribed by the legislature to practice his calling without endangering the health of his patrons. To hold that he is not entitled to practice this calling because not a full citizen of the United States is to deny him rights which we think are preserved by the Fourteenth Amendment."

The right to labor and to enter into contracts therefor is strictly personal property. This has been held by such a long line of decisions that it is not debatable and that aliens have the right to hold and dispose of personal property is a proposition so self-evident as to hardly need the citation of authorities. (1 Ruling Case Law 805.)

This is clearly recognized by the Alien Land Law as its provisions *relate only to real property*, and there was no attempt by the people of the state in adopting the original act to include anything that even hints at limitation of personal property rights. It was their intention to keep the *control of real property* and real property alone from alien hands, and in every instance when it has been claimed by the state officers that the act went further, this court has failed to follow their contentions and has limited the effect of the law to the bounds placed on it by the adopting body, the people of the state. There was reason and a good reason for the enactment of the original act. The reason has ceased to exist. Congress has placed a ban on the coming to our shores of the ineligible alien and the

"Japanese problem" has been solved. The children of these aliens born here are citizens. The following cases decided by this court limit the Alien Land Law to the boundaries originally *given it*, and definitely protect the inherent, inalienable rights of the ineligible with us. (*Estate of Yano*, 188 Cal. 645; *In re Okahara*, 66 Cal. Dec. 15.)

II.

This right is protected by the "equal protection" and "due process" clauses of the Fourteenth Amendment to the Constitution of the United States and section 1977 of the U. S. Revised Statutes, enacted in order to carry out the provisions of said amendment.

Ever since the adoption of the Fourteenth Amendment to the Constitution of the United States, aliens legally residing in the United States have been protected in all and every property right except the right of the various states to control the ownership and devolution of real property. That this is inherent in this state is unquestioned, but the right of the alien to freely enjoy life, liberty and happiness, to make contracts and perform them, the right to equal protection of the laws, frequently decided to mean the protection of equal laws, and to due process of law, cannot be denied, and whenever this attempt has been made, it has been denied (with only two other exceptions; the right of the various states to determine that they will permit only citizens to enjoy the wild game of this state, and require all persons executing contracts for public work with the state or any of its subdivisions, to employ only citizens thereon) by the Supreme Court of the United States when the alien claimed such privileges under the Fourteenth Amendment. In fact, it is beyond the power of the states to make laws affecting the right to freely contract for labor. This under the said Fourteenth Amendment.

This proposition came before the Supreme Court of the United States in two great cases where an attempt was made to control the right of contract and where personal liberty as well was involved, where, first, Congress in adopting a law making it a criminal offense against the United States for an agent or officer or interstate carrier to discharge an employee from service of such carrier because of his membership in a labor organization (U. S. Compiled Statutes, 1901, p. 305, sec. 10). This matter came before the United States Supreme Court in the case of *Adair vs. United States*, 208 U. S. 161, 52 L. Ed. 436. This case arose in the eastern district of Kentucky, where one William Adair was master mechanic for the Louisville & Nashville Railway Company and discharged one O. B. Coppage, because of his membership in a labor organization. He was arrested and convicted in the United States district court and the matter was taken to the Supreme Court where Mr. Justice Harlan in delivering the opinion of the court said in part:

"* * * In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the rights of the individual to his personal liberty to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other has to sell labor.' Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by

legislation. The minority were of the opinion that the business referred to in the New York statute was such as to require regulation, and that, as the statute was not shown plainly and palpably to have imposed an unreasonable restraint upon freedom of contract, it should be regarded by the court as a valid exercise of the state's power to care for the health and safety of its people.

"While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the service of such employee. It was the legal right of the defendant, Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so,—however unwise such a course on his part might have been,—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. These views find support in adjudged cases, some of which are cited in the margin. Of course, if the parties by contract fixed the period of service, and prescribed the conditions upon which the contract may be terminated, such contract would control the rights of the parties as between themselves, and for any violation of those provisions the party wronged would have his appropriate civil action."

The State of Kansas in 1903 adopted an act making it unlawful for any individual or member of any firm, or manager, agent or employee of any corporation, to coerce, require, demand or influence anyone to enter into an agreement not to join or become or remain a member of any labor organization. T. B. Coppage was superintendent of Frisco lines at Ft. Scott, Kansas, and presented to a certain employee named Hedges, who was a member of the Switchmen's Union, an agreement to withdraw from said union while in the employ of the Frisco Company, which was refused and he was then discharged by said superintendent. Superintendent Coppage was arrested and found guilty in the Kansas county court which judgment was affirmed by the supreme court of the state and it was then appealed to the Supreme Court of the United States on the ground that the statute as construed and applied was in conflict with the Fourteenth Amendment of the Constitution. Mr. Justice Pitney delivered the opinion of the court. The following is a quotation therefrom, *Coppage vs. Kansas*, 59 L. Ed., p. 445:

"And does not the ordinary contract of employment include an insistence by the employer that the employee shall agree, as a condition of the employment, that he will not be idle and will not work for whom he pleases, but will serve his present employer, and him only, so long as the relation

between them shall continue? Can the right of making contracts be enjoyed at all, except by parties coming together in an agreement that requires each party to forego, during the time and for the purpose covered by the agreement, any inconsistent exercise of his constitutional rights?

"These queries answer themselves. The answers, as we think, lead to a single conclusion: Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will. It follows that this case cannot be distinguished from *Adair vs. United States*.

"The decision in that case was reached as the result of elaborate argument and full consideration. The opinion states (208 U. S. 171): 'This question is admittedly one of importance, and has been examined with care and deliberation. And the court has reached a conclusion which, in its judgment, is consistent with both the words and spirit of the Constitution, and is sustained as well by sound reason.' We are now asked, in effect, to overrule it; and in view of the importance of the issue we have re-examined the question from the standpoint of both reason and authority. As a result, we are constrained to reaffirm the doctrine there applied. Neither the doctrine nor this application of it is novel; we will endeavor to restate some of the grounds upon which it rests. The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

"An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the state. But, notwithstanding the strong general presumption in favor of the validity of state laws, we do not think the statute in question, as construed and applied in this case, can be sustained as a legitimate exercise of that power."

The State of Pennsylvania in 1897 attempted to discriminate against the employing of aliens, by imposing a tax of three cents per day on the employer for each of such aliens so employed. This act was held to be in conflict with the Fourteenth Amendment to the Constitution of the United States. Chief Justice Sterrett, in stating the opinion of the court, said:

"The act in question clearly belongs to a vicious species of class legislation which too often finds its way into our statute books, and we have no doubt as to its unconstitutionality on both grounds indicated by the learned president of the court below. It has already been adjudged void by the circuit court of the United States of the Western District of Pennsylvania.

"In *Fraser vs. McConway etc. Co.*, 6 Pa. Dist. Rep. 555, the learned circuit judge, after citing authorities directly in point, said: 'The tax is of

unusual character, and is directed against and confined to a particular class of persons. Evidently, the act is intended to hinder the employment of foreign-born, unnaturalized persons over twenty-one years of age. The act is hostile to and discriminates against such persons. It interposes to the pursuit by them of their lawful avocations obstacles to which others in like circumstances are not subjected. It imposes upon these persons burdens which are not laid upon others in the same calling and condition. The tax is an arbitrary deduction from the daily wages of a particular class of persons. The equal protection of the laws declared by the Fourteenth Amendment to the Constitution secured to each person within the jurisdiction of a state exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances.' (*Railroad Tax Cases*, 13 Fed. Rep. 722, 733.)"

Juniata Limestone Co. vs. Fagley, 187 Penn. St. 193, 67 A. S. R. 580.

This same act was held unconstitutional by the United States district court, the opinion being extensively quoted from in the *Juniata* case (*supra*). (*Fraser vs. McConway etc. Co.*, 82 Fed. 259.)

The principles contended for by petitioner in this case have been expressly upheld by many decisions of the federal court where discrimination had been attempted against the right of aliens to follow the common and ordinary occupations of life and freely contract in relation thereto. Many of these decisions are in the early California cases attempting to limit the rights of Chinese to labor.

In 1881, the question of the act of the legislature of California, under section 2 of article XIX of the constitution of California, as adopted in 1879, making it a crime for any corporation, its officers or agents, to employ in any manner or capacity upon any work for the corporation, any Chinese or Mongolians, came before the United States circuit court on writ of *habeas corpus* by Tiburcio Parrott.

Opinions were handed down in discharging the prisoner by Judges Hoffman and Sawyer, holding the constitutional provisions and the act of the legislature of California enacted thereunder were void, and prohibited by the Fourteenth Amendment, and section 1977 of the United States Revised Statutes, passed to give effect to the amendment. This section provides that:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

This case was expressly decided on the proposition that the Chinese were protected by treaty and that regardless of the treaty were protected by their constitutional rights and by the quoted section of the Revised Statutes. The following quotation is from the decision of Mr. Justice Sawyer:

"As to by far the greater portion of the Chinese, as well as other foreigners who land upon our shores, their labor is the only exchangeable commodity they possess. To deprive them of the right to labor is to consign them to starvation. The right to labor is, of all others, after the right to live, the fundamental, inalienable right of man, wherever he may be permitted to be, of which he cannot be deprived, either under the guise of law or otherwise, except by usurpation and force. Man ate and died. When God drove him 'forth from the Garden of Eden to till the ground,

from whence he was taken,' and said to him, 'In the sweat of thy face shalt thou eat bread, till thou return unto the ground,' He invested him with an inalienable right to labor in order that he might again eat and live. * * *

"But the provisions in question are also in conflict with the Fourteenth Amendment of the National Constitution, and with the statute passed to give effect to its provisions. The Fourteenth Amendment, among other things, provides that 'no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"Section 1977 of the Revised Statutes, passed to give effect to this amendment, provides that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.'

"It will be seen in the latter clause the words are 'any person,' and not 'any citizen,' and prevents any state from depriving 'any person' of life, liberty or personal property without due process of law, or from denying to 'any person within its jurisdiction the equal protection of the law.' In the particulars covered by these provisions it places the right of every person within the jurisdiction of the state, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the Constitution; and, in consonance with these provisions, the statute enacts that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.' Chinese residing in California, in pursuance of the treaty stipulations, are 'persons within the jurisdiction of the state,' and 'of the United States,' and therefore within the protection of these provisions. *And contracts to labor, such as all others make, are contracts which they have a 'right to make and enforce,' and the laws under which others' rights are protected are the laws to which they are entitled to the 'equal benefit,' 'as is enjoyed by white citizens.'*

"It would seem that no argument should be required to show that the Chinese do not enjoy the equal benefit of the laws with citizens, or 'the equal protection of the laws,' where the laws forbid their laboring, or making and enforcing contracts to labor, in a very large field of labor which is open, without limit, let or hindrance, to all citizens, and all other foreigners, without regard to nation, race or color. Yet in the face of these plain provisions of the National Constitution and statutes, we find, both in the constitution and laws of a great state and member of this Union, just such prohibitory provisions and enactments discriminating against the Chinese. Argument and authority, therefore, seem still to be necessary, and fortunately we are not without either. From the citations already made, and from many more that might be made from Justices Field, Bradley, Swaine, and other judges, it appears that to deprive a man of the right to select and follow any lawful occupation—that is, to labor, or contract to labor, if he so desires and can find employment—is to deprive him of both liberty

and property, within the meaning of the Fourteenth Amendment and the act of Congress."

In re Tiburcio Parrott, 1 Fed. Rep. 481, 506.

The following cases also directly uphold the right of aliens to follow the common and ordinary occupations of life:

In re Ah Singh, 13 Fed. 286; *Yick Wo vs. Hopkins*, 118 U. S. 356.

We believe the question has been finally settled and disposed of by the United States Supreme Court in the case of *Truax vs. Raich*, 239 U. S. 33. This case arose under a statute enacted by the legislature of Arizona, in 1914, which made it a crime for any corporation, association or individual, employing more than five workers at any one time, to employ not less than eighty per cent of qualified electors or native-born citizens. An action to enjoin the state authorities from enforcing the act was brought by plaintiff Raich on the grounds that it denied him the equal protection of the laws, and was therefore contrary to the Fourteenth Amendment. The United States district court granted the writ and the state officers enjoined appealed to the United States Supreme Court. The opinion of the court was written by Mr. Justice Hughes, and the rights of states to forbid the employment of aliens in the common and ordinary occupations of life was carefully considered. The right of the states to discriminate against aliens in certain instances, viz.: the devolution of real property; to prohibit employment of aliens on public works; the regulation and distribution of the public domain or of the common resources of the state was carefully explained and limited; then it was said (239 U. S. p. 40):

"The discrimination here involved is imposed upon the conduct of ordinary private enterprise.

"The act, it will be observed, provides that every employer (whether corporation, partnership, or individual) who employs more than five workers at any one time, 'regardless of kind or class of work, or sex of workers,' shall employ 'not less than 80 per cent qualified electors or native-born citizens of the United States, or some subdivision thereof.' It thus covers the entire field of industry with the exception of enterprises that are relatively very small. Its application in the present case is to employment in a restaurant the business of which requires nine employees. The purpose of an act must be found in its natural operation and effect (*Henderson vs. New York* [*Henderson vs. Wickham*], 92 U. S. 259, 268, 23 L. Ed. 543; *Bailey vs. Alabama*, 219 U. S. 219, 244, 55 L. Ed. 191, 202, 31 Sup. Ct. Rep. 145), and the purpose of this act is not only plainly shown by its provisions, but it is frankly revealed in its title. It is there described as 'an act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona.' As the appellants rightly say, there has been no subterfuge. It is an act aimed at the employment of aliens, as such, in the businesses described. Literally, its terms might be taken to include with aliens those naturalized citizens who, by reason of change of residence, might not be at the time qualified electors in any subdivision of the United States; but we are dealing with the main purpose of the statute, definitely stated, in the execution of which the complainant is to be forced out of his employment as a cook in a restaurant, simply because he is an alien.

"It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to

lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure. (*Butchers' Union S. H. & L. S. L. Co. vs. Crescent City L. S. L. & S. H. Co.*, 111 U. S. 748, 762, 28 L. Ed. 585, 588, 4 Sup. Ct. Rep. 652; *Barbier vs. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357; *Yick Wo vs. Hopkins*, *supra*; *Allgeyer vs. Louisiana*, 165 U. S. 578, 589, 590, 41 L. Ed. 832, 835, 836, 17 Sup. Ct. Rep. 427; *Coppage vs. Kansas*, 236 U. S. 1, 14, 59 L. Ed. 441, L. R. A. 1915 C, 960, 35 Sup. Ct. Rep. 240.) If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens, unless restrained, was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. (*Fong Yue Ting vs. United States*, 149 U. S. 698, 713, 37 L. Ed. 905, 913, 13 Sup. Ct. Rep. 1016.) The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality."

This case was approved by the United States Supreme Court in the case of *Tanner vs. Little*, 240 U. S. p. 369 (60 L. Ed. 691). This was a case from the State of Washington and was tried in the United States district court for the Eastern District, and was brought to enjoin the threatened enforcement by state officers of a state statute in regard to trading stamps. The Supreme Court of the United States, speaking through Mr. Justice McKenna, in discussing classification, said (60 L. Ed. 701):

"But the classification which was sustained in *Consolidated Coal Co. vs. Illinois*, 185 U. S. 203, 46 L. Ed. 872, 22 Sup. Ct. Rep. 616, was condemned in *Truax vs. Raich*, 239 U. S. 33, *ante*, 131, 36 Sup. St. Rep. 7. The statute in the latter case required employers of more than five workers at any one time to employ not less than 80 per cent qualified electors or native-born citizens of the United States or of some subdivision of such. The statute was held void because there was no authority to deal with that at which the legislation was aimed."

Again the Supreme Court of the United States refers to the case of *Truax vs. Raich* (*supra*) in the case of *New York Central Railroad Company vs. White*, reported in 243 U. S. p. 188 (61 L. Ed. 667). This was a case appealed from the supreme court of the State of New York testing the constitutional validity of the compulsory compensation plan of the New

York Workingmen's Compensation Act. The court said, opinion by Mr. Justice Pitney (61 L. Ed. 676):

"But, it is said, the statute strikes at the fundamentals of constitutional freedom of contract; and we are referred to two recent declarations by this court. The first is this: 'Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense.' (*Coppage vs. Kansas*, 236 U. S. 1, 14, 59 L. Ed. 441, 446, L. R. A. 1915C, 960, 35 Sup. Ct. Rep. 240.) And this is the other: 'It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure.' (*Truax vs. Raich*, 239 U. S. 33, 41, 60 L. Ed. 131, 135, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7.)

"It is not our purpose to qualify or weaken either of these declarations in the least."

We believe that the case of *Truax vs. Raich* is conclusive of the question in the case, if the California Alien Land Law should be construed as barring such an employment contract as is presented by this record.

III.

The Alien Land Law of California, in so far as it purports to prevent such labor contracts, is in conflict with:

- (a) Sections 1 and 13 of article I of the constitution of California;
- (b) Subdivision second, nineteenth and thirty-third of section 25 of article VI of the constitution of the State of California.

(a)

In measuring the contract at bar by the scale of our California constitutional requirements, we find that California, in adopting its own basic law, placed solid safeguards around the stranger within our gates, as well as around its citizens, and when the constitution speaks as it does in section 1 of article I:

"All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness."

We believe that something definite, tangible and peremptory was meant. This section was copied verbatim from section 1, article I of the constitution of 1849, and the "due process" clause of section 13, article I, was copied without change from section 8 of article I of the constitution of 1849. We find that our own state, even before the adoption of the Fourteenth Amendment to the Constitution of the United States, fairly aligned itself on the side of the oppressed and by this, the most solemn act of the state, said that aliens have the inherent rights of citizens as far as life, liberty and property are concerned. It is true that later certain public prejudice arose against the Mongolians and the legislature adopted certain discriminatory measures against them, which were for a time upheld, but beginning with *Ex parte Kuback*, 85 Cal. 274, down to the latest decision of the court, in the *Okahara* case, the constitutional rights of *all men* have been upheld by this court, whether aliens or citizens, and the fundamental

prerogative of the state to control the devolution of its real property has been as well sustained.

In *Ex parte Kuback* an ordinance of the city of Los Angeles made it a misdemeanor to employ Chinese on any city contract. The particular clause held obnoxious was as follows:

"It shall be unlawful for any contractor, by himself or through another, when having labor performed under any contract with the city, to employ Chinese labor thereon."

The opinion was by the court in bank, and we quote the following therefrom:

"It is claimed in support of the petition that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts. If the services to be performed were unlawful or against public property, or the employment were such as might be unfit for certain persons, as, for example, females or infants, the ordinance might be upheld as a sanitary or police regulation, but we cannot conceive of any theory upon which a city could be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered because the contract is that he shall work more than a limited number of hours per day. Mr. Cooley, in his work on Constitutional Limitations, says:

"The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them. But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some class by leaving them open to others. Some employments, for example, may be admissible for males and improper for females, and regulations recognizing the impropriety and forbidding women engaging in them would be open to no reasonable objection. The same is true of young children, whose employment in mines and manufactories is commonly, and ought always to be, regulated. And some employments in which integrity is of vital importance, it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are not reputable."

Ex parte Kuback, 85 Cal. 274.

The town of Chico attempted to establish certain laundry regulations to prevent the Chinese from following that occupation. Sing Lee was arrested and applied to this court for a writ of *habeas corpus*. This court in discharging the prisoner said (96 Cal. 356):

"The business of conducting a laundry is a lawful occupation, precisely as much so as is that of the carpenter, blacksmith, or merchant, and is not of itself, and irrespective of the manner in which it is conducted, offensive or dangerous to the health of those living within its vicinity, and no municipal corporation has the power to make the right of a person to follow this business at any place he may select for that purpose dependent upon the will of any number of citizens or property owners within its limits, as is attempted in the ordinance under review.

"A town or city may, when deemed necessary for the public health or safety, adopt reasonable regulations as to the manner in which said busi-

ness shall be conducted, and for this purpose may, in the exercise of its police power, impose reasonable restrictions as to the kind of building which may be used for such purpose, as, for instance, that it shall be brick or stone in large and closely built cities, and that it shall have sufficient drainage, and may prescribe within reasonable limits the hours during which the work of the laundry shall be suspended. (*Ex parte Moynier*, 65 Cal. 36; *Barbier vs. Connolly*, 113 U. S. 27; *Soon Hing vs. Crowley*, 113 U. S. 703.) Regulations such as these were held in the cases above cited to be merely police regulations, which any municipality possessed of the ordinary powers of such corporations may exercise with a view to promote the health and safety of the community. But the ordinance which the petitioner here is charged with violating is not of this character, and the restrictions which it imposes upon the right to carry on a public laundry have no tendency to promote the public health, or in any way to secure the public comfort or safety. The sections of the ordinance above quoted bear no kind of relation to such objects, and do not attempt to regulate the business mentioned with the view of accomplishing such ends, but they commit the right to carry on such business at all, in all but two blocks of the town, to the unrestricted will and caprice of a majority of the real property owners within the block upon which it is proposed to establish such laundry, and of the four blocks immediately surrounding such block. Such a condition imposed upon the right of a person to maintain a public laundry is not only an unauthorized interference with the inalienable right of such person to engage in a lawful occupation, but also with the right of the owner of property to devote it to a lawful purpose. The personal liberty of the citizen and his rights of property cannot be thus invaded under the disguise of a police regulation. (*In the Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.)"

Ex parte Sing Lee, 96 Cal. 354.

In 1897 the legislature of California, in order to prevent certain evils in regard to payment of laborers, passed an act (Statutes 1897, p. 231) providing that all corporations should pay their employees at least once a month, affixed a penalty of \$50.00 to each failure and provided for attorney's fees. This was not an act affecting alien laborers any more than citizen laborers, but the principles announced are applicable and pertinent here. An action was brought against the defendant corporation, Goodyear Mining Co., by Andrew Johnson on his own and assigned claims for wages, under the provisions of the act. The court said (127 Cal. 7):

"The plaintiff claims the benefit of the provisions of said act applicable to this case, and the defendants contest the said provisions and every part of said act as being unconstitutional. The statute is said to contravene the following provisions of the constitution of the state: 1. 'No person shall be deprived of life, liberty or property without due process of law.' (Const., art. I, sec. 1, subd. 13.) 2. 'Nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.' (Const., art. 1, sec. 1, subd. 21.) 3. 'All laws of a general nature shall have a uniform operation.' (Const., art. I, sec. 1, subd. 11.) 4. Section 25, article IV, providing that the legislature shall not pass local or special laws in the following cases: '3. Regulating the practice of courts of justice; * * * 24. Authorizing the creation, extension, or impairing of liens; * * * 33. In all other cases where a general law can be made applicable.' 5. Fourteenth Amendment to the Constitution of the United States: 'Nor shall any state deny to any person within its jurisdiction the equal protection of the laws.' In the decision

of this case the constitutionality of the sections of the statute herein set forth is necessarily involved, and it is with a deep sense of the importance of the subject that we enter upon its discussion. We must determine whether the law-making power of the state has in this instance gone beyond the limits of the Constitution adopted by the people. This is always a question of great delicacy and one which this court approaches with reluctance, but one in which the duty of the court is plain and which must be met squarely when presented. The same Constitution that lays down the fundamental law of our state and prohibits legislatures from going outside the powers and limitations therein contained created the courts, and provided that they should stand as the guardians of the people and lay their restraining hands upon the legislature in all cases where it has plainly violated the provisions of the people's charter of rights. * * *

"The corporation and the laborer are prohibited from making any contract whereby wages are to become due for a longer period than one month as a condition of employment, or by which the laborer is to be paid in anything except money or negotiable checks. The working man of intelligence is treated as an imbecile. Being over twentyone years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due. Being of sound mind and knowing the value of a horse, he is not allowed to make an agreement with the corporation that he will work sixty days and take the horse in payment. Business might be such that a corporation could not possibly pay wages without getting laborers who were willing to wait for their wages until the corporation could get money with which to pay them by marketing its products.'"

Johnson vs. Goodyear Mining Co., 127 Cal. 4.

The City Street Improvement Co. entered into a contract with the County of San Joaquin to repair certain highways in that county under the "Good Road Act." After the contract had been partially completed a demand in favor of the contractor was allowed by the board of supervisors, but Kroh, the county auditor, refused to issue a warrant therefor on many grounds, among others, that the contractor had failed to comply with certain provisions of the specifications which were made a part of the contract. These specifications provided that, except by permission of the highway commission, no *unnaturalized alien* might be employed on the work.

The contractor applied to this court for a writ of mandate to compel the auditor to issue his warrant. The writ was granted, and this court said:

"The provision of the specifications to the effect that, except by permission of the highway commission, no *unnaturalized alien* shall be employed in the work, is invalid and unenforceable when attempted by public authorities. The Constitution provides that all men have the inalienable right of enjoying liberty and acquiring property, and that foreigners of the white race, eligible to citizenship, while *bona fide* residents of the state, shall have the same right to acquire property as native-born citizens. (Const., art. I, secs. 1, 17.) Laws forbidding the employment of aliens have been held invalid. (*Chicago vs. Hulbert*, 205 Ill. 363 [68 N. E. 786]; *People vs. Warren*, 34 N. Y. Supp. 943 [13 Misc. 615].) Such a law would violate the treaties with almost all the nations from which this country receives immigrants. (See *Estate of Ghio*, 157 Cal. 552 [108 Pac. 516].) The statute in question charges the supervisors with the duty of administering the scheme for building roads, but it does not purport to confer power to make or enforce a provision of this character. They have, no doubt, a wide discretion

as to the manner of carrying on the work and may adopt any measure reasonably tending to facilitate the same, or, perhaps, any which may incidentally further any laudable public purpose. But they are not given authority to put restrictions upon the contractor which can only hinder the work, which makes it more expensive, and which have no relation whatever to the thing to be done, or to any conceivable legislative purpose disclosed in the statute, and which would be a direct attempt to discriminate against one class of *bona fide* residents of the state and favor another, a violation of treaty obligations, and contrary to the principles of the Constitution."

City Street Imp. Co. vs. Kroh, 158 Cal. 308-325.

It has been repeatedly held by this court that the legislature cannot restrict the method of payment agreed to by the parties in a contract. One cannot be told, "You may only pay for, or receive for your labor, money." This would be an attempt to infringe one of the oldest and most respected human rights, that of trade and barter—in other words, as has been judicially said so many times, "the right to freely contract for labor on both the part of the employer and employee."

This exact proposition came before this court in 1902. The particular question was as to the constitutionality of the provisions of section 1184 of the Code of Civil Procedure, as then in effect, providing that as to all liens, except that of the contractor, the whole contract price shall be payable in money only.

This court held the provision unconstitutional, and said:

"This provision of section 1184 is as follows: 'As to all liens, except that of the contractor, the whole contract price shall be payable in money * * *. In case such contracts and alterations do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof.' The section does not declare a contract not made in these terms to be void, but while holding that it is valid between the owner and the contractor, it purports to give to the materialmen and laborers the right to enforce payment from the owner of the value of the materials and labor furnished by them, irrespective of the contract price or compensation agreed upon between him and the contractor, notwithstanding he may have fully and strictly complied with the terms of the contract. Under many decisions of this court, if the statute was susceptible of such a construction it would be invalid. See the cases cited in *Kellogg vs. Howes*, 81 Cal. 175, where it was said that 'Where there is a valid contract between the owner and contractor, such contract is the measure of the owner's liability.'

"The provision in the constitution respecting mechanics' liens (art. XX, sec. 15) is subordinate to the Declaration of Rights in the same instrument, which declares (art. I, sec. 1) that all men have the inalienable right of 'acquiring, possessing and protecting property,' and (in sec. 13) that no person shall be deprived of property 'without due process of law.' The right of property antedates all constitutions, and the individual's protection in the enjoyment of this right is one of the chief objects of society. He has the right to enjoy his property and improve the same according to his own desires in any way consistent with the rights of others, subject only to the just demands of the state. This right is invaded if he is not at liberty to contract with others respecting the use to which he may subject his property, or the manner in which he may enjoy it. The legislature may prescribe the form in which contracts shall be executed in order that they may be valid

or binding, but it cannot limit the right of parties to incorporate into their contracts respecting property, otherwise valid, such terms as may be mutually satisfactory to them. A statute declaring invalid any contract by the owner of real property for the construction of a building thereon, unless it is provided therein that the contract price shall be payable only in money, is unconstitutional in that it is an infringement upon the right of the owner in the possession and enjoyment of his property. The legislature could with equal right declare that all contracts for the sale of merchandise, or for the manufacture of machinery, or for the employment of artisans, should be invalid unless they should provide that the payment thereunder, should be made only in money. The right of the owner of land to contract with a builder for its improvement and to compensate him therefor with other real property, or with personal property other than money, is the same, and as inalienable, as the right of the owner of any other property to contract respecting the payment of any improvement thereof."

Stimson Mill Co. vs. Braun, 136 Cal. 122-124.

It is interesting to note that in the foregoing decision the Declaration of Rights, found in section 1, article I, California constitution, is declared to be the paramount provision of the constitution, and that other lesser matters must give precedence to it. This must necessarily be so, as that section states the inherent rights of man.

This same principle of law is upheld by the following decisions in this state: *Snell vs. Bradbury*, 139 Cal. 379-382; *Ex parte Drexel*, 147 Cal. 763; *People vs. Holder*, 53 Cal. App. 42-51.

In all these cases the right to freely contract is firmly upheld. Legislatures frequently pass laws that attempt to invade this right and to fix bounds to and limits for the conduct of human affairs, but whenever the constitutional rights of individuals are encroached upon, then the wisdom of our tripartite form of government is disclosed in that our courts are a constitutional check on such legislation.

Outstanding examples of this action on the part of this court are found in the following recent decisions. We do not quote the text of any of these decisions here, as we do not want to unduly prolong this argument. (*In re Terui*, 187 Cal. 20; *In re Kotta*, 187 Cal. 27; *Est. of Yano*, 188 Cal. 645; *In re Okahara*, 66 Cal. Dec. 15.)

Basing our contention on this line of decisions, we maintain that if the Alien Land Law should be construed to forbid contract like the one in this case, then it is an unconstitutional invasion of the right of contract of both the employer and the employee. It seems that such a thought never entered the minds of the people of this state when they adopted the original initiative act. The Alien Land Law originally adopted had such contracts in view and if prohibition thereof had been intended it would have been inserted. Following are the pertinent provisions:

"Sec. 5. (a) The term 'trustee' as used in this section means any person, company, association or corporation that as guardian, trustee, attorney in fact or agent, or in any other capacity, has the title, custody or control of property, or some interest therein, belonging to an alien mentioned in section two hereof, or to the minor child of such an alien, if the property is of such a character that such alien is inhibited from acquiring, possessing, enjoying, using, cultivating, occupying, transferring, transmitting or inheriting it.

(b) Annually on or before the thirty-first day of January every such trustee must file in the office of the secretary of state of California and in

the office of the county clerk of each county in which any of the property is situated, a verified report showing:

(1) The property, real or personal, held by him for or on behalf of such alien or minor;

(2) A statement showing the date when each item of such property came into his possession or control;

(3) An itemized account of all such expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof." Alien Land Law, Statutes 1923, p. 1020.

If there had been any intention to prohibit the acquirement and use of personal property, even such as cropping contracts, or employment contracts, when such personal property contracts were under consideration, then we would certainly find sure and apt words indicating that purpose. On the contrary, the Initiative Act is entirely silent.

(b)

If the Alien Land Law should be construed so as to forbid contracts like the one in the instant case, then it would conflict with subdivisions second and nineteenth of section 25 of article IV of the constitution of the State of California.

"The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

"Second: For the punishment of crimes or misdemeanors.

"Nineteenth: Granting to any corporation, association or individual any special or exclusive right, privilege or immunity." California Constitution, sec. 25, art. IV.

The general argument heretofore made, we believe, fairly covers the reasoning in support of the foregoing propositions. Is it constitutionally right to say that an ineligible alien cannot sell his labor for a proportionate share of a crop raised by his labor, or for a recompense or wage to be partially measured by the assiduity with which he performs his work? This most certainly comes within the proposition that privileges and immunities are granted to the persons not prohibited from making that class of contracts. In other words, denying a privilege to one person is equal to granting it to all others not denied.

Again, making it a crime for ineligible aliens to enter into purely labor contracts of employment when others may so freely contract is prohibited by the second subdivision of said section 25.

A case fairly in point with our case is that of *Ex parte Westerfield*, 55 Cal. 550. This was a petition by Westerfield for a writ of *habeas corpus*. He was charged with misdemeanor under a statute of California, entitled:

"An act to regulate and provide for a day of rest in certain cases." (Statutes of 1880, p. 80.)

The act was held to be in conflict with *subdivision section of section 25, article IV*, of the constitution of California. Mr. Justice Myrick in giving the decision of the court said:

"The act purports, according to its title, to be an act to provide for a day of rest. Instead of pursuing that intent, it goes on to say that certain acts, viz., the labor of baking for the purpose of sale, if performed by certain persons, viz., persons 'engaged in the business of baking for the purpose of sale,' shall constitute a crime, and shall be punished. The employees are not to be punished. This is special legislation. A certain class is selected. As well might it have said, if master carpenters or blacksmiths, or if attor-

neys having clerks, shall labor or permit employees to labor, they shall be deemed guilty of a misdemeanor and be punished; carpenters or blacksmiths, not master workmen, or attorneys without clerks, may labor at their will. The baking of bread is in itself lawful and necessary. Even if there be authority to restrain the labor on some one day, it must be, if at all, under a general law restraining labor on that day."

Mr. Justice McKinstry in a concurring opinion said:

"A general law must include within its sanction all who come within its purpose and scope. It must be as broad as its object. If it is to be made a crime not to refrain from labor during the whole or during a portion of any given day of the week, it must be made equally a crime as to all persons who do not so refrain; or the prohibitory law must be made applicable to all of a class, the members of which, for reasons apparent, upon mention of the class, must at least require, for the benefit of their health or morals, a period of rest not beneficial to any other class or individual. We might perhaps take notice that there are controlling reasons why clergymen should not be prohibited from pursuing their pious labors on the Christian Sabbath, and that a law might still be general which included all others, although it excluded them. So we might perhaps hold that there are other special classes who might be permitted to pursue their avocations, notwithstanding a law which prohibited labor by the rest of the community, because of the fact that their peculiar pursuits involved 'works of necessity,' and placed them beyond the benefits of a law, which would compel an enforced cessation of labor by others. *But there can be no rule which will permit the prohibition of a particular kind of labor in itself innocent and beneficial to the public.*"

The law, as above stated, that there can be no rule which will permit the prohibition of a particular kind of labor, in itself innocent and beneficial to the public, is particularly appropriate to facts we have under consideration here.

IV.

If it should be held that the Alien Land Law does forbid such contracts, then it is in conflict with and superseded by article I of the treaty between the United States and Japan.

If the construction asked for by the state is placed on this contract, then the provisions of the treaty between the United States and Japan would immediately bar the prohibition.

Article I of the treaty is as follows:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects. *The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.*

"They shall, however, be exempt in the territories of the other from compulsory military service, either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions." (*Italics ours.*)

The provision that *the citizens and subjects of each party to the treaty shall receive the most constant protection for their persons and property*, was placed therein for the purpose of protecting such rights as we are asking this court to protect.

The right to labor and freely contract in relation thereto is fully protected by the equal protection clause of the Fourteenth Amendment, and one cannot have liberty without it. Of course, we do not for a moment maintain that the state cannot control the ownership of real property and any interest therein; however, when in the guise of effecting this purpose it attempts to contravene the well-known and long-existing provisions of a treaty that does protect all personal property rights, it appears then it is not only the right, but the duty, of the courts to intervene.

It is quite as much the province of this court to construe the provisions of a treaty as that of the federal courts, notwithstanding that a construction of the treaty by the Supreme Court of the United States is final. There has been, and we are satisfied there will be, no decision of that court holding such personal property rights as are involved here are not protected by the treaty, else the words quoted from treaty are meaningless.

Treaties are to be construed the same as contracts. Every stipulation in a treaty, the same as in a contract, is to be given its due weight, and a liberal construction should be favored in the place of a construction that is restrictive of rights claimed thereunder.

"When a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred." (*Shanks vs. Dupont*, 3 Pet. 242.) "Such is the settled rule of this court." (*Hauenstein vs. Lynham, etc.*, 100 U. S. 483-487, 25 Law. Ed. 628-630.)

Treaties are to be construed so as to reconcile and give effect to all their parts. (*People vs. Gerke*, 5 Cal. 381-383.)

Treaties are subject to the same rules of interpretation as other documents, and words employed therein are to be given the meaning they usually have when used in that connection. (*Est. of Ghio*, 157 Cal. 522.)

Under the foregoing rules, why have not Nose and Bischof the right to enter into and perform their contract? It is admitted that the contract is, as it clearly appears on its face, one for the hiring of common farm labor. Under it Nose acquires no further rights than to do his work and receive his pay as stated. This must surely come within the constant security for the protection of property provision of the treaty.

V.

The amendments to the Alien Land Law adopted by the legislature of the State of California in 1923 (Statutes of 1923, p. 1020), so far as they add to the provision of the original act, are void and in conflict with the provisions of the original act, adopted as an initiative measure (Statutes 1921, p. lxxvii), and are therefore prohibited by section 1, article IV, of the constitution of this state.

In this state, when the initiative amendment to our constitution was adopted, in order to prevent the legislature from attempting to improve upon, change or repeal the act adopted by the people, such amendment was forbidden unless power was specifically conferred in the act itself.

"* * * and no act, law or amendment to the constitution adopted by the people at the polls under the initiative provisions of this section, shall be amended or repealed except by a vote of the electors, unless otherwise provided in said initiative measure. * * *" (Constitution of California, sec. 1, art. IV.)

When the Alien Land Law was adopted by the initiative the following limitation was placed therein:

"Sec. 13. The legislature may amend this act in furtherance of its purpose, and to facilitate its operation."

The legislature of 1923, and solely on account of the decision of the United States district court in the O'Brien case, attempted to amend the Alien Land Law by inserting many new provisions therein, the principal ones being:

(a) The addition of the prohibitive words *use, occupy* and *have in whole or in part the beneficial use thereof*, referring to the rights of ineligible aliens as to real property, in section 2.

(b) "*including cropping contracts, which are hereby declared to constitute an interest in real property less than the fee.*" (Sec. 8.)

(a)

When the legislature added the words prohibiting ineligible aliens from using, cultivating or occupying real property, or having the beneficial use thereof in whole or in part, the amendment was redundant to the extent of the reference to the beneficial use. Where the use was originally prohibited, the beneficial use in whole or in part was prohibited. So we may confine ourselves to the effect of the addition of the words *use, cultivate, occupy*, in so far as they change the act, if they do, or effect the relationship of the ineligible aliens to real property in this state. It is admitted by the state that such aliens may *cultivate* agricultural lands as laborers for a fixed compensation—so the word *cultivate* is meaningless, and all ineligible alien labor certainly has the right to *use* and *occupy* land, whether farm land or not, for residential purposes; to argue otherwise would be unreasonable, for if one may employ ineligible aliens on his farm for a stated cash wage, he surely may house them, and such use and occupancy, we do not believe, will be denied them by the counsel for the state, and surely is given by the treaty provision which provides they may "*own or lease and occupy houses.*" This is not qualified by any restriction whatever, and therefore the addition of the words, by amendment, as far as occupying houses on farms, such use by ineligible laborers is not forbidden, but specifically granted, by the treaty, and the addition of these words, as far as such contracts for labor as we have in this case, is meaningless. As far as the Nose contract is concerned, however, we understand there is no housing question involved, there being no house on the Bischof property, and housing is not given by the contract.

The word *cultivate* being eliminated, the only words then added, which even by implication change the act, are the words *use* and *occupy*, and taking the provisions of article I of the treaty into consideration, their addition does not help or hinder a Japanese agricultural laborer in his work on a farm. Nor do they extend the prohibitions of the original act, because when one cannot acquire, possess, enjoy or transfer real property, or any interest therein, one cannot use it or occupy it. We therefore maintain that the additional prohibitory words inserted in section 2 of the act did not extend in any manner the prohibitory terms, but simply are a repetition of words, and prohibiting that which was already forbidden. The words *use* and *occupy* are in relation to real property, of no other or greater

legal significance than enjoy. Therefore the amendments to section 2 of the original act do not extend the bar to agricultural property as far as ineligible aliens are concerned; they were completely barred from acquiring, possessing, enjoying, transmitting or inheriting agricultural real property or any interest therein, and the words added by the legislature are clearly redundant.

(b)

The next addition to the Alien Land Law, declaring a cropping contract to be an interest in real property less than the fee, is a serious change, and does not further the purpose of the original act. We are extremely fortunate to have a clear and concise definition of the purpose of the Initiative Alien Land Law by this court in *In re Okahara*, 66 C. D. 15-20, where it is said:

"The words 'acquire, possess, enjoy and transfer,' used in an inhibitory sense, are well understood legal terms. 'Acquire,' as used in the law of contracts and descents, means to become the owner of property; to make one's own. (1 Words & Phrases, 113.) 'Possess,' used in reference to land titles and estates, means to own, have as a belonging; property. (Cent. Dict.) 'In popular usage the word "possess" includes real and personal property to which one has title as his landed possession.' (Webster's Dict.; 6 Words & Phrases, 54, 63, and cases cited.) The word 'enjoy' is one frequently found in instruments of transfer and means to make such use of the thing transferred as is consistent with the tenure by which it is held. 'Transfer' is a word commonly used to denote a passing of title in property (usually realty) or an interest therein from one to another. The entire clause, if considered with reference to its context, leaves no room for doubt as to what is meant thereby. The purpose of the Alien Land Law, as is well said in *O'Brien vs. Webb*, *supra*, 'was apparently to prevent ownership and legal interest in farming lands from passing to aliens who never could become citizens; and there is nothing from which it can be legitimately inferred that the design of the law is to prevent an alien from entering into a cropping agreement whereby he gives his labor for a share in the crops to be raised.' It must be presumed that the act was adopted by the people with full understanding on their part of the law of estates, tenures and transfers as created by constitutional and legislative authority and as expounded by the courts of the land. It must further be presumed that the law was passed with full understanding on the part of the people of the state of existing laws governing or affecting cognate subjects. The argument that the law forbids the making of a contract of employment or agreement to till the soil on shares can only be sustained by adopting the theory that the particular agreement under consideration transfers an interest in land. To accept this theory it would become necessary to give a new and unwarranted interpretation to words and terms of ancient and established usage, the meaning of which has long been settled by judicial pronouncements and legislative sanction."

This is a fair and liberal construction of the act, and when the intent and purpose of the act were under direct consideration, and necessarily so, because in order to define the meaning of the words "transfer an interest in real property," it was requisite for the court to first determine whether the rights acquired by Okahara were an interest in real property or not, and the decision that such rights were not an interest in real property was a determination that the purpose of the act did not preclude the entering into and performance of such cropping contracts. This was an interpretation of the purpose of the act when such purpose was in question and

under the direct consideration of this court, because it was compelled to define the words "*transfer an interest in real property*" as these words were and are found in section 2, in section 10, and in the complaint under which Okahara was in custody. If the rights transferred to Okahara were not "*an interest in real property*" he would be discharged; if they were such an interest, he would be remanded. So in considering the case then before it, this court was compelled to construe section 2 of the act. In thus construing the act this court was compelled to determine its purpose, which was evident, that is to prevent ineligible aliens from *acquiring, possessing and enjoying real property*, or any interest therein, except as permitted by the treaty. Section 10 of the act provided only for a punishment for the transfer of the forbidden interest, but such punishment was for the purpose of preventing the acquiring, possessing and enjoying, because before an alien could acquire, possess or enjoy, the forbidden interest must be transferred—and when this court decided that the rights transferred to and used by Okahara were not a transfer of an interest in real property they also decided that his acquirement, possession and enjoyment of these rights, required by him were not an acquirement, possession or enjoyment of an interest in real property, and as properly construed, such words and their purpose in the act, as it did the word "*transfer*."

That cropping contracts are not, and never have been an interest in real property no longer needs citation of authority in this state to support. That it was not the intention of the people of the state to forbid them is clear from the Initiative Act itself as cropping contracts were definitely mentioned, in section 5 (*supra*) when speaking of the duties of the trustees of aliens, the trustees were required to present an itemized account of all cropping contracts and other agreements in respect to land and the handling and sale of the products thereof.

As said in the Okahara case (*supra*):

"It must be presumed that the act was adopted by the people with the full understanding on their part of the law of estates, tenures and transfers as created by constitutional and legislative authority and as expounded by the courts of the land."

The legislature in attempting to extend the prohibitory provisions of the Alien Land Law to personal property exceeded the power of amendment provided in the act, as well as coming in conflict with the treaty provisions with Japan. The purpose of the act merely was not to prevent the prescribed class from laboring on the farms, or to establish rules for the payment of their compensation. The intent of the act was to prevent ineligible aliens from controlling real property, not only *agricultural* real property, as far as it can constitutionally be done, the original act and the amendments were adopted, before Congress settled the ineligible alien question by the Exclusion Act.

While the legislative power to enact laws is broad and comprehensive, yet there are natural and constitutional boundaries that cannot be passed. It cannot change sex, nor can it make personal property into realty. The purpose of the Initiative Alien Land Law is plain and its provisions are unambiguous and as far as allowable, it limits the rights of ineligible aliens. The legislation can go no farther than the people did when they adopted it. On the other hand, the rights that aliens have are as highly protected by the supreme law of our nation and state, our constitutions, as the rights of citizens and among these inherent, impregnable rights is the one to follow the common occupations of life without let or hindrance.

VI.

Can it rightfully be said that under the contract in this case the ineligible alien has any control of the real estate upon which he agrees to perform labor?

We cannot see how this can be so. Nose under this contract has not the slightest interest in occupancy or enjoyment of the real property upon which he agrees to perform labor. No real action will lie in regard to the contract. The whole argument of the state is based upon the fact that this compensation is partially measured by the energy and efficiency exercised by the laborer. This is very clearly shown in the decision of Judge Conkling of the superior court of Imperial County in *In re Noji*, superior court, Imperial County, Criminal No. 147. The Noji case was a counterpart of this one; the contract was identical and was decided on an application for a writ of *habeas corpus*. Judge Conkling's decision is such a clear exposition of the law in the case that we have attached it in full as an appendix to this brief.*

The enforcement of this contract cannot be had by an action of specific performance; the only right of the laborer would be one for damage if he is discharged without cause, and if he quits or is discharged for cause, he loses all right to the additional compensation. The whole effect of the contract is to provide efficient agricultural laborers who will not quit their job on the slightest pretext and leave the landowner in the lurch. This class of contracts are a real necessity to farmers where climatic conditions, as in Imperial Valley, often assist the laborer to make up his mind to move on. We use these contracts constantly with Mexican, Japanese, Hindus and Filipinos; these people constituting the large bulk of our common laborers. Would this court for an instant consider that a Mexican or a Filipino had any interest in real property if presented with such a contract under such a claim? We do not think it would. If attempts should be made in the guise of such contracts to allow ineligible aliens to acquire prohibited interest, the law itself provides a penalty. We are certain this court will not say, when it is admitted by the state as it is here, that there is nothing behind, or concealed in this contract, that the California farmer may not protect his farm and make his crops by employing ineligible aliens who are legally residents, to labor on the land.

While we believe that cropping contracts where the method of payment is a portion of the crops delivered by the owner of the land to the cropper, are not prohibited by the Alien Land Law, and cannot be constitutionally barred, yet the Nose contract does not go that far, his only measure of compensation is the cash wage paid him which may be added to by his efficient work and also may be increased by the market condition and then the landowner and the tiller of the soil will each receive added income. In the Nose contract there can be no interference with or interest in the actual product of the land; his compensation depends on the yield, but his legal rights do not include in any way control of the soil or its production.

We therefore earnestly maintain that the petition in this case should be discharged.

Respectfully submitted,

HITCHCOX, CRENSHAW & TRUDE,
Attorneys for Petitioner S. Nose.

(*For this decision see Chapter XVI, Section A-2.)

2. POINTS AND AUTHORITIES, BY U. S. WEBB.

We understand that this petition for writ of *habeas corpus* has been filed for the purpose of testing the validity of the 1923 amendment to section 10 of the Alien Land Act of this state. There are several other points raised in the petition for writ of *habeas corpus*, and having to do with general constitutional and treaty provisions. We do not feel it necessary at this time to answer these arguments. They have been thoroughly considered by the courts in the various alien land cases which we have successfully prosecuted in both the federal and the state courts. We merely refer to these decisions which finally pass on these various constitutional and treaty questions.

The lease case is *Porterfield vs. Webb*, and finally decided by the United States Supreme Court, and reported in 263 U. S. 295. The companion lease case from the State of Washington is entitled *Terrace vs. Thompson*, and is reported in 263 U. S. Reports at page 197. The cropping contract case is *O'Brien vs. Webb*, reported in volume 263 U. S. Reports, page 313. The corporation stock case is *Frick vs. Webb*, reported in 263 U. S. at page 326. In *Ex parte Akado*, 188 Cal. 739, our state supreme court upheld the contention of the attorney-general that those provisions of the original act which made it a crime to enter into a conspiracy for the violation of any of the provisions of the act were valid.

Coming then to our question of the right of the legislature to amend section 10 of the Initiative Act the said section 10 as adopted originally provided that:

"If two or more persons conspire to effect a transfer of real property or of an interest therein in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years or by a fine not exceeding five thousand dollars, or both."

In 1923 the legislature amended this section to read as follows:

"If two or more persons conspire to violate any of the provisions of this act they are punishable by imprisonment in the county jail," etc.

The question involved in this case is whether it was within the power of the legislature to make penal by this amendment what theretofore was not penal. Our supreme court in the *Okahara* case (*In re Okahara*, vol. 66, California Decisions, p. 15) decided that section 10 of our Initiative Alien Land Act did not prohibit cropping contracts. The question, then, is whether it was within the power of the legislature to so amend the penal section of the act as to prohibit such cropping contracts. This question is discussed in our brief filed in the case of *Porterfield and Mizuno vs. U. S. Webb et al.*, Los Angeles No. 8214, and which case is to be argued and submitted at the same time that this case is argued and submitted. We refer, therefore, to the brief filed in the said *Porterfield* case for our argument on this question of the right of the legislature to so amend the Initiative Act.

It will be found that the contract in this case contains the same general provision that we found in the contract in the *Porterfield* case to the effect that the so-called "employer" is desirous of employing the said "employee" for a term of six months commencing on the 15th day of July, 1924, to perform all the labor on the said described premises, in preparing the ground for planting, cultivating, caring for, irrigating and harvesting crops.

Paragraph 3 of this contract provides that:

"It is further agreed that the said employer will, as an incentive to the said employee to be industrious and efficient, and as an additional wage,

pay to the said employee the sum equal to 50% of the net profits of the crops grown and harvested on said premises during the performance of this contract, within 60 days after said crops have been sold."

This provision is practically the same in its effect as we found in the contract set forth in the case of *Jones et al. vs. U. S. Webb etc. et al.*, Los Angeles No. 8215, which case is to be argued and submitted. We therefore refer to our brief filed in that case to be read in connection with this brief.

Fundamentally, it would seem clear that it is certainly "facilitating the operation" of the original Initiative Alien Land Act to make the entering into a cropping contract a criminal offense although it was not made a criminal offense in the original draft of section 10 of the Initiative Act. That is, if the legislature finds that the purposes of the act are not being fulfilled unless the entering into such contracts is made a penal offense, then the legislature would be doing no more than "furthering the purpose" of the Initiative Act as is authorized by section 13 thereof.

Dated, July 16, 1924.

Respectfully submitted,

U. S. WEBB,

Attorney-General of the State of California,

FRANK ENGLISH,

Deputy Attorney-General of the State of California,

ASA KEYES,

District Attorney of the County of Los Angeles,

TRACY CHATFIELD BECKER,

Deputy District Attorney of the County of Los Angeles,

Attorneys for State of California.

3. BRIEF OF AMICUS CURIAE.

(SEE CHAPTER XVIII-B-2.)

4. DECISION OF THE COURT.

(PENDING.)

CHAPTER XX.—SHOKUTA, KUSUMI, AND MIYAGAWA CASES.

SECTION A. SHOKUTA CASE IN THE SUPREME COURT, STATE OF WASHINGTON.

THE STATE OF WASHINGTON, on the relation of JOHN H. DUNBAR,
Attorney-General, Respondent, vs. K. SHOKUTA, Appellant.

1. BRIEF OF APPELLANT.

Note—Judge Truax gave the decision, simply stating that “in this case judgment will be entered in favor of plaintiff” on Dec. 12th, 1922.

STATEMENT OF THE CASE.

This action was commenced for the purpose of escheating to the state the west twenty-five (25) feet of lot ten (10), and the south twenty-five (25) feet of lot eleven (11), in block three (3), of the Northern Pacific Railroad Company's plat of Pasco, in Franklin County.

THE PLEADINGS.

The plaintiff is the attorney-general of the state. The defendant is not a citizen of the United States and has not at any time in good faith declared his intention to become a citizen of the United States or of the State of Washington. The plaintiff alleged that, subsequent to the adoption of the constitution of the state and the organization of the state thereunder, the defendant did by mesne conveyances become the record owner of the property in question and that he was in possession of it as owner thereof. Defendant denied those allegations. It was further alleged that the real estate was not acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of a debt, and that it contains no deposits of minerals, metals, iron, coal or fire clay, and that the property was not necessarily nor adaptable for mills or machinery to be used in the development or manufacture of products of lands containing such deposits of minerals, and was not so used by the defendant. Those allegations are admitted.

As a first affirmative defense the defendant pleads that the real estate mentioned in the complaint was not at any time his property, but was at all times in the complaint mentioned the property of and owned by Buddhist Mission Society, a Washington corporation, the majority of whose stockholders in number and amount of stock were citizens of the United States and of the State of Washington; that on the 18th day of March, 1921, the Buddhist Mission Society duly conveyed said real estate and the whole thereof for a valuable consideration to George F. Russell, who ever since has been and now is the owner and holder thereof. As a second affirmative defense the defendant plead that he was at all times a subject of the Emperor of Japan, born of Japanese parentage, and at no time had been a citizen of the State of Washington, but that he duly entered the confines of the United States in compliance with all the laws and

regulations appertaining to the entry of aliens within the confines of the United States.

THE EVIDENCE.

On the trial it was stipulated that the Buddhist Mission Society, above mentioned, was a Washington corporation, in good standing and authorized by its articles to own real estate; also that prior to July 5, 1910, Leopold F. Schmidt and Johanna Schmidt, husband and wife, were seized in fee simple and in possession of the south twenty-five (25) feet of lot eleven (11), block three (3), of the above property, and that prior to December 23, 1910, the west twenty-five (25) feet of lot ten (10), block three (3), of the above property was owned by the Bank of Pasco, a corporation, in fee simple; that the property in question was not valuable for minerals and so forth; also that the defendant was a bachelor.

On the trial, the plaintiff offered in evidence, as Exhibit "A," the *lis pendens*, filed at the commencement of the action. W. R. Cox, called by the plaintiff, testified that he was auditor of Franklin County; that from a search of the records in his office he found no conveyance of the south twenty-five (25) feet of lot eleven (11), and the west twenty-five (25) feet of lot ten (10), in block three (3), Northern Pacific Railroad plat of Pasco, to the Buddhist Mission Society prior to or including April 26, 1921. Thereupon exhibits were offered and received by the court over the objection of the defendant, affecting title to the property as follows:

"B," a quitclaim deed, dated December 23, 1910, of the west twenty-five feet of lot ten (10) from the Bank of Pasco to G. C. Klein, and Marguerite Klein, his wife;

"C," a warranty deed, dated October 31, 1913, from G. C. Klein, and Marguerite Klein, his wife, to M. Kanasashi, and K. Shokuta, of the west half of lot ten (10);

"D," a warranty deed, dated December 27, 1915, from M. Kanasashi, a bachelor, to K. Shokuta, of the west twenty-five (25) feet of lot ten (10) and the south twenty-five (25) feet of lot eleven (11);

"E," a quitclaim deed, undated, from Arthur Henry Reilly and Martha Nasburg Reilly, his wife, to K. Shokuta, of the west twenty-five (25) feet of lot ten (10). The acknowledgment is dated April 17, 1916;

"F," a mortgage, dated March 6, 1919, from K. Shokuta to Western Loan and Building Company, of the west twenty-five (25) feet of lot ten (10). The block number does not appear;

"G," a warranty deed, dated July 5, 1910, from Leopold Schmidt and Johanna Schmidt, his wife, to Edward Horrigan, of all of lot eleven (11);

"H," a contract of sale, dated July 13, 1910, from Edward Horrigan to K. Shokuta and M. Kanasashi, of the south twenty-five (25) feet of lot eleven (11).

Thereupon the plaintiff rested, and the defendant offered in evidence the following exhibits:

"1," a quitclaim deed, dated January 28, 1913, from K. Shokuta and M. Kanasashi to Buddhist Mission Society, a corporation, of the south twenty-five (25) feet of lot eleven (11).

"2," a quitclaim deed, dated February 26, 1913, from Edward Horrigan, of the south twenty-five (25) feet of lot eleven (11) in block three (3), in which the name of the grantee appears in blank, but on the back of it appears the name of Buddhist Mission Society.

"3," a deed from Buddhist Mission Society, dated the 18th day of March, 1921, to George F. Russell, of the south twenty-five (25) feet of lot eleven (11).

Thereupon the defendant rested and the plaintiff called Edward Horrigan, who testified, after examining plaintiff's Exhibit "H," above mentioned, that he was the vendor named in the contract, and that he was the grantor in the deed admitted as defendant's Exhibit "2," and that the deed was executed in fulfillment of the contract, plaintiff's Exhibit "H." Thereupon, upon motion of the defendant, the cause was reopened for further testimony on behalf of the defendant, and D. V. Halverstadt testified that shortly after the complaint was filed in this action, he went over the facts with the defendant and Mr. Matsumi, and that Mr. Benjamin Ohnick, an American citizen, who was president of the Buddhist Mission Society, and had its records, delivered to the witness defendant's Exhibits "1" and "2."

Thereupon the plaintiff offered in evidence interrogatories 2 and 3 and the answers thereto, as follows:

Interrogatory 2: "From whom did the said Buddhist Mission Society obtain title to the premises herein described in plaintiff's complaint?"

Answer: "From K. Shokuta and M. Kanasashi."

Interrogatory 3: "Was any consideration given by said Buddhist Mission Society for said premises, and if so, what was the consideration?"

Answer: "Ten dollars."

FINDINGS, CONCLUSIONS, DECREE AND EXCEPTIONS.

Thereafter the court made findings to the effect that the defendant was not a citizen of the state, but was a subject of the Emperor of Japan, was a bachelor, and had not at any time declared his intention in good faith to become a citizen of the state; that the premises in question contained no valuable deposits of minerals and so forth, following the exception in section 33 of article II of the constitution of the state; that on the 26th of April, 1921, a *lis pendens* was filed by the plaintiff in the office of the auditor of Franklin County, which is regular in form, after the commencement of the action on that day; that prior to the 26th of April, 1921, the defendant was owner in fee simple of the premises in question, good as against all the world excepting the State of Washington; that while such owner the defendant signed and acknowledged before a notary public a deed of general warranty purporting to convey the premises without naming a grantee therein, and that the name of no grantee was ever inserted in the deed, and the deed was never delivered to any person until after the bringing of this action, and the filing and recording of a notice of *lis pendens*; that the deed never was recorded by nor filed for record with the auditor of Franklin County, but that the defendant in fact at the time of the commencement of this action and the filing of the *lis pendens* owned the premises except as against the State of Washington; also, that the defendant had not supported the allegations of his first and second affirmative defenses; conclusions were entered by the court directing a decree that at the time of the commencement of the action and the filing of the *lis pendens* the defendant was the owner of the property in question, good as against all the world excepting the state; that the title was not good as against the state but defeasible and void upon the bringing of the action; that all the right, title and interest of the premises of the defendant and the Buddhist Mission Society and of all persons and corporations claiming, by, through or under them, or either of them, should be forfeited and escheated to the state, and entered a decree accordingly.

The defendant, within the time limited, filed separate exceptions to each of the findings of fact and of the conclusions of law of the court.

From the decree so executed this appeal is prosecuted.

ASSIGNMENTS OF ERROR.

I.

The court erred in finding and adjudging that George F. Russell was not the owner in fee simple of the south twenty-five (25) feet of lot eleven (11), in block three (3).

II.

The court erred in finding and adjudging that the title and interest in said premises of the Buddhist Society and all persons claiming by, through or under it, be escheated, and that the deed from the Buddhist Mission Society to George F. Russell, not having been filed for record prior to the filing of the *lis pendens*, Russell was precluded from claiming ownership in the property.

III.

The court erred in finding and adjudging that the property was subject to escheat to the State of Washington, and in entering judgment that the same be escheated to the State of Washington.

ERRORS NOS. 1, 2 AND 3.

The court will bear in mind that there are two pieces of property involved, the west half of lot ten (10) and the south twenty-five (25) feet of lot eleven (11). From Exhibit "G" it appears that on July 5, 1910, Leopold F. Schmidt and wife executed to Edward Horrigan a deed to the whole of lot eleven (11), and that on July 13, 1910, Horrigan executed and delivered to Shokuta and Kanasashi a contract agreeing to sell to them the south twenty-five (25) feet of lot eleven (11). From defendant's Exhibit "1" it appears that on the 28th day of January, 1913, Shokuta and Kanasashi deeded to the Buddhist Mission Society the south twenty-five (25) feet of lot eleven (11), and on the 26th day of February, 1913, Horrigan executed a deed, the name of the grantee being blank, to the south twenty-five (25) feet of lot eleven (11), but on the back of the deed the name of the Buddhist Mission Society appears as the grantee. On the 18th day of March, 1921, the Buddhist Mission Society deeded the south twenty-five (25) feet of lot eleven (11) to George F. Russell. Horrigan testified that his deed, naming a blank grantee, was executed in fulfillment of his contract to sell the property to Shokuta and Kanasashi. (St. 10.) If the state desires to take the position that no title passed to the Buddhist Mission Society by reason of the fact that its name does not appear in the deed from Horrigan, then, we ask, where is the title to the piece of real estate now? In Horrigan? If so, then this action did not lie, because the title remained in Horrigan. The grantees in the contract of sale had neither a legal nor an equitable interest in the land, and there can be only a legal or an equitable interest in land. (*Tieton Hotel Co. vs. Manheim*, 75 Wash. 641, 642, 643.)

If the title did pass from Horrigan by virtue of the deed in question, then to whom did it pass? If to Shokuta and Kanasashi, then the title which they acquired, being an after acquired title, passed to the Buddhist Society by virtue of their prior deed dated January 28, 1913. *Ankeny vs. Clark*, 1 Wash. 549; *West Seattle Land etc. Co. vs. Novelty Mill Co.*, 31 Wash. 435; *Gough vs. Center*, 57 Wash. 276; *Pioneer Sand & Gravel Co. vs. Seattle Construction & Dry Dock Co.*, 102 Wash. 608.)

All these cases are simply in support of the general rule that even an ordinary quitclaim deed passes an after acquired title to real estate.

Hence, the plaintiff is in this position, namely: If he takes the position

that the deed from Horrigan passed no title to the Buddhist Mission Society because of the fact that the name of the grantee is blank in the deed, then the title was thereby conveyed to Shokuta and immediately passed to the Buddhist Mission Society, or it remained in Horrigan. If the title did remain in Horrigan, this action did not lie. If the deed from Horrigan conveyed the title to Shokuta, it immediately passed from him to the Buddhist Mission Society as an after acquired title.

We understand that the plaintiff takes the position that no delivery of the deed from Horrigan and the deed from Shokuta and Kanasashi was shown, and that for *that* reason title to the property remained in Shokuta. But no evidence of non-delivery was shown. It was shown beyond question that each of the deeds were in possession of the Buddhist Mission Society. That as a matter of fact was not disputed. The rule relating to delivery of deeds is stated thus:

"So where a deed is duly signed, attested and witnessed there arises a presumption of sealing and *delivery*, and the time of its execution and *delivery* is *presumed* to be on the day of its date." (Italics ours.) Jones on Evidence, vol. 1, sec. 50a, and authorities cited in accompanying note.)

In the case of *State vs. Dana*, 59 Wash. 30, this court held that a deed is presumptively executed and *delivered* on the date of its execution and acknowledgment and cited, in support of the rule, Devlin on Deeds (2nd Ed.), sections 178, 182, 265.

The plaintiff introduced in evidence interrogatories two and three, from the answers to which it appears that the Buddhist Mission Society did obtain title to the premises in question, and that the consideration therefor was \$10.00. We submit that it clearly appears that the full and complete title to the south twenty-five (25) feet of lot eleven (11) was vested in the Buddhist Mission Society on the 26th day of February, 1913, by virtue of the deed from Shokuta and Kanasashi, and that the title thereto continuously thereafter remained in it until the 18th day of March, 1921, when it conveyed the same to George F. Russell.

It must be borne in mind that the statute relating to recording of deeds is necessary only to protect a grantee when his grantor conveys the same property to a subsequent *bona fide* purchaser for value without notice. (6 C. J. 1106.)

"The objects of the recording act being to protect certain specified classes of persons against fraud, failure to record will not, in the absence of an express provision to that effect, render the instrument wholly void and inoperative to convey the legal title; the unrecorded instrument is valid against everyone except the classes of persons included within the terms of the statute." (24 Am. & Eng. Enc. Law, 2nd Ed. p. 116.)

In the case of *Svanstrom vs. Washington Trust Co.*, 41 Wash. 561, 563, this court quoted with approval from Webb on Records of Titles, sec. 13, as follows:

"Recording is required for the protection of subsequent purchasers only."

In the case of *McDonald & Co. vs. Johns*, 62 Wash. 521, 523, this court said:

"The recording statutes were for the purpose, as is universally understood now, of giving constructive notice to innocent purchasers and incumbrancers, and the practical question in all these cases is, who are innocent purchasers and incumbrancers?"

Obviously, neither the plaintiff nor the state was a *bona fide* purchaser for value, without notice.

It being clear that Shokuta had no title whatever to the real estate in question on the commencement of this action, having theretofore, eight years prior thereto, conveyed the property to the Buddhist Mission Society, it follows that the Buddhist Mission Society took a valid title to the land, and conveyed a valid title to George F. Russell. In other words, there was no land being held in violation of the state constitutional provisions or of chapter 50 of the Laws of 1921, and the grantees of the alien took an indefeasible title. (*Oregon Mortgage Co. vs. Carstens*, 16 Wash. 165; *Abrams vs. The State of Washington*, 45 Wash. 327; *State ex rel. Atkinson vs. World Real Estate Commerce Co.*, 46 Wash. 104; *Prentice vs. How*, 85 Wash. 165.)

We respectfully submit that this action at no time could be maintained as to the south twenty five (25) feet of lot eleven (11); that the decree is erroneous, and that the judgment should be reversed to that extent.

Respectfully submitted,

GUIE & HARVERSTADT,
Attorneys for Appellant.

2. BRIEF OF RESPONDENT.

STATEMENT.

This action was brought to escheat to the state two tracts of land in the city of Pasco, Washington (west 25 feet of lot 10, and south 25 feet of lot 11, block 3, Northern Pacific Railroad Company's plat), upon the ground that they were held by defendant, Shokuta, a Japanese subject, in violation of section 33, article II of the state constitution. A *lis pendens* was filed with the county auditor on April 26, 1921, the date of the commencement of the action (Exhibit "A"), which in all respects conforms to the requirements of section 243, Rem. Comp. Stat. It is admitted that defendant is not within the exceptions enumerated in section 33, article II, nor does appellant contest the power of the state to forfeit real property, title to which is held by an ineligible alien under that provision.

For a further statement of the facts we refer the court to appellant's brief.

The only question involved in this appeal is whether the second tract (south 25 feet of lot 11) was properly included in the judgment of escheat. Appellant makes no contention that the judgment below was not correct in so far as it relates to the first tract (west 25 feet of lot 10). Respecting the second tract, however, two contentions are urged in support of a reversal of the decree of escheat: (1) That an indefeasible title to the property vested in George F. Russell by virtue of a conveyance (Ex. "3") from the Buddhist Mission Society, which corporation had taken title by virtue of two quitclaim deeds, dated January 28, 1913, and February 26, 1913, respectively, one running from K. Shokuta and M. Kanasashi as co-grantors to the Buddhist Mission Society as grantee (Ex. "1"), and the second from Edward Horrigan as grantor, with the name of the grantee blank. (Ex. "2".) (2) That even if these deeds be void for failure of delivery prior to the filing of *lis pendens* in this action the decree cannot stand, for in that event title to the property is in Edward Horrigan, the vendor in the contract of sale. (Ex. "H".)

ARGUMENT.

Our argument resolves itself into substantially three subdivisions. We contend (1) that, if it be assumed that delivery of the deeds to the Buddhist Mission Society was sufficiently shown by the evidence, grantee took no title as against the respondent in this action, inasmuch as those deeds

were not recorded prior to the filing of *lis pendens* and (2) that there was in fact no delivery of those deeds shown.

If our second point is correct and there was no delivery of the deeds until after April 26, 1921, obviously the Buddhist Mission Society could not take title superior to that of the state, for it took subsequent to the *lis pendens* in this action and became a purchaser *pendente lite*. If, on the other hand, delivery prior to the *lis pendens* be assumed, the Buddhist Mission Society did not take title superior to that of the state for, under the law of this state, the holder of a prior *unrecorded* deed becomes a subsequent purchaser or encumbrancer within the purview of the *lis pendens* statute. So in either contingency the grantee under those deeds became a purchaser *pendente lite*, and Russell as purchaser from the *pendente lite* purchaser, the Buddhist Mission Society, is to the same extent affected by the *lis pendens*.

We further contend (3) that if our position is correct, that the Buddhist Mission Society and Russell became purchasers *pendente lite*, so as to defeat their title, the decree escheating the property to the state was correct, for Shokuta and not Horrigan, the vendor in the contract of sale, held title to the property.

I.

FAILURE TO RECORD DEEDS TO IT MADE BUDDHIST MISSION SOCIETY A PURCHASER PENDENTE LITE.

This action involves primarily only an interpretation of our *lis pendens* statute (sec. 243, Rem. Comp. Stat.). Except incidentally, it does not involve the question of the effect of the recording statute (sec. 10596, Rem. Comp. Stat.) upon the failure to record a deed. That section, on its face, provides that a recorded deed shall be valid as against *bona fide* purchasers. Hence we have no quarrel with the statement of appellant that, under that statute, an unrecorded deed is void only as against subsequent *bona fide* purchasers (*Swanstrom vs. Washington Trust Co.*, 41 Wash. 561; *McDonald Co. vs. Johns*, 62 Wash. 521), and valid as between the parties and all other persons.

Appellant, however, has overlooked the *lis pendens* statute, which has the effect of ingrafting a further exception into the recording act, namely, that as against a *lis pendens*, an unrecorded deed is ineffectual, if not absolutely void. The *lis pendens* statute provides in part:

"In an action affecting the title to real property the plaintiff, at the time of filing the complaint * * * may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in that county affected thereby. From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or *subsequently recorded* shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice *to the same extent as if he were a party to the action* * * *." (Italics supplied.)

In 25 Cyc. 1480 the rule is laid down as follows:

"Generally under the recording acts, where a conveyance is delivered before, but not recorded until after, the commencement of the action, the person taking it is a *pendente lite* purchaser or encumbrancer.

"By the *lis pendens* statute the holder of a conveyance unrecorded at

the time the notice of the pendency of the action is filed is in some states a purchaser *pendente lite*."

We submit that the last paragraph above is applicable to the *lis pendens* statute of this state, although an unequivocal statement to that effect has not as yet been enunciated by this court. It is necessary, therefore, to review the cases decided by this court upon the question.

In *Eldridge vs. Stenger*, 19 Wash. 697, certain property was deeded by one Hugh Eldridge to his mother, the deed being executed and delivered but not being recorded until four years later. In the meantime, Eldridge had mortgaged the property to one Stenger, and Stenger brought action to foreclose the mortgage and filed a notice of *lis pendens* prior to the time the deed to the mother was recorded. When the grantee sought to restrain the sale under foreclosure of the mortgage, Stenger contended that his *lis pendens* having been filed prior to the recording of the deed shut off any claim thereunder. This contention was dismissed, but on the ground that Stenger had *actual notice* of the deed at the time he took the mortgage. The case is wholly consistent with our view of the statute.

In *Payson vs. Jacobs*, 38 Wash. 203, virtually the same state of facts was involved. This court said:

"This court has frequently held that the holder of the legal title to real property is a necessary party to an action to foreclose a mortgage or other lien against it. (*Dane vs. Daniel*, 23 Wash. 379, 63 Pac. 268, and cases cited.) Since the holder of the legal title is an essential party to such an action, it is equally essential that the holder of the mortgage or other lien should have certain and definite means of ascertaining who is the holder of the legal title, within this rule. In our opinion our statute furnishes such means. Bal. Code, section 4887, provides for the filing of a notice of *lis pendens* in actions affecting the title to real property, and that, from the time of filing such notice, the pendency of the action is constructive notice to purchasers and incumbrances of the property affected by the action, and every person whose conveyance or incumbrance is subsequently recorded shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice, to the same extent as if he were a party to the action."

In *Wright vs. Jessup*, 44 Wash. 618, plaintiff claimed title through conveyances from a former holder of the legal title and from purchasers at an attachment sale. Defendant claimed title under an action to foreclose street grade assessments in which a *lis pendens* had been filed. Plaintiff brought suit in ejectment, claiming that defendant and those under whom he claimed had notice of the unrecorded instruments. This the court held to be immaterial, saying:

"The lien of the street grade assessment was paramount and superior to the claim of any of the parties hereto, and the judgment of foreclosure is therefore binding upon the appellants, and those under whom they claim, by reason of the notice of *lis pendens*."

In *Merrick vs. Pattison*, 85 Wash. 240, the trustee of a bankrupt corporation sued to recover certain property the record title to which stood in the name of one of the directors of the corporation. A *lis pendens* was regularly filed. Prior to the commencement of the action the property had been conveyed to a third party by deed which was not until subsequently recorded. Such third party intervened and set up ownership in himself. He prevailed and upon appeal the judgment was affirmed. The court said:

"We have italicized the words particularly relied upon by counsel for appellant, who seems to proceed upon the theory that the *lis pendens* notice

had the effect of making respondents purchasers of the property, in legal effect, subsequent to and with notice of the claimed rights of appellant, for all purposes. We are unable to so view the effect of a notice of *lis pendens* under this statute. This, we think, is only a law of procedure, enacted with a view of making a decree of the nature here sought, if ultimately rendered in favor of the plaintiff, effective, not only against the original defendant in the action, but also effective against one who purchases the property or whose conveyance evidencing such purchase is recorded after the filing of the notice of pendency of the action, 'to the same extent as if he were a party to the action.' In other words, the statute, and a notice of *lis pendens* filed in pursuance thereof, has the effect of constructively making the one claiming under such subsequently executed or recorded conveyance a party to the action. It does not follow that a decree must necessarily be rendered in favor of the plaintiff because his notice of *lis pendens* is prior in time to the recording of a conveyance of a purchaser. Such purchaser is not thereby prevented from asserting his claimed rights as against the claims of the plaintiff and having the same determined upon the merits. Such rights may or may not be superior to those claimed by the plaintiff. The notice of *lis pendens*, as we view it, has no practical effect on the substantive rights of the respective parties, but is only a method of forcing a purchaser, under a subsequently recorded conveyance, to set up his claim of right in that action or have the decree therein, which may be rendered in favor of the plaintiff, made effective against him as well as the original defendant."

In *Ellis vs. McCoy*, 99 Wash. 457, an action was brought to quiet title to real property. The McCoy's conveyed property to the Roots in consummation of a trade, and they later conveyed it to Ellis, whose deed was not recorded until eight days after its delivery and four days after McCoy filed a *lis pendens* in an action against the Roots to rescind the trade. Ellis had no actual notice of the pendency of the action by the McCoy's against the Roots, nor did the McCoy's have any actual knowledge of the unrecorded deed to Ellis.

This court reviewed in considerable detail the previous cases upon the question, and found in favor of the title acquired under the *lis pendens*, saying in part:

"It is at once apparent that these cases announce two distinct principles; first, that the commencement of an action for the recovery of, or for the foreclosure of, a lien upon real property and the filing of a notice of pendency of the action, even though prosecuted to judgment, will not foreclose or bar the assertion of a superior outstanding unrecorded title of which the plaintiff in the action had notice; and second, that the commencement of such an action and the filing of the notice will not prevent the holder of a superior outstanding unrecorded title, of which the plaintiff in the action does not have notice, from appearing in the action and asserting such title. But it is apparent, also, that neither of these principles quite meets the question presented in the case before us. Here the respondents had an equitable interest in the land in question anterior in point of time to the interest acquired by the appellant from his purchase of the property. For want of record, this interest was cut off by the appellant's purchase. The appellant did not, however, perfect his acquired title by recording his deed until after the respondents had begun an assertion of their interest, nor did he appear in the action in which that interest was sought to be asserted. To say that his interest was not cut off, therefore, requires the declaration of a new principle; it must be declared that no paramount title can be cut off by a procedure under the statute of notice.

"No case, in so far as we are advised, has gone to that extent, and seemingly the statute should not be so construed. Between two innocent persons, one of whom must suffer a loss, no matter which view of the statute is taken, there should at least be a weighing of the equities, and that equity be allowed to prevail which favors the person least in fault. In the action before us, unquestionably the greater fault lies with the appellant. In the first place, he was negligent in failing to record his deed until the lapse of so long a time. In the second place, he had the last call to examine the record. He could but know, since he allowed eight days to elapse between the time he took his conveyance and the time he filed it for record, that adverse interests could intervene, and had he examined the record at that time, he would have learned of the claims made by the respondents and could, by making known his claims, have prevented the respondents from waging a fruitless suit, or at least prevented a judgment which will be rendered fruitless if his claim is now permitted to prevail. On the other hand, the respondents had no call to examine the record subsequent to the commencement of their action. *As the record was then free from opposing claims, and as they then put notice of their own claims upon the record, they had the right to rest upon the assurance that subsequent claims would either be brought to their notice or would be barred by a successful prosecution of their action because of failure to assert them.*" (Italics supplied.)

This is the last word of this court upon the question, and should, we submit, control as against implications which may be found in the earlier cases suggesting a contrary construction.

This decision is important in that it furnishes us with the true meaning of the concluding language of the statute which reads: "to the same extent as if he were a party to the action." Ellis contended that in view of that language he should be given relief because had he appeared in the suit and set up his claim, the court could not have given judgment against him and therefore the judgment actually entered could have no greater effect because he was not a party. Answering the contention the court said:

"But we cannot think this the meaning of the statute. We think it means that he is bound by the judgment actually entered to the same extent as if he were a party to the action."

In other words, the Buddhist Mission Society could not now come in and claim that inasmuch as its claimed title *might have been upheld*, had it intervened in this action, it is not bound by the judgment actually entered.

The courts in those states operating under similar *lis pendens* statutes have uniformly followed the rule for which we contend.

Our statute seems to have been copied from the New York statute (see Judge Anders' statement in *Eldridge vs. Stenger*, *supra*), and the New York Courts have consistently adopted this construction. (*Ayrault vs. Murphy*, 54 N. Y. 203; *Fuller vs. Scribner*, 73 N. Y. 190; *Kindberg vs. Freeman*, 39 Hun. 466, 109 N. Y. 653; *Slattery vs. Schwannecke*, 44 Hun. 75, 118 N. Y. 543; *Kipp vs. Brandt*, 49 How. Pr. 358.)

In *Peoples Trust Co. vs. Tonkonogy*, 128 N. Y. S. 1055, the New York court of appeals said:

"Section 1671 of the Code of Civil Procedure provides in part as follows:

"Where a notice of pendency of an action may be filed, as prescribed in the last section, the pendency of the action is constructive notice, from the time of so filing the notice only, to a purchaser or incumbrancer of the property affected thereby, from or against a defendant, with respect to whom the notice is directed to be indexed, as prescribed in the next section. A person, whose conveyance or incumbrance is subsequently executed, or subsequently

recorded, is bound by all proceedings taken in the action, after the filing of the notice, to the same extent as if he was a party to the action.'

"It has been long settled that under this provision of law an incumbrance executed and delivered before, but not recorded until after, the filing of the notice of pendency of action, is as completely cut off by the judgment as if the holder thereof had been made a party to the action. (*Ayrault vs. Murphy*, 54 N. Y. 203.)"

The Nebraska statute is identical to ours, and in *Munger vs. Beard*, 79 Nebr. 764, the Nebraska court in an exhaustive and well considered opinion, reached a similar conclusion, saying in part:

"The question was not how to implead and serve parties having unrecorded interests. The legislature understood, as well as any one else, that parties secretly holding title or liens could not be known to the plaintiff, could not be made parties, could not be served, and the question was how to cut them off from asserting their interest after a judgment against the persons appearing of record as the only ones having any interest. The plain way to accomplish this end was to declare that all parties with unrecorded interests should be bound by a judgment against those whose interests were known or appeared of record. It was the application in another way of the doctrine that the party who fails to record his title shall be estopped from asserting it against a subsequent good faith purchaser. The legislature, in the use of an undoubted power, exercised its right to say that a party who failed to place of record any interest held by him in real estate should be bound by a judgment entered in an action involving such property, where the record owners were made parties. In other words, the purchaser of real estate, under a decree of court in which a *lis pendens* has been filed, takes title paramount to any conveyance or incumbrance not known to the plaintiff or found of record when the *lis pendens* was filed; and this upon the same theory that a subsequent good faith purchaser acquires good title against a prior conveyance which was not of record when the second party made his purchase. One who would deny the power of the legislature to declare a judgment entered against parties holding the record title to real estate paramount to the rights of a party who acquired an interest in the property prior to the commencement of the action, but who failed to record his conveyance or incumbrance, would have to deny the right of the legislature to say that a subsequent *bona fide* purchaser can take title as against a prior unrecorded conveyance."

The North Carolina *lis pendens* statute has the same language and in *Collingwood vs. Brown*, 106 N. C. 362, the same rule was adopted. The court held (syllabus):

"B commenced an action for recovery of land, in the superior court. Complaint and answer were filed, and judgment was obtained declaring B the owner in fee. Previous to the commencement of the action, the defendant had executed a deed to one C, which was not recorded until after the filing of the complaint and answer: *Held*, that the judgment rendered thereon took priority over the unrecorded deed."

The rule was followed in *Williams vs. Kerr*, 113 N. C. 306.

The Wisconsin statute, while not identical, is of similar import and its court has followed the current of authority. *Cutler vs. James*, 64 Wis. 173; *Siedschlag vs. Griffin*, 132 Wis. 106; *McCord vs. Akeley*, 132 Wis. 195. See, also, *Fernandez vs. Perez*, 6 Porto Rico Fed. 665.)

In fact we have found no decision reaching a contrary conclusion as to a similar statute.

There are, furthermore, a large number of cases which have adopted this

rule, not in the construction of *lis pendens* statutes, but in the construction of recording acts, the effect of which, in substance, is to declare unrecorded deeds void except as against the parties or persons having actual notice. (*Smith vs. Worster*, 59 Kan. 640; *Ferris vs. Udell*, 139 Ind. 579; *Atchison vs. Lips*, 69 Kan. 252; *Wilson vs. Robinson*, 21 N. M. 422; *Caldweller vs. Bigger*, 76 Kan. 49; *Holland vs. Cofield*, 27 Okl. 469; *Norton vs. Birge*, 35 Conn. 250; *Smith vs. Hodsdon*, 78 Me. 180.)

These cases, of course, are not in point, but their language is helpful.

Cases which reach a contrary conclusion, in every instance we have found, are based upon *lis pendens* statutes differing essentially from section 343. Typical cases might be cited. (*Warnock vs. Harlow*, 96 Cal. 298; *Hammond vs. Paxton*, 58 Mich. 393; *Baker vs. Bartlett*, 18 Mont. 446; *Carroll vs. Land Co.*, 24 Colo. Ap. 217; *Grant vs. Bennett*, 96 Ill. 513; *Noyes vs. Crawford*, 118 Ia. 15.)

Even if the construction is not the most obvious in an ordinary action between private individuals, we submit that it ought to be adopted in an action of this kind wherein the state is seeking to enforce its sovereign prerogative of forfeiting title to property held by an alien in violation of the constitution. As the court judicially knows, the legislature of 1921 enacted the Alien Land Law (chap. 50, Laws 1921) for the purpose of facilitating the enforcement of the constitutional provision. That act reflects the mature legislative judgment upon the possession of real property in the state by persons owing no allegiance to it. It has recently been upheld by the United States Supreme Court. (*Terrace vs. Thompson*, 68 L. Ed. 35.)

If appellant's contention be sustained, that act as well as the constitutional provision become mere "scraps of paper." It will deliver into the hands of ineligible aliens a means by which they will be enabled to flaunt the constitution and statute with impunity. In order to avoid an escheat, an alien, at the time of taking title to property, simply has to execute and deliver a secret deed purporting to convey the land to a friendly third party with the understanding that the alien shall remain in active possession of the premises. He might even execute a deed to a dummy grantee and make it extremely difficult for the state to establish the fraud. He need not even deliver the surreptitious deed to the grantee, but simply deposit it in escrow with the understanding that it is not to be handed the grantee until escheat proceedings are brought. Deposit in escrow would amount to delivery. Pursuing the inquiry further, he might not execute a conveyance at all until after the escheat proceedings are instituted, but upon the commencement of such proceedings immediately execute and deliver deeds of conveyance to third parties, and falsely assert the execution and delivery of the deeds prior to *lis pendens*. With collusion on the part of the grantee, the state would be powerless to prove the true facts. These were the very things, it seems to us, which the *lis pendens* statute was designed to prevent. The words "subsequently recorded" can have but one significance. If the state is obliged, before bringing escheat proceedings against an alien, to unearth every secret unrecorded deed which the alien might have made after taking title, the constitutional and statutory prohibition of alien ownership of land will become absolutely a dead letter.

The manifest inequity of such a holding is at once apparent. In the case at bar, assuming that the deeds were delivered at the time of execution, we have a situation where the grantee failed and neglected to record said deeds, or as Judge Fullerton said in the *Ellis* case, "failed to perfect its acquired title" for nine years. So far as we are informed the deeds are yet unrecorded. Such neglect, casting aside the *lis pendens* statute altogether, can appeal to no one as other than so collusive and fraudulent as to work a

complete estoppel against the grantee's claim to the property by virtue of those deeds.

It is our contention that under the *lis pendens* statute an unrecorded deed has no force or effect as against a *lis pendens*, and especially that this construction ought to prevail in escheat proceedings, inasmuch as the state should have a right to rely upon the record title in ascertaining whether property is or is not held contrary to its laws.

II.

THERE WAS IN FACT NO DELIVERY PRIOR TO LIS PENDENS.

If we are wrong in the above position, we submit that the decree should be affirmed because there was no evidence to show delivery of the deeds to the Buddhist Mission Society until after April 26, 1921. Delivery and acceptance are, of course, essential to the validity of a deed. (8 R. C. L. 973; 18 C. J. 196; *Nichols vs. Opperman*, 6 Wash. 618; *Showalter vs. Spangle*, 93 Wash. 326; *White vs. Chellew*, 108 Wash. 628.)

The only evidence of delivery is found in the testimony of Mr. Halverstadt, attorney for appellant, who testified:

"Shortly after the complaint was filed in this case, a copy of which was delivered to me by Mr. Shokuta, who was in my office with Mr. D. Matsumi of Seattle, I went over the facts with Mr. Matsumi and Mr. Shokuta. Then Mr. Benjamin Ohnick, an American citizen, who was president of the society, delivered to me the deeds in question." (St. of F., p. 11.)

Appellant contends that possession is the best evidence of delivery. It is true that possession of deed by the grantee therein named raises a presumption of delivery, which can be rebutted only by clear and convincing evidence. (*Richmond vs. Morford*, 4 Wash. 337; *Jackson vs. Lamar*, 58 Wash. 383; *Anderson vs. Woolley*, 61 Wash. 236.)

But this cannot avail appellant to show delivery prior to April 26, 1921. The first time possession was shown was when the conference was held at Mr. Halverstadt's office, so the only presumption permitted under the above rule is that of delivery at and after the date of that conference.

We further contend that the evidence of possession was incompetent. Mr. Halverstadt, when asked how he knew that Mr. Ohnick was president of the Buddhist Mission Society, said: "Because he told me so and because he had the records." (St. of F., pp. 11-12.)

Under the rule that declarations of an agent are not competent to bind the principal as to the agency, there is absolutely no proof that Ohnick was an officer of the grantee corporation, and Mr. Halverstadt's testimony was incompetent to show possession by said corporation at all. (*Gregory vs. Loose*, 19 Wash. 599; *Larson vs. American Bridge Co.*, 40 Wash. 224; *Woodworth vs. School District*, 92 Wash. 456.)

Appellant, however, cites *State vs. Dana*, 59 Wash. 30, to the effect that a deed is presumptively executed and delivered on the date of its execution and acknowledgement.

This presumption should not prevail in this case. This is not a suit between the grantor and grantee. We apprehend that that presumption would no doubt be permissible if the Buddhist Mission Society had sued Shokuta in ejectment or otherwise with respect to possession of the land and had established its possession of the deeds. But where a deed is not brought to light until nine years after its purported execution and has never been recorded, we submit if any legal presumption should be indulged it ought to be that of non-delivery, at least until the date actual possession thereof was proved.

"The mere fact of the grantee's possession of the deed does not necessarily amount to a delivery, since the deed may have been obtained by theft or fraud, or the grantee may hold it as agent of the grantor, or he may have possession of it merely for the purpose of examination."

Thompson, Title to Real Property, p. 308, citing *Dietz vs. Farish*, 44 N. Y. Sup. Ct. 190; *Lee vs. Richmond*, 90 Ia. 695, and *Comer vs. Baldwin*, 16 Minn. 172.

Failure to record should lead to a presumption of non-delivery upon the same theory that recording gives rise to a presumption of delivery. (*Prignon vs. Daussat*, 4 Wash. 199; *Bjmerland vs. Eley*, 15 Wash. 101; *Prentice vs. Hays*, 88 Pac. [Kan.] 738; 9 L. R. A. [N. S.] 224.)

Delivery at the date of execution and acknowledgement obviously cannot be presumed in this case for another reason. The quitclaim deed from Shokuta and Kanasashi to the Buddhist Mission Society was dated Jan. 28, 1913. Horrigan's deed to blank grantee was dated Feb. 26, 1913. On Dec. 27, 1915, nearly three years after the co-grantors executed the deed to the Buddhist Mission Society, Mr. Kanasashi, one of the co-grantors by warranty deed, properly recorded, conveyed the identical property to Mr. Shokuta, the other co-grantor (Ex. "D.").

A warranty deed, by section 10552, Rem. Comp. Stat., "shall be deemed and held a conveyance in fee simple to the grantee" with covenants, *inter alia*, "that at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple in and to the premises."

If Kanasashi had fee simple title on December 27, 1915, which he then conveyed to Shokuta, it certainly cannot be contended that either Shokuta or Kanasashi could convey title to the property to the Buddhist Mission Society on January 28, 1913, so exhibit "D" positively negatives the presumption that Exhibit "1" was sufficiently delivered to pass title as of the date of its execution and acknowledgement.

In any event, presumptions furnish simply a rule of evidence when certain proof is lacking; they are never allowed to displace facts. (*Beeman vs. Puget Sound T. L. & P. Co.*, 79 Wash. 137.)

In that case this court quoted from *Paul vs. United Rys. Co.*, 152 Mo. App. 577, as follows:

"Presumptions' as happily stated by a scholarly counselor *ore tenus*, in another case, 'may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.' That presumptions have no place in the presence of actual facts disclosed to the jury, or where plaintiff should have known the facts had he exercised ordinary care, is held in many cases, of which samples are, *Reno vs. Railroad*, 180 Mo. 1, c. 483; *Nixon vs. Railroad*, 141 Mo. 1, c. 439; *Bragg vs. Railroad*, 192 Mo. 331. To give place to presumptions on the facts of this case, is but to play with shadows and reject substance."

The language is much in point in this case. Appellant had it in his power to prove by positive evidence the date of delivery of the deeds in question. The facts were in his knowledge and not that of respondent, who would have been required to prove a negative, if it attempted by proof to establish the non-delivery of the deeds prior to April 26, 1921.

In *Hyer vs. Holmes Land Co.*, 79 S. E. (Ga. App.) 58, it was said (syllabus):

"Where the means of proving a negative are not within the power of one of the parties, but all the proof upon the subject is within the control of the other, who, if the negative is not true, can disprove it at once, the truth of the negative averment can be presumed from the fact that the party who

has within his power proof (if such exists) that the negative is not true, still withholds or does not produce such proof."

In *Clover vs. Clover*, 224 S. W. (Texas) 916-920, it was said:

"We understand the rule, which is well settled by authority, to be that the failure to produce evidence peculiarly within the knowledge of a party will raise a presumption against him, and every reasonable intendment will be in favor of his opponent on that issue."

If the doctrine is not sufficiently well established by the adjudicated cases, we submit that this court should at this time lay down the rule that, in a case of this kind, the burden of proving or disproving execution and delivery of a secret deed should fall upon the grantor or grantee under such deed and not upon a litigant under a *lis pendens* who does not have negative proof in his possession, but must rely upon the record title.

We submit that there was no evidence of delivery of the deeds in question until after the *lis pendens* was filed, if at all.

III.

LEGAL TITLE IN SHOKUTA AND NOT HARRIGAN.

Appellant makes the alternative argument that if there was no delivery such as to vest title in the Buddhist Mission Society, the decree was erroneous because in that event the title was in Horrigan by virtue of Exhibit "G". This argument is answered by the testimony of Mr. Horrigan at p. 10 of the Statement of Facts:

"Q. Are you the Edward Horrigan mentioned as vendor in that contract? A. Yes, sir.

"Q. I now hand you a paper marked Defendant's Exhibit 2 purporting to be a quitclaim deed from Edward Horrigan, a bachelor, to grantee. Will you examine that, please? Are you the Edward Horrigan that executed that deed? A. Yes, sir.

"Q. You may state whether or not that deed was executed in fulfillment of this contract I just handed you? A. Yes, sir."

It is true this court has held that a forfeitable executory contract of sale of real estate, while it remains executory, creates no interest in land in the vendee and he does not acquire either legal or equitable title until the contract has been fully performed. (*Churchill vs. Ackerman*, 22 Wash. 227; *Younkman vs. Hillman*, 53 Wash. 661; *Converse vs. LaBarge*, 92 Wash. 282; *Shaefer vs. Gregory Co.*, 112 Wash. 408.)

In the LaBarge case it was said:

"By performance they ripen into title, either legal or equitable, but fail of either by nonperformance."

Mr. Horrigan's testimony must be accepted as conclusive evidence of performance of the contract. By that completed performance Shokuta and Kanasashi became vested with the equitable title, and by the execution of deed (Ex. "2") by Horrigan to blank grantee, the co-vendees took legal title.

There was no evidence to show when the contract was fulfilled, but in view of the warranty deed between co-vendees (Ex. "D") they obviously acquired legal title on or before December 27, 1915.

We think as a matter of fact that the fee simple title was shown to be in Shokuta by the deed of December 27, 1915, without any further evidence, for the rule is that a fee simple title is sufficiently shown by a warranty deed without deraining title. (*Darrin vs. Humes*, 60 Wash. 537.)

It cannot be claimed that the quitclaim deed from Horrigan to blank grantee (Ex. "2") was not a valid instrument. (*Clemmons vs. McGeer*, 63 Wash. 446; *Wright vs. Heyting*, 118 Wash. 436.) In the first case it was held that the person to whom such deed is delivered has the right to insert name

of a grantee. When that deed, according to Horrigan's testimony, was given to Kanasashi and Shokuta in fulfillment of the contract of sale, those parties had the undoubted right to insert the name of the Buddhist Society as grantee from them. The name was not inserted but written on the back of the deed. In the Clemmons case the person in possession actually did insert the name of a third party who, in effect, became his grantee. Assuming that the indorsement of the name of the Buddhist Mission Society on the back of the deed was sufficient under the Clemmons case to convey the premises to the society as grantee of Shokuta and Kanasashi, that deed simply became a deed running concurrently with the quitclaim deed dated January 28, 1913, from the two Japanese as grantors to the same society as grantee. There is, therefore, no question in the case of the passing of an after acquired title. Either deed (Exs. "1" or "2") had it been delivered to the society, or, in any event, recorded, prior to *lis pendens*, would have been sufficient to pass title to the Buddhist Mission Society, but from the record, as supplemented by Mr. Horrigan's testimony, legal and equitable title was and remained in Shokuta.

We submit that the judgment of the lower court was correct as to both tracts of land and should be, in all respects, affirmed.

Respectfully submitted.

JOHN H. DUNBAR,
Attorney-General,
E. W. ANDERSON,
Assistant Attorney-General,
Attorneys for Respondent.

3. REPLY BRIEF OF APPELLANT.

I.

The attorney-general in his brief contends that the main issue in this case is an interpretation of the *lis pendens* statute as applied to escheatment proceedings. His interpretation of the statute is that upon the filing of the *lis pendens* all unrecorded deeds affecting the property in question are rendered of no force and effect as against the *lis pendens*.

This contention is answered by a consideration of the nature of an action to escheat lands owned by an alien. The basis of the plaintiff's cause of action is ownership of the land by an alien within the inhibitions of the constitutional provision. The state, upon the commencement of the action, puts in issue the ownership or a lack of ownership by the alien.

The law of this state is that if the ownership is not in the alien at the time of the commencement of the action, the action to escheat will not lie. (*Oregon Mortgage Co. vs. Carstens*, 16 Wash. 165; *Abrams vs. The State of Washington*, 45 Wash. 327; *State ex rel. Atkinson vs. World Real Estate Commercial Co.*, 46 Wash. 104.)

In *State ex rel. Atkinson vs. World Real Estate Commercial Co.*, *supra*, this court, quoting from *Abrams vs. State*, *supra*, said:

"Since the appeal was taken herein we have, in the case of *Abrams vs. State*, 45 Wash. 327, 88 Pac. 327, construed the section of our constitution upon which the appellant relies, and in effect held that the state must forfeit or escheat lands, conveyed to and held by an alien in violation thereof, prior to any alienation of such real estate by the alien to a citizen, for a good and valuable consideration. Passing upon the question herein involved, we said:

"Being an alien, it follows that she had no right to acquire title to real estate in this state by purchase, and the deed executed to her by the appellant *Abrams* was void in the sense that a forfeiture of the property might have been declared by the state at any time while it remained in her posses-

sion and under her control, she claiming title under such deed. This court, however, in the case of *Oregon Mortgage Co. vs. Carstens*, *supra* (16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841), in substance held that an alien holding lands in this state by purchase under a defeasible title, subject to attack on the part of the state, might by deed transfer a good title to a third person entitled to receive and hold it, provided no proceeding had theretofore been taken by the state for the purpose of declaring a forfeiture or escheat. In other words, if Lou Graham (the alien), after receiving her deed from the appellant Abrams, had, for a good and sufficient consideration, conveyed the property to a third party entitled to receive title, the State of Washington could not thereafter, by office found, have forfeited such title as against her grantee. The state could, however, at any time prior to such transfer, have successfully instituted proceedings to declare a forfeiture and escheat.'"

The rule as announced by these decisions is that the state must act while the real estate is owned by the alien. If the alien deeds the property to a person competent to take and to hold, before the commencement of the action to escheat, then the state has no cause of action.

When does the alien deed the land within the meaning of these decisions? It requires no citation of authority to support the position that the alien deeds the land within the meaning of these decisions when he executes and delivers the deed to his grantee. At that time the title and ownership passes from the alien to the grantee. No recordation is necessary.

In the case at bar, when Shokuta executed and delivered a deed to the Buddhist Mission Society, ownership passed out of Shokuta and at that time the right of the state to maintain an action to escheat terminated. The state's right to escheat is dependent upon the title of the alien.

In this case the state can escheat only what interest Shokuta had. The state can assert for the purpose of escheatment only what Shokuta himself could have asserted. Could Shokuta have asserted any claim to the property after his conveyance to the Buddhist Mission Society? Could Shokuta have commenced an action against the property and by filing a *lis pendens* repudiated the unrecorded deed executed and delivered by him?

Obviously no such procedure would be allowed. Yet this is the position the plaintiff has taken. The plaintiff seeks to escheat the land on the ground that it is owned by Shokuta. It puts in issue ownership by Shokuta. Under such issue every valid instrument going to prove or disprove ownership in Shokuta is material. Yet the plaintiff contends that by filing a *lis pendens* it precludes any proof of the unrecorded instruments. It limits the proof to the record title. In this contention no question is raised as to the validity of the unrecorded deeds. We may therefore assume that if the deeds proving ownership in a person competent to hold had been filed prior to the *lis pendens*, the state would have had no cause of action.

In other words, the plaintiffs' position must be that the state can by filing a *lis pendens* create a cause of action where none could have existed in the absence of a *lis pendens*. We do not believe that this is the purpose of the *lis pendens* statute. The plaintiff must have a cause of action regardless of the *lis pendens*.

The statute of *lis pendens* is only a law of procedure. (*Merrick vs. Pat-tison*, 85 Wash. 240.)

The plaintiff's position makes this statute not a law of procedure but a positive law of evidence, excluding from proof of ownership valid unrecorded deeds. This though the very issue of the case is ownership and all title instruments are competent.

That this is not the law is apparent from a consideration of the consti-

tutional and statutory provisions relating to ownership of land by an alien.

Section 33, article II, of the constitution of the state is as follows:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts, and all conveyances of land hereafter made to any alien directly, or in trust for such alien, shall be void; Provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition."

Chapter 50, laws of 1921, in defining ownership, is as follows:

"Section 1. In this act, unless the context otherwise requires, * * *

"(d) To 'own' means to have the legal or equitable title to or the right to any benefit of; * * *"

What issue does the foregoing constitutional and statutory provision raise? Purely that of ownership by the alien. Neither the constitution nor the statute makes any mention of the record title. The law prohibits ownership by an alien and ownership may be by an unrecorded deed as well as by a recorded deed. Under these provisions it cannot be said that the special statute of *lis pendens* can change the constitutional provision of ownership to record title. Nor can the plaintiff by filing a *lis pendens* limit ownership to record title and thereby alter the plain terms of the constitution and the statute. This consideration alone would seem to dispose of the plaintiff's interpretation of the statute.

In *Abrams vs. The State, supra*, and *State ex rel. Atkinson vs. World Real Estate Commercial Co., supra*, no mention was made of the recorded deed. The court followed the plain meaning of the constitutional provision and took the position that the action of escheatment is barred if the alien deeds land prior to the commencement of the action. It is the passing of the title and not the recording of the title instrument that governs; it is the passing of title that determines the ownership as between the state, the alien and the grantee.

Would the state take the position that if the state brought an action to escheat real property on the ground of alien ownership and filed a *lis pendens*, and it developed at the trial that record title was not in the alien but that the alien held by virtue of an unrecorded deed, that the state was barred from proving the true status of the ownership by the unrecorded deed? Could the holder of the record title defend the action to escheat on the ground that his deed to the alien was not recorded? This is the converse of the rule contended for by the plaintiff in the case at bar, but we submit that it is the logical application of the rule announced by the plaintiff.

The plaintiff in this action is in no sense a *bona fide* purchaser and therefore cannot on that ground assert that this case comes within the operation of the *lis pendens* statute.

In an escheatment no notice of the proceedings is necessary. Any person who takes a deed from an alien must take with notice of any proceeding that may have been brought by the state. Under the rule of *Abrams vs. State, supra*, the commencement of the escheatment proceedings takes from the alien all power to transfer the property, and one who takes after the commencement of the proceeding takes nothing. There is, therefore, no necessity for the filing of a *lis pendens* nor can the state by filing a *lis pendens* add to the effect of its proceeding. If the alien does not own the land the

state cannot by filing a *lis pendens* make out a case of alien ownership where none in fact exists.

The plaintiff argues that if the law is not as he contends then the Alien Land Law is a dead letter and in support of this proposition he assumes a case in which by means of a series of frauds by the alien and his confederates the state would be unable to prove its case.

It would seem a sufficient answer to this argument to say that if the exercise of a legal right is to be denied for the reason that such exercise might in some cases be the means of fraud and over-reaching, then few, if any, rights can be asserted.

The presumption of the law is that men act honestly and not fraudulently. (*Pederson vs. Seattle City Railway Co.*, 6 Wash. 202; *Samuel vs. Kittinger*, 6 Wash. 261.)

This argument is, however, fully answered by this court in the case of *Oregon Mortgage Co. vs. Carstens*, 16 Wash. 165. In this case the question arose as to whether or not an alien mortgagee should be allowed to satisfy its mortgage by taking a deed from the mortgagor and whether such procedure would be within the clause of the constitutional provision relating to the acquisition of property by an alien "in the ordinary course of justice in the collection of debts."

The contention was that if such action was allowed fraud upon the Alien Land Law would be perpetrated. This court in answering the contention said, on page 171:

"As an alien may acquire and hold lands in this state in the instances specified, and in case of mineral lands, etc., under the last part of the provision, may clearly obtain title thereto by direct purchase, the mere form of the conveyance can prove nothing; and the real question in each case must be whether the land was obtained in good faith or by fraud in violation of the provisions, and this should only be determined by a proceeding upon the part of the state. Before such a determination, the presumption would be that the parties had kept within the law rather than that they had violated it, and *prima facie* the deed would be good."

II.

The attorney-general in the second division of his argument raises the point that possession of the deed (Ex. "1") could not by presumption show delivery prior to April 26, 1921. The theory of his argument being that there was no proof showing possession until after the filing of the *lis pendens*.

Where the grantee has possession of a properly executed deed, there is no necessity of a presumption as to delivery from and after the time possession is shown. The rule is that a deed is presumptively executed and delivered upon the date of its execution and acknowledgment. (*State vs. Dana*, 59 Wash. 30.)

Subsequent possession by the grantee raises a presumption of delivery and that presumption relates back to the time of acknowledgment and not to the date when possession is shown:

"Where a grantee is in possession of a deed which has been duly executed, the presumption arises that it has been duly delivered, and the burden of proof rests upon the party disputing the presumption, the presumption being disputable and not conclusive. So possession of a deed by a person claiming under the grantee is regarded as evidence of delivery to such grantee until the contrary is shown, and possession by the husband of the grantee may be sufficient to show delivery to the wife. It has been held that the presumption of delivery, arising from possession by the

grantee will not be overcome by indefinite evidence on the part of the grantor, and that it is overcome by evidence that the grantor delivered the deed to a third person for delivery on specified conditions, and that the third person in violation of instructions, delivered the deed to the grantee, but not by the fact that the grantee *has failed to record his deed, and allowed the grantor to remain in possession.* * * * (Italics ours.) (18 C. J. 418, 419.)

The evidence of the possession of the deed by the Buddhist Mission Society, through its president, Mr. Ohnick, was sufficient. This was not a case where third parties were attempting to bind the principal by the declaration of the agent. The question was whether or not Mr. Ohnick was president of the Buddhist Mission Society. Mr. Ohnick's statement was competent to prove the fact of agency. Proof of agency may be made either by the testimony of the agent or the principal. (*Bender vs. Ragan*, 53 Wash. 521.)

The testimony not only showed that Ohnick not only stated that he was the president of the Buddhist Mission Society but that he had in his possession papers belonging to the society. This was uncontroverted and was sufficient to prove that Ohnick was an officer of the society. (*Lemcke vs. Funk & Co.*, 78 Wash. 460.)

Plaintiff argues that the presumption of delivery in this case should not be allowed for the reason that the defendant should have proven all the facts of delivery. The answer to this contention is that proof of delivery of the deed was sufficiently shown by the execution and acknowledgment of the deed and proof of possession by the grantee. This was a presumption based on proven facts. Neither the facts nor the presumption arising from the facts were controverted by the state, nor was any attempt made to controvert it. The defendant was not required to make further proof in the absence of controverting evidence. When a party makes out a *prima facie* case, that case is sufficient in the absence of proof overthrowing the *prima facie* case. If the rule is otherwise, then there is no rule as to presumption arising from proven facts.

The presumption in this case was based upon the fact of execution and acknowledgment of a deed and such a presumption uncontroverted is sufficient. (*Weber vs. Yancy*, 7 Wash. 84; *Beach vs. Brown*, 20 Wash. 266.)

In support of the defendant's contention that the quitclaim deed by Shokuta and Kanasashi to the Buddhist Mission Society (Ex. "1") was delivered, it should be noted that the quitclaim deed executed by Horrigan to the blank grantee in performance of the contract of sale (Ex. "H") was likewise in the possession of the Buddhist Mission Society.

III.

The attorney-general's position as announced in the third division of his argument, as we understand it, is that if the deed from Shokuta and Kanasashi (Ex "1") is ineffective for want of delivery, then title is in Shokuta and not in Horrigan.

The same argument that would prove the deed of the co-grantors (Ex "1") ineffective, would prove the deed from Horrigan to the blank grantee ineffective to prove ownership in Shokuta. Horrigan's testimony was to the effect that the deed was executed in fulfillment of the contract. (S. F. 10.) There was no proof of delivery to Shokuta and Kanasashi of the quitclaim deed from Horrigan (Ex. "2"), other than the same proof that was made in support of the delivery of the quitclaim deed. (Ex. "1".) The

attorney-general cannot deny the delivery of the quitclaim deed of Shokuta and Kanasashi (Ex. "1") for the purpose of showing the title did not pass to the Buddhist Mission Society and then assert the delivery of the Horrigan deed (Ex. "2") for the purpose of showing title in Shokuta.

If the plaintiff takes the position that the record title governs in this case, then the record shows title in Horrigan. The contract of sale from Horrigan to K. Shokuta and M. Kanasashi (Ex. "H") passed no title to the vendees. The vendees in the contract had neither a legal nor equitable interest in the land and there can be only a legal or equitable interest in land. (*Tieton Hotel Co. vs. Manheim*, 75 Wash. 641, 642, 643.)

The warranty deed from Kanasashi to Shokuta (Ex. "D") could pass nothing to the grantee because, as far as the record is concerned, Kanasashi had no interest in the land. The record title was therefore in Horrigan.

Respectfully submitted,

GUIE & HALVERSTADT,
Attorneys for Appellant.

4. DECISION OF THE COURT. (PENDING.)

SECTION B. KUSUMI CASE IN THE SUPERIOR COURT, STATE OF WASHINGTON.

STATE OF WASHINGTON, Plaintiff, vs. J. T. KUSUMI, and JANE DOE KUSUMI, his wife, whose true Christian name is unknown; S. HAYASHI and JANE DOE HAYASHI, his wife, whose true Christian name is unknown; ENTERPRISE INVESTMENT COMPANY, a Corporation; JAPANESE COMMERCIAL BANK OF SEATTLE, a Corporation, Defendants.

No. 159868.

1. COMPLAINT.

Comes now the State of Washington by Malcolm Douglas, prosecuting attorney for King County, and for cause of action against the defendants states and alleges, as follows:

I.

That J. T. Kusumi and Jane Doe Kusumi, his wife, whose true Christian name is unknown to the plaintiff or any of its officers or agents, are and were at all times hereinafter mentioned husband and wife.

II.

That S. Hayashi and Jane Doe Hayashi, his wife, whose true Christian name is unknown to the plaintiff or any of its officers or agents, are and were at all times hereinafter mentioned husband and wife.

III.

That the Enterprise Investment Company is a corporation, organized and existing under and by virtue of the laws of the State of Washington.

IV.

That the Japanese Commercial Bank of Seattle is a corporation organized and existing under and by virtue of the laws of the State of Washington.

V.

That the defendants J. T. Kusumi and Jane Doe Kusumi, his wife, S. Hayashi and Jane Doe Hayashi, his wife, are not citizens of the United States, but are aliens in that they are citizens and subjects of the Empire of Japan and that none of said defendants have declared their intention in good faith to become citizens of the United States.

VI.

That the east half ($E\frac{1}{2}$) of the southeast quarter ($SE\frac{1}{4}$) of the southwest quarter ($SW\frac{1}{4}$) of the southeast quarter ($SE\frac{1}{4}$) of section twenty-one (21), township twenty-six (26) north, range four (4) east, W. M., situated in King County, State of Washington, is agricultural land and capable of being used only and exclusively for agricultural purposes.

VII.

That the defendants J. T. Kusumi and S. Hayashi acquired title to said land in violation of section 33, article II, of the constitution of the State of Washington; that the title to said land was held by the Western American Realty Company, a corporation, organized under and by virtue of the statutes of the State of Washington, in trust for the use and benefit of said defendants J. T. Kusumi and S. Hayashi, who were the actual owners thereof subject to terms and provisions of said section 33, article II, of the constitution of the State of Washington.

VIII.

That on June 1, 1921, the said Western American Realty Company, a corporation, at the instigation and on behalf of the said defendants Kusumi and wife and Hayashi and wife, deeded said land to the Enterprise Investment Company, a corporation, one of the defendants herein, by deed filed June 7, 1921, in vol. 1143 of Deeds, page 636 of the records of the auditor of King County, Washington, which deed expressed a consideration of the sum of ten dollars (\$10.00), but in truth and in fact there was no consideration passing between said Western American Realty Company, a corporation, and the Enterprise Investment Company, a corporation, or J. T. Kusumi and wife and S. Hayashi and wife, or any of them, either financial or otherwise, on account of said conveyance. The Enterprise Investment Company, a corporation, executed a mortgage to the Western American Realty Company, a corporation, covering said land for the express consideration of thirty-five hundred dollars (\$3500.00) with interest at five (5) per cent, payable June 3, 1927, and recorded in the office of the auditor of King County, Washington, in vol. 816 of Mortgages, at page 307; that there was no actual consideration, financial or otherwise, passing between the said Western American Realty Company, a corporation, and the Enterprise Investment Company, a corporation, on account or by reason of said mortgage, but that the same was actually made for the use and benefit of the said Kusumi and wife and Hayashi and wife. That thereafter, the exact date of which is unknown to this plaintiff and to any of its officers or agents, the said Western American Realty Company, a corporation, assigned and transferred said mortgage to the defendants J. T. Kusumi and S. Hayashi; that there was no actual consideration, financial or otherwise, passing between said defendants J. T. Kusumi and S. Hayashi; and the said corporation, Western American Realty Company, for the transfer or assignment of said mortgage, but that the same was made together with the various other transactions hereinbefore and hereinafter referred to for the purpose of evading the effect of chap. 50 of the Session Laws of 1921

of the State of Washington; that the Enterprise Investment Company, a corporation, made and executed direct to the said J. T. Kusumi and S. Hayashi certain lease or leases covering said property for a term of years, but there was no consideration, financial or otherwise, passed between defendants J. T. Kusumi and S. Hayashi and the Enterprise Investment Company, a corporation, by reason of said lease. That said J. T. Kusumi and Jane Doe Kusumi, his wife, and S. Hayashi and Jane Doe Hayashi, his wife, are now in the actual occupation of said real property and holding the same under and by virtue of the transactions hereinbefore referred to and set out and in violation of said section 33, art. II, of the constitution of the State of Washington and chap. 50 of the Session Laws of 1921 of the State of Washington.

IX.

That the defendant the Japanese Commercial Bank of Seattle, a corporation, has or claims to have some interest in said property by reason of a chattel mortgage on the crops grown on said land covering a certain period or otherwise, the exact interest of which is unknown to this plaintiff, its officers or agents, but this plaintiff alleges that the interest of the said Japanese Commercial Bank of Seattle, a corporation, is inferior, subsequent, subordinate and subject to the interest of the plaintiff herein.

X.

That the actual and real owners subject to the constitutional and statutory provisions herein mentioned of said property are J. T. Kusumi and Jane Doe Kusumi, his wife, and S. Hayashi, and Jane Doe Hayashi, his wife, and except as herein otherwise mentioned none of the other defendants or any other parties, persons or corporations have any actual right, title or interest in and to said property; that by reason of the facts in this complaint alleged, said property is forfeited and escheated to the State of Washington.

Wherefore plaintiff prays that this honorable court enter its judgment and decree herein declaring said property forfeited and escheated to the State of Washington, and further declaring and decreeing that the right, title and interest of said defendants and each of them, if any there be, are null and void and of no force and effect whatsoever and confirming the title of the plaintiff therein.

MALCOLM DOUGLAS,
EWING D. COLVIN,
Attorneys for Plaintiff.

MEMORANDUM.

DESCRIPTION OF LAND.

"E $\frac{1}{2}$ of SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of sec. 21, twp. 26 N., R. 4 E., W. M., about five acres, excepting 30 feet south for county road."

IMPROVEMENTS.

"5 room dwelling house, 3 barns, 24x20; 12x25; 12x20; all clear from stumps and fenced up."

HISTORY OF TRANSACTIONS.

August 29, 1916, Ralph C. Chittenden, owner, leased this land to Smith Bates Company, a Washington corporation, for term of three years, beginning September 1, 1916, ending August 31, 1919. Rentals, \$720.00, payable

monthly at rate of \$20.00. In this lease Smith Bates Co. had an option to purchase the land during the term of lease on following conditions:

\$3,400.00 on or before Sept. 1, 1917.

\$3,500.00 on or before Sept. 1, 1918.

\$3,600.00 on or before Sept. 1, 1919.

Lease was recorded in vol. 34, of Leases, p. 570, King County, Sept. 6, 1916.

J. T. Kusumi, K. Hamamoto and S. Oko bought hogs, horses, wagons, farming implements and all other personal properties together with leasehold interest of Smith Bates Co. for \$25,000.00, paying them \$10,000.00 in cash, the balance of \$15,000.00 to be paid monthly at rate of \$2,500.00.

July 26, 1917, the parties to this deal entered an agreement in writing and Smith Bates Co. assigned the lease to J. T. Kusumi, K. Hamamoto and S. Oko. The assignment of lease was recorded in vol. 36 of Leases, p. 322, King County, August 17, 1917.

The Japanese paid Smith Bates Co. all the monies under contract before expiration of the lease and they also paid rents every month to Ralph G. Chittenden.

Prior to expiration of the lease Kusumi applied to Chittenden to renew the lease for 4 years or 5 years, but Chittenden refused to renew the lease except for a short term, which was not satisfactory with Kusumi because he and his association invested large sums of money and had about 800 head of hogs and other livestock on the place. The Western American Realty Co. was willing to buy the land and lease the land to Kusumi and others for 5 years; Kusumi, K. Hamamoto, S. Oko assigned lease to Western American Realty Co. By virtue of the assignment of lease Western American Realty Co. bought the land for \$3,600.00 and took title to the land; the deed was recorded in vol. 1073 of Deeds, p. 239, King County, Sept. 3, 1919.

Sept. 3, 1919, J. T. Kusumi advanced \$3,600.00 to Walter A. Keene, with an understanding that the Western Realty Co. would lease the land in question for 5 years at monthly rental of \$20.00, and that the Western American Realty Co. would credit \$20.00 per month for rental of the land during the term of the lease and that uncredited balance of advance should be paid to Kusumi and Hayashi at any time as they may so desire, but without interest for the same.

At this stage of transaction K. Hamamoto and S. Oko quit the partnership and S. Hayashi took over their place and it was agreed with Kusumi that their interest in their business shall be 50 to 50.

In September, 1919, exact date of which Kusumi and Hayashi are uncertain, the Western American Realty Co. leased them the land in question for 5 years, beginning from September 1, 1919, at a monthly rental of \$20.00 and that the rent should be credited out of the advance made by these Japanese. This lease was not recorded, and it was surrendered to Mr. Keene in May, 1921. At the time of \$3,600.00 advanced to Mr. Keene a note was given to J. T. Kusumi and S. Hayashi; note was a demand note.

Western American Realty Co. gave credit to J. T. Kusumi and S. Hayashi on that lease as follows:

1919, Sept. to Dec. inclusive, 4 months at \$20.00	\$ 80.00
1920, Jan. to Dec. inclusive, 12 months at \$20.00	\$240.00
1921, Jan. to May, inclusive, 5 months at \$20.00	\$100.00

Total credit on lease\$420.00

June 1, 1921, Enterprise Investment Co. gave written lease to J. T. Kusumi and S. Hayashi of following property:

"E $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$, SE $\frac{1}{4}$, sec. 21, twp. 26 N., R. 4 E., W. M. (containing 5 acres) and lots 1 to 20, inclusive, in block 1 of Kenwood Division No. 2, King County, Washington, according to the recorded plat thereof, containing 5 acres."

for a term of 5 years from June 1, 1921, at annual rent of \$450.00, payable semi-annually in advance, \$225.00 on every 6 months. This lease is recorded in vol. 43 of Leases, p. 27, King County, June 7, 1921.

J. T. Kusumi and S. Hayashi paid following rents to Enterprise Investment Co.:

July 7, 1921	\$225.00 by check,
Feb. 28, 1922	\$150.00 by check,
May 31, 1922	\$100.00 " "
July 13, 1922	\$200.00 " "
May 1, 1923	\$140.00 " "

May 31st, 1921, at request of Mr. W. A. Keene, J. T. Kusumi, Sen Kusumi, his wife, S. Hayashi, Yakeko Hayashi, his wife, gave to Enterprise Investment Co., a quitclaim deed of that "E $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$, SE $\frac{1}{4}$, sec. 21, twp. 26 N., R. 4 E., W. M.", and it is recorded in vol. 1147 of Deeds, p. 366, King County, June 21, 1921. Consideration of \$1.00 for the deed.

June 1, 1921, J. T. Kusumi and S. Hayashi took \$3,500.00 note secured by a real estate mortgage of that "E $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$, SE $\frac{1}{4}$, sec. 21, twp. 26 N., R. 4 E., W. M.", which mortgage was originally made by Enterprise Investment Co., dated June 1, 1921, in favor of Western American Realty Co., the note was also made in favor of the Western American Realty Co., dated June 1, 1921, and both the note and mortgage assigned by Western American Realty Co. to J. T. Kusumi and S. Hayashi. This assignment of mortgage is not recorded, but it is now pledged to the Japanese Commercial Bank as additional security for a certain loan made by it.

December 5, 1919, J. T. Kusumi and S. Hayashi made a contract with Dexter Horton Trust & Savings Bank to purchase following property:

"Lots 1 to 30, inclusive, block 1 of Kenwood Division No 2, King County, Washington, according to the recorded plat thereof"

for a consideration of \$2,500.00 with a cash payment of \$500.00 on December 5, 1919, and the balance of \$2,000.00 to be paid monthly at rate of \$50.00 with additional interest at rate of 6% per annum for the deferred payments.

The following payments were made:

Date	Principal	Interest	Total
Dec. —, 1919.....	\$ 500.00	\$....	\$ 500.00
Jan. 30, 1920.....	50.00	9.87	59.87
Feb. 28, 1920.....	50.00	9.50	59.50
March 30, 1920.....	50.00	9.50	59.50
April 30, 1920.....	50.00	8.75	58.75
June 1, 1920.....	50.00	8.75	58.75
July 18, 1920.....	50.00	9.10	59.10
July 31, 1920.....	50.00	7.65	57.65
Sept. 1, 1920.....	50.00	8.00	58.00
Oct. 4, 1920.....	50.00	7.75	57.75
Nov. 1, 1920.....	50.00	7.50	57.50
Dec. 1, 1920.....	50.00	7.25	57.25
Jan. 7, 1921.....	50.00	7.25	57.25
June 5, 1921.....	250.00	40.50	290.50
	\$1,350.00	\$141.37	\$1,491.37

Balance unpaid on contract on June 5, 1921.....	\$2,500.00
	1,350.00
	\$1,150.00
Kusumi and Hayashi cleared about 4 acres of this land and put it under cultivation; the reasonable value of this land on May 31, 1921....	\$4,000.00
Unpaid balance	1,150.00
Equity value of J. T. Kusumi and S. Hayashi.....	\$2,850.00

In May, 1921, Kusumi and Hayashi were advised that their right in this contract is invalid and therefore their investment is not safe unless they immediately sell their equity in the contract before new law became effective. They offered Mr. Walter A. Keene to sell their contract and lease the place from him. At his suggestion it was agreed that they will make an assignment of the contract to the Enterprise Investment Co. and lease the land from the company for 5 years.

In the lease of the Chittenden property Kusumi and Hayashi were given the credit for rent \$420.00 and the balance of \$3,180.00 was still due to them on June 1, 1921, and that their equity value in that Dexter Horton Bank property was estimated at \$2,850.00, making total aggregate of \$6,030.00. Kusumi and Hayashi wanted to get \$8,030.00, but Mr. Keene refused to pay so much. It was finally agreed that Mr. Keene will pay them \$5,000.00, but he cannot pay them any cash. As far as payment is concerned they were compelled to take anything Mr. Keene dictated as they were in a position to get whatever they can get out of the deal.

It was agreed finally as follows:

(1) Kusumi and Hayashi surrender lease of Chittenden property executed by Western American Realty Co. in Sept., 1919.

(2) Kusumi and Hayashi and their wives give Enterprise Investment Co. a quitclaim deed for Chittenden property, in order to clear any question of trust.

(3) Kusumi and Hayashi assign the Dexter Horton Trust & Savings Bank's contract to Enterprise Investment Co.

(4) For (1), (2) and (3) Mr. Keene will pay \$5,000.00 with 2 notes \$3,500.00 and \$1,500.00, both of which made by Enterprise Investment Company; former secured by a real estate mortgage and latter secured by assignment or real estate contract.

(5) Enterprise Investment Co. executed a lease for 5 years to J. T. Kusumi and S. Hayashi at annual rental of \$450.00.

May 31, 1921, J. T. Kusumi and S. Hayashi executed an assignment of Dexter Horton Trust and Savings Bank's contract to Enterprise Investment Co., recorded in vol. 1143 of Deeds, p. 10, King County, June 7, 1921.

June 1, 1921, Western American Realty Co. gave a quitclaim deed to Enterprise Investment Co. to E $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$, SE $\frac{1}{4}$, sec. 21, twp. 26 N., R. 4 E., W. M. (Chittenden property), and the instrument is recorded in vol. 1143 of Deeds, p. 836, King County, June 7, 1921. June 1, 1921, Enterprise Investment Co. gave a note, \$3,500.00, dated June 1, 1921, payable on or before 6 years, interest 5% per annum, payable annually, to Western American Realty Co., the same being secured by a real estate mortgage on Chittenden property, the mortgage dated June 1, 1921, recorded in vol. 816 of Mortgages, p. 307, King County, June 7, 1921.

June 1, 1921, Western American Realty Co. made an assignment of mortgage of Enterprise Investment Co. of that Chittenden property of J. T. Kusumi and S. Hayashi; this is not recorded.

June 1, 1921, when Kusumi and Hayashi surrendered first lease of Chittenden property, made in Sept., 1919, together with a note of Western American Realty Co. in the sum of \$3,600.00, and gave a quitclaim deed of that Chittenden property, dated May 31, 1921, and gave assignment of Dexter Horton Bank property, dated May 31, 1921, to Mr. Walter A. Keene, they were given in return 2 notes, \$3,500.00 secured by mortgage made by Enterprise Investment Co. to Western American Realty Co., and it assigned to Kusumi and Hayashi, and \$1,500.00 unsecured note made by Enterprise Investment Co., dated June 1, 1921. At the same date Enterprise Investment Co. executed a lease to J. T. Kusumi and S. Hayashi for a term of 5 years of those of Chittenden property and Dexter Horton Bank property at annual rental of \$450.00.

The business of Kusumi and Hayashi in the years of 1921, 1922 and 1923 was very poor and could not make any money, therefore they failed to pay rent punctually as shown elsewhere and borrowed money from banks from time to time. Enterprise Investment Co. made several demands to pay up the rent, but they could not pay the same, therefore they in turn did not demand the payment of interest on the notes. Enterprise Investment Co. does not pay any interest on the notes up to date. The \$3,500.00 note is now pledged to the Japanese Commercial Bank as additional security to the obligation secured by crop mortgage. (Banking relations of Kusumi and Hayashi will be shown in separate papers.)

Kusumi and Hayashi paid real estate taxes on that Dexter Horton Bank property up to 1921; they did not pay any real estate tax for Chittenden property; they paid all personal property taxes since they went into business there. They are now using farm for vegetables, truck garden, not hog ranch.

2. FINDINGS OF FACT.

This cause having heretofore come regularly on for trial on the 26th day of February, 1924, upon the complaint of the plaintiff and the answers of the defendants J. T. Kusumi and Sen Kusumi, his wife, S. Bayashi and Yayeko Bayashi, his wife, and the separate answers of the Enterprise Investment Company, a corporation, and the Japanese Commercial Bank of Seattle, a corporation, the plaintiff appearing by Malcolm Douglas, prosecuting attorney of King County, and Ewing D. Colvin, deputy prosecuting attorney of King County, and the defendants J. T. Kusumi and Sen Kusumi, his wife, S. Bayashi and Yayeko Bayashi, his wife, appearing in person and by their attorneys, Guie and Halverstadt, and the Enterprise Investment Company, a corporation, appearing by its officers and attorney, T. M. Williams, and the Japanese Commercial Bank of Seattle, a corporation, appearing by its attorneys, W. M. Williams and Preston, Throgrimson & Turner, and the court having heard the evidence admitted on behalf of the plaintiff and the respective defendants and being fully advised in the premises, does hereby make the following findings of fact:

I.

That the defendants J. T. Kusumi and Sen Kusumi, his wife, and S. Bayashi and Yayeko Bayashi, his wife, and each of them, are aliens, being the subjects of the Empire of Japan, and that none of them have in good faith declared their intention to become citizens of the United States.

II.

That the defendant the Enterprise Investment Company, a corporation, is a corporation organized and existing under and by virtue of the laws

of the State of Washington, and the defendant Japanese Commercial Bank of Seattle is a corporation and existing under and by virtue of the laws of the State of Washington.

III.

That the east half (E $\frac{1}{2}$) of the southeast quarter (SE $\frac{1}{4}$) of the southwest quarter (SW $\frac{1}{4}$) of the southeast quarter (SE $\frac{1}{4}$) of section twenty-one (21), township twenty-six (26) north, range four (4) east, W. M., situated in King County, State of Washington, is agricultural land and capable of being used only and exclusively for agricultural purposes.

IV.

That heretofore the defendants J. T. Kusumi and Sen Kusumi, his wife, and S. Bayashi and Yayeko Bayashi, his wife, acquired title to the hereinbefore described real property, which title was held by the Western American Realty Company, a corporation, in trust for said defendant J. T. Kusumi and Sen Kusumi, his wife, S. Bayashi and Yayeko Bayashi, his wife, subject to and in evasion and violation of section 33, article 2, of the constitution of the State of Washington.

That on or about May 31, 1921, J. T. Kusumi and Sen Kusumi, his wife, and S. Bayashi and Yayeko Bayashi quitclaimed said property to the defendant the Enterprise Investment Company, a corporation, by deed recorded in vol. 1147 of Deeds, page 366, in the office of the auditor of King County, Washington, and that on June 1, 1921, the Western American Realty Company gave a quitclaim deed to said land to the defendant the Enterprise Investment Company, a corporation, which said deed is recorded in vol. 1143 of Deeds, page 636, in the office of the auditor of King County, Washington; that there was no financial consideration passed between any of said parties for said deeds, but as a part of the same transaction the Enterprise Investment Company, a corporation, mortgaged said land to the Western American Realty Company for the sum of thirty-five hundred dollars (\$3500.00), which mortgage is recorded in the office of the auditor of King County in vol. 816 of Mortgages, page 307, and is dated June 3, 1921, and that on June 1, 1921, the Enterprise Investment Company, a corporation, executed a lease covering said land to J. T. Kusumi and S. Bayashi, which said lease is recorded in the office of the auditor of King County, Washington, vol. 43 of Leases, page 27; that thereafter the Western American Realty Company, a corporation, assigned the mortgage hereinbefore referred to to the defendants J. T. Kusumi and S. Bayashi; that there was no financial consideration passed between said parties for the assignment of said mortgage; that the reasonable, fair cash value of said land at all times herein referred to did not exceed the sum of thirty-five hundred (\$3500.00) dollars and that all the transactions hereinbefore referred to were made for the purpose of evading the constitution of the State of Washington and chap. 50 of the Session Laws of 1921 of the State of Washington.

VI.

That on the 23rd day of June, 1922, a *lis pendens* was filed in the office of the auditor of King County, Washington, in this cause, giving full notice of the pendency of this action; that thereafter the defendants J. T. Kusumi and S. Bayashi assigned said mortgage referred to in the last preceding paragraph to the defendant the Japanese Commercial Bank of Seattle; that said assignment was made with full notice and knowledge of the pendency of this action; however, said Japanese Commercial Bank of Seattle holds a chattel mortgage on the crops raised or to be raised on said land by the defendants Kusumi and Hayashi, and said chattel mortgage is a good and

valid lien against the crops raised or hereafter to be raised on said land by said Kusumi and Hayashi as long as they retain possession of said land.
Done in open court this — day of April, 1924.

CONCLUSIONS OF LAW.

From the foregoing findings of fact the court now makes the following conclusions of law:

1. That all the right, title and interest of all the defendants in this action to the land hereinbefore described was held subject to section 33, article 2, of the constitution of the State of Washington, and chap. 50 of the Session Laws of 1921, and in violation thereof, and that by virtue of said constitution and the statutes of the State of Washington, said land and the whole thereof and all right, title and interest of each and all of the defendants therein should be forfeited and become the property of the State of Washington, except the claim of the Japanese Commercial Bank of Seattle against the crops raised on said land or to be raised on said land by said Kusumi and Hayashi as long as they remain in possession of said land.

Done in open court this — day of April, 1924.

NOTE.—The case has been appealed to the supreme court, State of Washington.

SECTION C. MIYAGAWA CASE IN THE SUPERIOR COURT, STATE OF WASHINGTON.

STATE OF WASHINGTON, Plaintiff, vs. M. MIYAGAWA and MITSUE MIYAGAWA, his wife; TOKI MIYAGAWA, JOHN DOE KURABA, whose true given name is to plaintiff unknown; CARL JOHAN ENGSTROM; CAPITOL SAVINGS & LOAN ASSOCIATION, a corporation, and A. V. WILLIAMS & CO., a Corporation, Defendants.

No. 163422.

1. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on for trial before the court regularly on the 9th day of July, 1923, the plaintiff appearing by Ewing D. Colvin, deputy prosecuting attorney of King County, Washington, the defendants M. Miyagawa and Mitsue Miyagawa, his wife, John Doe Kuraba, whose true Christian name is to plaintiff unknown, Carl Johan Engstrom, not appearing, but each of them having heretofore made default herein, and their and each of their defaults having been heretofore duly and regularly entered, the Capitol Savings & Loan Association appearing by Bigelow, its attorney, the defendant A. V. Williams & Co. appearing by Reames & Frye, its attorneys, and its officers, and Toki Miyagawa appearing in person and by Reames & Frye and Guie & Halverstadt, her attorneys, and testimony and evidence on behalf of the plaintiff having been offered and received by the court, and the court being fully advised in the premises, does now make the following

FINDINGS OF FACT.

I.

That the defendants M. Miyagawa and Mitsue Miyagawa are now and at all times in these findings mentioned were husband and wife, and each of them are subjects of the Emperor of Japan, and neither of them have ever declared their intention to become a citizen of the United States; that the defendant John Doe Kuraba, whose true Christian name is to plaintiff unknown, is a subject of the Emperor of Japan, and has never declared his intention to become a citizen of the United States; that the defendant Carl

Johan Engstrom, is a subject of the King of Sweden, but has in good faith declared his intention to become a citizen of the United States; that the defendant Capitol Savings & Loan Association is a corporation, organized and existing under and by virtue of the laws of the State of Washington; that the defendant A. V. Williams & Co., is a corporation organized and existing under and by virtue of the laws of the State of Washington.

II.

That the defendant Toki Miyagawa was born in the City of Seattle in the County of King, State of Washington, on the 5th day of January, 1903, and at all times has been and is now a citizen of the United States.

III.

That the real estate, hereinafter described, located in King County, is agricultural land, being used now and capable of being used only for farming and agricultural purposes, said property being more particularly described as follows:

The northeast quarter ($NE\frac{1}{4}$) of the northwest quarter ($NW\frac{1}{4}$) and the south half ($S\frac{1}{2}$) of the north half ($N\frac{1}{2}$) of the northwest quarter ($NW\frac{1}{4}$) of the northwest ($NW\frac{1}{4}$) quarter, of section seven (7), and the south half ($S\frac{1}{2}$) of the southeast quarter ($SE\frac{1}{4}$) of the southwest quarter ($SW\frac{1}{4}$) of section six (6), all in the township twenty-two (22) north, range three (3) east, W. M., containing seventy (70) acres more or less.

IV.

That on the — day of May, 1921, the defendant M. Miyagawa was, and for some time prior thereto has been, the owner of 98 shares of the capital stock of Rehan Investment Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, and having a capital stock of 100 shares; that Walter Keene was the owner of one of the shares of the capital stock, and Mildred Keene was the owner of one share of said capital stock, on said date last mentioned. That on said — day of May, 1921, said M. Miyagawa made an absolute gift of 50 shares of the capital stock of said Rehan Investment Company to the defendant Toki Miyagawa, and then and there delivered to said Toki Miyagawa a certificate for said 50 shares of the capital stock of said corporation, and the said defendant Toki Miyagawa then and there became the absolute owner of said 50 shares of the capital stock of said corporation, and at all times thereafter, until she transferred the same as hereinafter set forth, remained the absolute owner of said 50 shares of the capital stock of said corporation in her own right, and for her own use and benefit, and the said M. Miyagawa did not thereafter retain or have any interest of any kind, name or nature in said 50 shares of the capital stock of said Rehan Investment Company, nor did any other person, firm or corporation, except said Toki Miyagawa have any right, title or interest in or to said 50 shares of the capital stock of said corporation, or any part or parcel thereof.

V.

That thereafter on, to wit, the 8th day of February, 1922, the owners of the real estate hereinabove described, and the defendant Toki Miyagawa, agreed to an exchange of said 50 shares of the capital stock of said Rehan Investment Company, so owned by said Toki Miyagawa as aforesaid, and said real estate above mentioned, by the terms of which the owners of said real estate became the owners of said 50 shares of capital stock of the Rehan Investment Company, so owned by Toki Miyagawa, and

she transferred the same to the owners of said real estate, and said Toki Miyagawa became the owner of said real estate; that said Toki Miyagawa caused the then owners of said real estate to execute and deliver to the defendant A. V. Williams & Co., their deed to said real estate, and the said A. V. Williams & Co., at the request, with the knowledge and consent of the defendant Toki Miyagawa, executed and delivered to the defendant Capital Savings and Loan Association its mortgage on said real estate for the sum of \$13,000.00, which mortgage bore date the 8th day of February, 1922; that at the time the said real estate was so deeded by the owners thereof to the said A. V. Williams Company as aforesaid, it was agreed between the said A. V. Williams & Company and the said Toki Miyagawa, that upon the execution and delivery of said mortgage to the Capital Savings & Loan Association, the said A. V. Williams & Company should execute and deliver to the said Toki Miyagawa a deed of and to said real estate, subject to said mortgage so executed and delivered to the Capital Savings and Loan Association, and thereafter on, to wit, the 14th day of February, 1922, pursuant to said agreement, the said A. V. Williams & Company did execute and deliver to the said Toki Miyagawa its deed to said real estate, subject to said mortgage of \$13,000.00 so executed and delivered to the Capital Savings and Loan Association as aforesaid. That said deed then was delivered to the said Toki Miyagawa, and at all times since said date has been in her control and possession.

VI.

That said deed so delivered and executed by A. V. Williams & Company to the defendant Toki Miyagawa was not placed on record in the office of the auditor of King County, Washington, because the said A. V. Williams & Company and the said Toki Miyagawa, each of them, believed that it would be more difficult to sell said real estate if her ownership thereof was disclosed by the records in the office of the auditor of King County, Washington; that it was not the purpose or intention of the said Toki Miyagawa to retain the ownership of said real estate, but at all times to sell the same and convert the same into money. That after the said A. V. Williams & Company had deeded said real estate to the defendant Toki Miyagawa, as aforesaid, and while she had the deed of said A. V. Williams & Company to said real estate in her possession, she permitted and caused the defendant A. V. Williams & Company to make, execute and deliver a deed of real estate in the name of said A. V. Williams & Company, as lessor, to the defendant Carl Johan Engstrom, and caused and permitted the said A. V. Williams & Company so to do, without recording the said deed so given to her by the said A. V. Williams & Company, because she believed that it would be more difficult to sell said real estate if her ownership thereof were disclosed by the records in the office of the auditor of King County, Washington.

VII.

That the defendant Toki Miyagawa ever since the 14th day of February, 1922, has been the owner of said real estate, free and clear of any right, title or interest of any of the other parties to this action therein or thereto, except the defendant Capitol Savings & Investment Loan Association, to the extent of its mortgage aforesaid, and except the defendant Carl Johan Engstrom, by virtue of said lease as aforesaid, and the said defendant Toki Miyagawa is now the owner of said real estate free and clear of any right, title, or lien or interest therein or thereto except said mortgage so given to the Capitol Savings & Loan Association as aforesaid, and none

of the other parties, either plaintiff or defendant, have any right, title or interest or lien in or on said real estate or any part or portion thereof.

Done in open court this — day of July, 1923.

WALTER FRENCH,
Judge.

And from the foregoing findings of fact the court deduces the following

CONCLUSIONS OF LAW.

That the defendant Toki Miyagawa is entitled to a decree here in adjudging that she is the owner of said real estate free and clear of any right, title, lien or interest of any of the parties to this action therein or thereto, except the Capitol Savings & Loan Association, one of the defendants above named, which Capitol Savings & Loan Association has a mortgage of said real estate, superior and prior to the interest of said Toki Miyagawa in and to said real estate, which mortgage was executed and delivered to the Capitol Savings and Loan Association on the 8th day of February, 1922, for the sum of \$13,000.00, on which mortgage certain payments have been made, and the said Toki Miyagawa is entitled to the credit thereon equal to the sum of the payments as made thereon as aforesaid, and that the defendant Toki Miyagawa, A. V. Williams & Company, and Capitol Savings & Loan Association are each entitled to recover their costs and disbursements against the plaintiff, to be taxes herein.

Done in open court this — day of July, 1923.

WALTER FRENCH,
Judge.

CHAPTER XXI.—GUARDIANSHIP CASES.

1. KUMAGAI CASE.

In the Matter of the Estates and Guardianship of KAZUO KUMAGAI and
IWAO KUMAGAI, Minors.

IN THE CALIFORNIA SUPERIOR COURT.
SANTA CLARA COUNTY.

San Jose, Cal., Nov. 5, 1920.

By Mr. Elliot: If your Honor please, this is an application for the appointment of guardian of the persons and estates of these two Japanese children. Your Honor made an order in this case that posting be made for 5 days, and I have the affidavit of posting, and the papers are all in proper form. We will have to have an interpreter.

T. Kimura sworn as interpreter.

Chozaburo Kumagai, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Elliot:

Q. What is your name? A. Chozaburo Kumagai.

Q. Where do you live? A. I live in Palo Alto.

Q. How long have you lived there? A. Three years and a half.

Q. What is your wife's name? A. Hatsuno Kumagai.

Q. How many children have you? A. Four.

Q. The two children that we are—that you are applying for letters of guardianship, what are their names? A. Kazuo Kumagai and Iwao Kumagai.

Q. Where were those two children born, and when? A. Kazuo was born at Alviso Road on the 22nd of March, 1908, and the other, Iwao Kumagai, was born on the same place on the 22nd of February, 1912, I think.

Q. These children have a piece of real property, the property where you live now in Palo Alto? A. Yes.

Q. When did they acquire that property? A. Three years and a half ago.

By Mr. Elliot: I introduced a deed in evidence, dated the 2nd day of February, 1917, between E. R. Williams and Emma L. Williams, grantors, and these two children born in the State of California, Kazuo Kumagai and Iwao Kumagai, grantees, the deed reciting that the deed is made to them as joint tenants and not tenants in common, the deed being recorded on the 5th day of March, 1917, in volume 452 of Deeds, page 297, describing a piece of property of about 30 acres on the Embarcadero Road near Palo Alto about two miles out of Palo Alto, to the east.

Q. Now this real property, what is the gross income derived from that property? A. You mean from the beginning until today, or every year?

By the Court:

Q. How much from the time of the purchase up to the present time, how much have you received off of that property, how much income? A. About four thousand dollars.

Q. About two thousand dollars a year? A. Some year one thousand and some year fifteen hundred.

By Mr. Elliot:

Q. How much does it average per year, how much has it averaged during the time you have had it? (The witness seems to have kept very accurate accounts.) A. It was about fifteen hundred dollars a year average.

Q. There is a mortgage on this property, is there not? A. Yes.

Q. How much is that mortgage? A. \$8,500.00.

Q. And the mortgage calls for \$500.00 a year and interest. You have made those payments? A. Yes.

By the Court:

Q. How much is the total of that mortgage? A. \$8,500.00.

Q. What is the net amount now of the mortgage? A. The net amount now is \$8,500.00.

Q. The original mortgage was what? A. \$10,000.00

Q. Who made this note and mortgage?

By Mr. Elliot: The mortgage was already on the place when he bought it and when the deed was taken by the children the place was theirs subject to the mortgage.

Q. That answers it. What is the value of this property? A. About \$15,000.

Q. What is it in; what produces the income? A. I planted pear trees all over, and also tomatoes, and a few acres of berries.

Q. When you took this money, or income, from this property, in whose name were the deposits made? A. In my name.

Q. And you paid it out for the running of the ranch, paid the necessary expenses out? A. Yes.

Q. How much have you now in the bank belonging to these children? A. None.

By Mr. Elliot:

Q. You keep books of account showing how much money you take in and how much you spend out? A. Yes.

Q. And you have kept all the receipts when you paid out money, you have kept those receipts? A. Yes, sir.

By the Court:

Q. Will you kindly ask him why he did not take out letters here three or four years ago?

Mr. Elliot: I asked him about it, why he didn't do it earlier and the fact is he was advised by Mr. Calden to wait awhile in the hope that things would be adjusted.

By the Court: It doesn't look good to me, this business. He has almost lost his right to receive letters. If you know any other Japanese sitting down quietly with property standing in their children's name, you had better tell them to get into court quickly if they expect to take out letters. If he is honest and sincere he should have been here three years ago, as soon as he got title to this real estate, and come in and applied for letters of guardianship. Now he comes in here after three years, and I am almost prompted to say I will appoint the public administrator.

By Mr. Elliot: Your Honor must understand the confusion that has existed and the doubts in people's minds, and the advice and counteradvice that has been given to these people. I really think there is some excuse for these people for they hear all kinds of things and all kinds of rumors. I will say this, that very frequently all courts have not taken the just view that your Honor has seemed to have taken in the cases your Honor

has heard this morning. Many have been rejected and the court has refused to appoint, in the face of the law and the statute. Your Honor seems to have been very just and fair. In most cases they have delayed the matter in the hopes something might turn up to clarify the situation. This man says he consulted Mr. Calden. He is an attorney and I know why Mr. Calden gave him that advice; hoping that the situation might be cleared up and the judges of the state would agree upon some consistent policy with respect to these particular applications. I had a case in Visalia that was very troublesome, and I think the removing of the guardian was such a decision as should be expected. I want to say that the delay here in this case, however, is the result of that confused state of things, and the fear that they would jeopardize their interest by making the application if an adverse decision was made; so I ask your Honor to follow the just rule which your Honor seems to have established, and appoint the guardian here with a bond such as your Honor wishes to fix, a surety bond, and I will advise him—and I think he will follow my advice, to file an inventory and file an account as soon as possible, and at that time your Honor may charge him with all property, or proper amounts of course in settling the account. I beg your Honor to do that, and not to hold this man responsible for a condition of things that has existed throughout the state which your Honor and I know well and which naturally produces fear and confusion in the minds of these people and in the minds of a great many attorneys who are advising the Japanese.

By the Court: I don't know why any attorney would have any fear in immediately taking steps for guardianship. I don't know what any attorney would be thinking about that would say to any Japanese, "You have your property in your children's name, let it stand there." It is an attempt to evade the responsibility by these Japanese and what is due to the children born within these United States. It is the business of any lawyer to give sound advice, and I don't commend any lawyer that does not do it.

By Mr. Elliot: In the County of Fresno, I am informed, in two or three cases the court absolutely refused to even hear the petition, and in another case refused to appoint the guardian.

By the Court: What reasons were given at that time?

By Mr. Elliot: I can only say about the case I myself handled. The court went in, over our protest, into the matter of the original transfer, and thought possibly there was some evasion of the law.

By the Court: How long before that had the title passed to the children?

By Mr. Elliot: Two or three years. In the cases your Honor heard this morning I felt that your Honor was most just and fair.

By the Court: These other cases this morning were small estates, but we have got something now that is pretty serious. This man sits down and uses this property as his own; this is a valuable estate. Those cases this morning were small incomes, nothing involved like this we are considering now. Do you know the practice of any other courts? I know of those you speak of. What are they doing around the bay, do you know anything about the practice?

By Mr. Elliot: The only cases I know of the courts very promptly granted the letters of guardianship.

By the Court: I don't think it is a matter of discretion. Children born in this state are American children and are entitled to all the privileges of American children. But I want to tell you, if these Japanese do not get busy pretty quick and take out letters of guardianship of children who have real estate in this county I am going to call the public administrator

in, so you may just as well tell your people they have got to get busy. If it was my children letters would be taken out three years ago instead of coming in here after three or four years, spending the money just as if it was his own. He says there is no money on hand now; what has become of the \$4500? I suppose it has gone to help to feed him and his wife if they live on the ranch.

By Mr. Elliot: All I can do is to say publicity should be given to your Honor's statement.

By the Court: That is how I stand on the matter. He has got to account for every cent he received from this property since these children got this deed, and he must make out an intelligent account. If he can't make out an intelligent account, if he tries to cover up or mislead me I will revoke his letters. He can't claim any privileges because he is a Japanese father; he has got to do like the American fathers do and file his account and inventory and let the court know what he is doing with these children's money. If he doesn't do that I will revoke his letters and put a man in there that will take care of this property for these American children.

By Mr. Elliot: I will see that that is done, and we will be extra careful in cases of this kind.

By the Court: Take an order appointing him guardian with instructions that he file his inventory within thirty days; that he get a surety company bond in the sum of \$12,000 for each child. He must account to this court for \$6000 and that will make a bond for \$12,000 for each. If he can furnish that he may proceed on his way, but he must follow the letter of the law closely. I don't know any escape at the present time from appointing him. We can't sit here and punish people according to our notions.

By Mr. Elliot: May I say, it is very refreshing to hear the statement of the court, that there is no distinction between American children regardless of what the color of their skin may be. Here is the form of order; may I ask your Honor if it is your practice to appoint a single appraiser in Palo Alto?

By the Court: Yes, sir; I will deal with it just as I do with white children; there is no distinction.

KAWAHARA CASE.

In the matter of the Estate and Guardianship of FUMIKO KAWAHARA,
A Minor.

IN THE CALIFORNIA SUPERIOR COURT. (TULARE COUNTY.)

Visalia, California, November 24, 1919.

This being the time heretofore fixed by the court for hearing the application of Masayo Kawahara to be appointed guardian of the person and estate of Fumiko Kawahara, a minor, and said petitioner appearing in person and by her attorney, J. A. Chase, Esq., thereupon the following proceedings were had, testimony taken, to-wit:

Masayo Kawahara, the petitioner, being sworn, and examined through the aid of an interpreter, testified as follows:

Mr. Chase:

Q. What is your name? A. Masayo Kawahara.

Q. Where do you live? A. Dinuba.

Q. Who is Fumiko Kawahara, is that your child? A. Yes, sir.

Q. Where was she born? A. Dinuba.

Q. In this county? A. Yes, sir.

Q. Now has she some property? A. Yes, sir.

Q. What does the property consist of? A. Twenty acres and ten acres, makes thirty acres.

Wallace, J.:

Q. How can she testify to the ownership of property? Has she any deed or contract with regard to it?

Mr. Chase. Have you your contract with you? A. Yes, sir.

Mr. Chase. This is one of the descriptions.

The Court. Let her identify it first.

Mr. Chase. Is that a contract for the purchase of one piece of land that you said this minor owns or has an interest in? (Handing paper to the witness.) A. Yes, sir.

The Court. Read it.

Mr. Chase (reads). "Agreement for sale of land. This indenture made this January 12th, 1918, by and between Franz Ens, hereinafter designated the seller, and Manji Kawahara, father of Fumiko Kawahara, all residing in Tulare County, Calif. Witnesseth: That the said seller, for and in consideration of the covenants hereinafter contained and the purchase price hereinafter agreed to be paid, agrees to convey unto said Fumiko Kawahara, a native of the County of Los Angeles, State of California, and hereinafter called the beneficiary, the following described property, to-wit:

"The east half of the northeast quarter of the southwest quarter of section twenty-four (24) in township sixteen (16) south of range twenty-three (23) east, M. D. B. & M., and the said Manji Kawahara, for the use and to the interest of the said beneficiary, agrees to pay unto the seller, the sum of four thousand dollars, in the manner and at the times hereinafter specified, to-wit: \$800 on the execution of this agreement, the receipt of which is hereby acknowledged, \$200 on October 15th, 1918, \$1000 on January 12th, 1922, \$1000 on January 12th, 1923, and the balance of \$1000 on January 12th, 1924, together with interest at the annual rate of seven per cent, payable on January 12th, on all the unpaid balance of the deferred payments.

"Said Manji Kawahara further agrees to pay all taxes and assessments of whatever nature shall hereafter be levied upon the said premises, and in consideration therefor shall have immediate possession of the premises to continue for three years from date, after which period, there being no default in payment thereon the said beneficiary shall be entitled to possession of the said premises, and upon full payment of all the deferred installments of the sum herein agreed to be paid with interest in accordance with the provisions hereof the said beneficiary shall be entitled to a good and sufficient conveyance of the premises, free of encumbrances, suffered by the seller, and to a certificate of title showing the premises to be clear in the maker or makers of such conveyance.

"The seller will accept any payment in advance of the maturity thereof if tendered, or paid on any mortgage lien on the premises.

"In case of default of any of the payments herein provided to be made, then the seller shall be relieved from any and all obligations to convey the premises, and may retain all sums paid prior to such default as liquidated damages and rental.

"Witness our hands this January 12th, 1918.

"FRANZ ENS.

"MANJI KAWAHARA.

"State of California, County of Tulare, ss.

"On this 12th day of January, 1918, before me, LeRoy G. Smith, a notary public in and for said county and state, personally appeared Franz Ens and Manji Kawahara, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same.

"Witness my hand and official seal the day and year in this certificate first above written.

"(Seal)

"LEROY G. SMITH, Notary Public.

"Recorded at the request of LeRoy G. Smith, March 21, 1918, at 8 min. past 9 o'clock A. M. in vol. 40 of Contracts, page 191, Tulare County Records.

"IRA CHRISMAN, Recorder."

Endorsed: "Received \$200.00 October 15th, 1918."

It doesn't say who received it.

The Court. Whom was it paid to? A. Franz Ens.

The Court (to interpreter). Ask her who paid that \$200.00?

The Interpreter. She and her husband paid it.

The Court (to witness). Do you live on this land? A. Yes, sir.

Q. Are you going to live on it, you and your husband? A. Yes, sir.

Q. What improvements are there on the land? A. Does that mean this 10-acre property?

Mr. Chase. There are two pieces of property; one is 10 and one is 20, and she asked if this was the ten-acre piece.

The Court. I don't care which; I want to know which she lives on.

Mr. Chase. The one I read was the 20-acre piece. A. Five acres of Emperors planted.

The Court. Are you and your husband going to cultivate these. A. Yes, sir.

Q. What are you going to do with the crops you raise on them? A. Keeps for baby.

Q. Keep them for him. Are you and your husband going to work for wages on the land? A. Yes, she says.

Q. Have you any other property than this land? A. The ten-acre and 20-acre, that's all.

Mr. Chase. There is another contract that I have not read. One calls for 20 and the other 10.

The Court. Has she any property herself. A. No, sir.

Q. Has her husband any property? A. No, sir.

Q. How long have you lived in the United States, in America? A. Four or five years.

Q. You and your husband been here the same length of time? A. All together.

Q. When was the child born?

The Interpreter. The 12th of March, she says, Japanese calendar. We must correct it to English.

The Court. You know what it means?

The Interpreter. Yes, sir. The 12th of March, 1914.

The Court. Have you any other children but this child? A. No, sir.

Mr. Chase. Have you the birth certificate of this child? A. Yes, sir.

Q. Have you it with you? A. No. She did not bring it here.

The Court. It was a certificate that was recorded here? A. Yes, sir.

Mr. Chase. I suppose so. I saw it once, I don't recollect where. At the time they came in they had the certificate with them. But she didn't bring it with her this time.

The Court. Who is the grantor?

Mr. Chase. Frank Ens.

The Court. Where does this land lie, where from Dinuba does it lie, where is the land from Dinuba? A. Beyond the city limits from Dinuba town.

Q. Which direction. A. Northwest.

Mr. Chase. Not northwest; that wouldn't conform to the legal description.

The Court. The description will show, but I don't just remember where it is.

The Court. It is easy enough to determine that fact. How long have you lived on this land? A. Three years.

Q. Did you have it leased? A. No.

Q. How did you come to live on it? A. After he bought it he lives there.

Q. Didn't she say three years?

Mr. Chase. That is what she says. The contract was made the 12th day of January, 1918.

The Court. What I am trying to get at is, What right they have to live on it? What arrangements did they have? Ask her if they had it rented, paid for the use of it?

Mr. Chase. When he first began to live on there, ask her how they went into possession. Did they have it leased at first or did they buy it? A. She didn't lease at all.

Q. She didn't lease at all? A. Yes, sir.

Q. You went into possession just at the time you got this contract, did you? A. After we buy this he move down there.

Q. Then when she said "three years", did she mean she was living on this land, or living in the vicinity of this land three years? A. Not three years in that, no.

The Interpreter. In Japanese counting they say "three years", means one 8, one 9 and one 9.

Mr. Chase. That is a part of 1917, all of 1918, and part of 1919?

The Interpreter. Yes, sir.

The Court. I want to know what right she had to live on the land before she got this contract. Did she have any other writing before that? A. After we bought we move there.

Mr. Chase. One thing I might mention is, that the other contract is dated 1917. One is for 10 acres and one is for 20. The contract for the 10-acre piece is dated 1917.

The Court. Did they live on the 10-acre piece? A. We live on the 20-acre piece.

Mr. Chase. I might introduce this other contract in evidence. Is this the contract under which you bought some of your land? (Handing paper to the witness). A. Yes, sir.

Mr. Chase. Then I will read the other contract.

The Court. Is it the same as the other contract? Better read it into the record.

Mr. Chase (reads): "This agreement made and entered into this 26th day of December, 1917, by and between C. F. Giddings and Margaret M. Giddings, his wife, of the County of Tulare, State of California, the parties of the first part, and Manji Kawahara of the same county and state, the party of the second part,

Witnesseth: That the parties of the first part for and in consideration of the covenants and agreements, hereinafter mentioned and contained, to be kept and performed by the party of the second part agree to sell unto the party of the second party, and the party of the second part agrees to buy of and from the parties of the first part in the name of and for the use and

benefit of Fumiko Kawahara, the minor child of the second party, born in the State of California, all that certain real property situate, lying and being in the County of Tulare, State of California, particularly described as follows, to-wit: Lot forty (40) of Ascutney Colony, according to the map or plat of said colony of record in the office of the county recorder of said County of Tulare. Together with the tenements, hereditaments, and appurtenances thereto belonging or in any wise appertaining and the rents, issues and profits thereof; for the sum of four thousand two hundred and fifty (\$4250.00) dollars, in gold coin of the United States of America, to be paid at the time and in the manner hereinafter specified;

"And the party of the second part, in consideration of the premises and on behalf of Fumiko Kawahara, promises, covenants and agrees to and with the parties of the first part to buy said real property for the said Fumiko Kawahara, to pay therefor the said sum of four thousand and two hundred and fifty (\$4250.00) dollars, in gold coin of the United States of America, at the times and in the manner as follows, to-wit: The sum of one thousand two hundred and fifty dollars (\$1250.00) cash in hand paid, the receipt whereof is hereby acknowledged by the parties of the first part; one thousand (\$1000.00) dollars on or before three years after date; one thousand (\$1000.00) dollars on or before four years after date; one thousand (\$1000.00) dollars on or before five years after date; with interest on all deferred payments from date until paid at the rate of seven per cent per annum, said interest payable annually.

"The parties of the first part agree to pay the taxes for the present fiscal year, and the party of the second party in consideration of immediate possession of said real property by the said Fumiko Kawahara and for the sole use and benefit of said Fumiko Kawahara agree to pay all taxes and assessments of whatsoever description which shall be levied subsequent to the date of this agreement.

"It is agreed and understood that a good and sufficient certificate of title has been furnished by the parties of the first part unto the party of the second part and the title to the said premises is free and clear of any incumbrances, and merchantable.

"Time where mentioned herein is of the essence of this agreement and should the said Fumiko Kawahara, or the party of the second part for her, fail to make any payment of either principal or interest, at the time the same is agreed to be paid, then the parties of the first part may re-enter the said premises and remove all persons therefrom, and may retain all sums of money theretofore paid as liquidated damages; but the parties of the first part, on receiving the full payment of principal and interest, at the time the same are herein agreed to be paid, agree to execute and deliver to the said Fumiko Kawahara, or her legal representatives or assigns, a good and sufficient deed of grant, bargain and sale, conveying the said real property unto the said Fumiko Kawahara free and clear of all incumbrances, done, made or suffered by the parties of the first part.

"The terms, covenants and conditions of this agreement shall apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto.

"In witness whereof, the parties hereto have hereunto set their hands this day and year first above written.

"C. F. GIDDINGS,

"MARGARET M. GIDDINGS,

"MANJI KAWAHARA.

"State of California, County of Tulare, ss.:

"On this 26th day of December, in the year one thousand nine hundred

and seventeen before me, Earl A. Bagby, a notary public in and for the County of Tulare, personally appeared C. F. Giddings, his wife, and Manji Kawahara, known to me to be the persons whose names are subscribed to the within instrument, and they duly acknowledged to me that they executed the same.

"In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the County of Tulare, the day and year in this certificate first above written.

"(Seal)

"EARL A. BAGBY,
"Notary Public in and for the County of
Tulare, State of California.

"Recorded at the request of Manji Kawahara, Dec. 26, 1917, at 38 min. past 2 o'clock P. M. in vol. 40 of Contracts, page 42, Tulare County Records.
"IRA CHRISMAN, Recorder."

The Court (Allen). You were born in Japan? A. Yes, sir.

Q. When? A. The 20th of January.

Q. About how many years ago? A. 24 years ago. Born the 20th of January.

Q. Did you ever own any property before you came here, land or personal property? A. No, sir.

Q. Well, do you intend to make your home on this land or a part of it? A. With her husband.

Q. Ask her if she and her husband intend to make it their home? A. Yes, sir.

Mr. Chase. Has your child ever had a guardian appointed? A. No, sir. The Court. Can you talk English? A. No, sir.

Q. Can you read or write English? A. No, sir.

Mr. Chase. That is all.

Manji Kawahara, being duly sworn and examined through an interpreter, testified as follows:

Mr. Chase. You talk some English, do you? A. Just a little.

Q. What is your name? A. Manji Kawahara.

Q. Where do you live? A. Dinuba.

Q. You are the husband of Massayo Kawahara that was just on the stand here? A. Yes, sir.

Q. Fumiko Kawahara is your child is she? A. Yes, sir.

Q. You live on this land that you have purchased or purchased for your child, near Dinuba, do you? A. Yes, sir.

Q. Has your child any legal guardian appointed, so far as you know? A. No, sir.

Q. You signed this contract, did you not? (Showing paper to the witness.) A. Yes, sir.

Q. That is your signature? A. Yes, sir.

Q. And also to this other contract, which is for the purchase of the 20-acre tract, you signed that, too, did you? A. Yes, sir.

Mr. Chase. I believe that is all.

The Court (Allen). You intend to make your home on this land, to live on this land? A. Yes, sir.

Q. How long? A. Three years.

Q. But how long from now on? A. Three years he says.

Q. No, no, but how long does he intend to stay there in the future? A. As long as he die.

Q. Until he dies? A. Yes, sir.

Q. What have you done with the income you have received from this land. A. I keep it for baby.

Q. How much is it? A. \$500 or \$600 coming in this year.

Mr. Chase. One thing I might ask him, part of it is not improved.

The Court (Allen). How much is improved? A. 10 acres.

Q. What is it, a vineyard? A. Yes, sir.

Q. How old is it? A. Three years old past.

Q. You have worked on the land all the time since you took possession of it? A. We work it.

Q. Do you read English? A. No, sir.

Q. Can you write English? A. Signature and sign alphabet.

Mr. Chase. Does he mean signature? A. Yes, sir.

The Court. Do you talk English? A. I can talk a little.

The Court (Allen). Now let him answer this question himself. Where were you born? A. On Japan.

Q. How old are you? A. Thirty-one.

Q. How long have you lived in California? A. Eleven years.

Q. When were you married to your wife? A. 1912.

Q. Have you any property of your own? A. No, sir.

Mr. Chase. At the time of purchasing this land they made payments that amounted approximately to \$2,000.00.

The Court (Allen). Where did you get the money that you paid on these contracts? A. He and his wife made that money after working.

Q. How much did they pay?

Mr. Chase. \$2050.00 is the first payment made, and one had \$200.00 more paid.

The Court (Allen). Where did you get the \$200.00 that you paid last? A. Got that money. We were money short, and wife brought from Japan.

The Court (Wallace). Where do you expect to get the balance? The money to pay the balance of this purchase price? A. Some part of them out of the crop? Some of them will make.

Q. How will they make it, by working for wages? A. On working, chiefly, but some way.

Q. You and your wife expect to make your home on this 10-acre tract, don't you, and live on it?

Mr. Chase. I think they testified they lived on the 10-acre tract.

The Court (Wallace). Ask him if he and his wife intend to make their home on this 20-acre tract, to live there and take care of it. A. Yes, sir.

Q. How long? A. Three years.

Q. No, no. They have been there three years, but how long hereafter in the future. How long do you intend to stay there, live there? A. Until baby grow up, and until he die.

Q. Did he say until he died. A. When baby grown up enough, baby can take care of it.

Q. But suppose the baby dies, then what are you going to do? A. I don't know how to do.

Q. Now you and your wife expect to keep this child yourself and raise it, don't you? A. Yes, sir.

Q. Why didn't you apply for letters of guardianship, and not your wife, why didn't you apply to be guardian. A. She help more than he did.

Q. You mean in getting the property? A. Yes, sir.

The Court (Allen). How did she help more than he did? A. When she came from Japan she have the money.

Q. Where did she get it? A. Her father gave her.

Q. She testified here she didn't have any property. When did she get money from her father? A. When she buy ranch, too, when she buy ranch.

Q. How much money did she get from her father? A. \$1500.00.

Q. Did you pay all of this on this land. A. Well, that counts up more than \$2,000.00, and also both made money.

The Court. That is all. Have you any further proof?

Mr. Chase. No, sir, that is all. I ask to withdraw these contracts, they have been recorded.

The Court. They have been read, that is all that is necessary (referring to contracts of purchase).

The Court (Wallace). The father is the natural guardian of the person of the child, and there is no necessity for a guardianship of the person, in any event, of a child two years old, unless it is to be taken away from its parents. That is the only occasion when it would be necessary to have a guardian of the person. The only thing now is the guardian of the property.

Mr. Chase. In regard to the property, it is impossible for them to handle these contracts in any way for the child except by order of the court.

The Court (Wallace). Has it any property? A minor under 18 years of age is incompetent to make a contract touching real property. If it is incompetent to make a contract, then it would be incompetent to take over an executory contract in regard to real property, to accept it.

Mr. Chase. Of course, the theory of the contract is, that the child is simply a beneficiary.

The Court (Wallace). It doesn't make any difference; somebody has got to be competent to accept.

Mr. Chase. The father is in a position to accept for it.

The Court (Wallace). No; the father cannot accept for it.

The Court (Allen). There are two other questions. Under the contract the father is probably trustee. He is in possession of the property and using it himself. A trustee is just as much under the jurisdiction of the court as the guardian. The purpose of that contract, if it has any purpose under our law, gives the use and benefit of the property to the minor; therefore, the trustee wouldn't have any right to use it, except under order of the court. The same rule would apply as to a guardian. The guardian would have no right to stay in possession of the property. In all likelihood, the court would not permit the guardian to stay in possession of the property. The property should be rented out to somebody else, somebody fit to take care of it and receive the rents, issues and profits, and apply it to the use and benefit of the child.

Now I want to state, as I cannot remain here very long, that in my judgment this contract is made purely as an evasion of the law to prevent Japanese from buying property in this state; that is evidently the purpose of it. I think I may state, while it has been decided by a judge of Southern California that a minor Japanese has a right to hold property under our law, yet if a guardian is appointed, in my judgment it should be someone who understands our laws and is capable of dealing with the property and handling it for the benefit of the minor. It should be the practice of the court to require that somebody else takes possession of that property other than the father or mother of the minor, and use it for the benefit of the minor. And in all cases there will be a strict requirement that they file inventories and make reports to this court as to the income of that property and what is done with it, just as is required of any other guardian. The Japanese cannot expect to buy property in the name of their children, then live on it and use it in the way this property is being used.

There is another thing I would like to say—I don't want to cast any reflection on any of the attorneys, either—but I believe the attorneys of this state should refrain, as far as possible, from handling any such propositions as this. I think if they will think it over, they will consider that in doing so they are assisting in an attempted evasion of the law. And the bar of this state ought to feel that they ought not to assist in such actions. Of course, the members of the bar will lose a little in the matter of fees, but that is nothing compared to what is our duty to the public and to the state.

The Court (Wallace). Following what Judge Allen has said in regard to the matter, the situation is simply this: This is a palpable attempted evasion of the laws of the State of California. Because the law limits the right to take possession and enjoy and inherit real property to those who are eligible to become citizens of the United States. Now, when these parties seek to come right into possession of it and take care of it, as they say, until this minor becomes of age, it is evident it is for their benefit. Now, this is an executory contract, and, as I have said before, such a contract can not be entered into by a minor of this age; she is incompetent to enter into it. It is true, on the question of qualification that if nothing else exists but the fact that the petitioner for letters of guardianship can not read and write, that is not a ground of disqualification. But in connection with that, when it comes to be the guardian of the estate of a minor with which the guardian is incompetent to take property of that kind, that is another factor entering into the question of his disqualification, and especially where it is apparent that the possession of this property is sought for his own benefit.

Now there was an act passed in 1915—we haven't yet determined as to whether it applies to a case of this kind, but it is very close to it. It is to the effect that—section 2 of the act is this:

"It shall be unlawful for any person, whether elected, appointed or commissioned, to fill any office in either the state, county, city and county or city government of this state, or in any department thereof, to appoint or employ any person to perform any duties whatsoever, unless such person so appointed or employed be a native-born or naturalized citizen of the United States, subject nevertheless to the exceptions contained in section 1 of this act."

The exceptions are in regard to school teachers who have declared their intention to become citizens of the United States, or any native-born woman who has married a foreigner, or professors of a college or university supported by the state, or any specialist or expert temporarily engaged in special investigation. The only thing that makes it uncertain yet—and that will have to be determined—is this: "It shall be unlawful for any person, whether elected or commissioned" to make such appointment. Whether or not that is broad enough to include the court, it manifestly includes the judge and any appointments he could make, aside from its being the court. And a guardian or administrator is an officer of the court, temporarily appointed and subject to its order. It is very close to the question as to whether or not it does not apply to all such cases. It evidently was intended to prevent the employment of those who were not naturalized or native-born citizens of the United States, where it was proper. Whether or not the appointment of a guardian would come within its provisions is uncertain. But it seems to me that under these contracts this minor has taken nothing; that she has no property, and that there is no necessity for appointing a guardian.

If this could be carried out, if those ineligible to become citizens can not acquire property in the United States by gift, grant or inheritance,

but their native-born child, two or three years old, could, by this very process every foot of land in Tulare County could be contracted away and title to it acquired in future years absolute. I think that is an absurd construction of the law that would have a far-reaching effect.

We seem to be agreed on this, that there is no necessity for appointing a guardian; and, furthermore, that the applicant is unfit, or isn't a suitable person, not competent to be the guardian or unfit for that purpose, for these reasons: She could not take or hold real property at all, and she seeks to join in controverting this law by occupying and enjoying the very property she seeks to control through the guardianship, contrary to the general law of this state. For these reasons, the application is denied.

3. WATANABE CASE.

In the Matter of the Estate and Guardianship of YAYE HIRUMA and TATSUKO WATANABE, Minors.

IN THE CALIFORNIA SUPERIOR COURT. (TULARE COUNTY.)

On December 6, 1919, an order was entered in this court requiring Joe Nishida, guardian of said minors, to show cause why his letters of guardianship should not be revoked for his failure and neglect to file an inventory of his wards' estate. In response to said order he appeared in court on January 5th, 1920, with his attorney, and a hearing was had. Documentary and oral testimony was produced.

In the petition of Nishida to be appointed guardian of the estates of said minors, filed in this court on December 24, 1917, it is averred that said minors had estate consisting of thirty acres of land of the value of \$8,000.00; that the first named was then of the age of one year and six months, and the second about one year; that the only relatives of Yaye Hiruma in this country is the father, and of Tatsuko Watanabe are the father and mother; that it was necessary that a guardian of the estate of said minors be appointed. After a hearing the court granted the petition, and on January 22, 1918, letters of guardianship of the estates of said minors were issued to Joe Nishida. He has never filed an inventory of the estates of his wards, but at the time of the hearing requested the appointment of the inheritance tax appraiser to appraise said property. His request was deferred pending the hearing. On January 5, at the time of the hearing, he filed his first account and report accompanied by a long list of vouchers, many of which were for the most part written in the Japanese language characters and not understandable by the judge of this court. He reports his possession as guardian of thirty acres of land purchased on behalf of said minors by Marangu Watanabe, the father of one, and Yasue Hiruma, the mother of the other, on April 28, 1917, under an executory contract. This contract was introduced in evidence and is an agreement "By and between G. G. Duerksen and Eva Duerksen, his wife, parties of the first part, and Matsagi Watanabe and Yasue Hiruma, parties of the second part." It provides that the parties of the first part, in consideration of the agreements of the parties of the second part, agree to sell to the parties of the second part and parties of the second part agree to buy in the name and for the use and benefit of said minors, "natural-born citizens of the United States," in joint tenancy and the survivors of them, the said real property, for the sum of \$8200.00, and the parties of the second part in behalf of said minors, naming them, promise and agree

to and with the parties of the first part to buy said real property for the said minors in joint-tenancy and to and for the survivors of them, and to pay therefor the sum of \$8200.00 as follows: \$500.00, which was then paid; the assumption of a note to C. L. Adams for \$3000.00, secured by a mortgage on said land, which note and mortgage said parties of the second part agree to assume and pay. The balance of \$4700.00 to be paid in four annual installments with interest on deferred payments. The contract contains this provision:

"It is understood and agreed that said Yaye Hiruma and Tatsuko Watanabe shall have *immediate possession* of said real property as joint-tenants; that the parties of the second part herein shall pay all taxes and assessments that may be levied on said land. It is further understood and agreed that the parties of the second part will at all times during the life of this agreement take good and farmerlike care of said property," also "that time is of the essence of this contract, and should the said Yaye Hiruma and Tatsuko Watanabe, *or the parties of the second part for them*, fail to make any payments of either principal or interest agreed to be made, then the parties of the first part may re-enter said premises and remove all persons therefrom and retain all sums of money paid as liquidated damages."

Upon full payment being made it is provided that a grant deed shall be executed and delivered to said minors. The contract is signed by Masage Watanabe and Yasue Hiruma as parties of the second part.

At the time the guardian was appointed the wards had no personal property. The verified report and account show that the guardian has purchased for said minors personal property for which he has paid \$1346.83; that he has made additional payments on said realty contract in the sum of \$2000.00; that he has received from the mother and father of Tatsuko Watanabe the sum of \$4000.00, and from the mother of Yaye Hiruma the sum of \$4000.00, and from Guggenheim & Co., for raisins sold, \$580.00, in all \$8580.00. It also shows that he has paid out the total sum of \$8188.87, which includes about \$1469.00 on principal and interest of contract; he also has cash on hand \$391.13, and under a contract he has with the Associated Raisin Co., from which he has procured a loan of \$1280.00, he will receive about \$600.00 in excess thereof for the crop of 1919. There is also due him from said association, on crop of 1918, an undetermined sum. He has procured no order of court authorizing him to sell or to purchase or to mortgage any of the property of his wards or to procure a loan or advance from the Associated Raisin Co.

The guardian is the stepfather of one of the minors. He and the parents of the minors were born in Japan.

At the time the petition for letters of guardianship was heard the contract to purchase the land was not produced.

The guardian testified at this hearing that he did not know that he had to file an inventory, that his attorney had not told him he was required to. His attorney testified that he could not remember telling the guardian that he need not file an inventory; that he withdrew from the practice of the law for a year after the appointment was made and resumed practice a short time before the order to show cause was made.

The account filed January 5, 1920, shows that the guardian has paid out considerable money for farming implements and other materials necessary in planting land to vines and raising fruit thereon, including 7000 grape stakes.

The contract for the purchase of the real property is very peculiar;

it provides that these infants, under the age of two years, shall have immediate possession of the realty. The parents agree to buy said real property and to pay for it and to pay all taxes and assessments upon it; they also agree at all times during the life of the contract to take good and farmerlike care of said property and the vines growing thereon. Notwithstanding this covenant, the guardian of his own volition has taken charge of the property, proceeded to develop it and farm it for said minors, and made several contracts without any authority from the court.

It seems to me that this contract was entered into to evade the Alien Land Law, which forbids aliens ineligible to citizenship to acquire, possess, enjoy, transmit and inherit real property or any interest therein in this state.

The manner in which the property has been handled tends to confirm the view that the real purpose of the contract was to effect an evasion of the Alien Land Law. Although it appears that upon final payment the title shall go to the minors, still the parents under their agreement that at all times during the life of the contract they must take good and farmerlike care of said property and the vines growing thereon have the right to occupy it for the purpose even to the exclusion of the guardian. So far as the contract requires any affirmative action on the part of the minors as taking and holding possession of said property or their giving consent to improve the property beyond what is necessary to keep it in good condition, or to permit any of the income to be used in payment of the purchase price, the agreement is void under section 33 of the Civil Code, nor could they prior to the age of eighteen years accept the provisions of a contract made for their benefit relating to real property or any interest therein.

Section 1773 of the Civil Code provides that every guardian must return to the court a verified inventory of the estate of his ward within three months after his appointment. He must annually thereafter, and at such other times as directed by the court, render a verified account of the estate of his ward. He has done neither of these acts. In addition to these delinquencies he has entered into contracts regarding the property of his wards, made extensive purchases of personal property, borrowed money on the crop produced, invested large sums in planting the property to grapes, without having procured any order of court; and has also, without authority of law, used part of the money arising from the sale of the crops to make payments on the purchase price of the real estate. In the contract of purchase the parties of the second part, Masagi Watanabe and Yasue Hiruma, agree to purchase the land and to pay the whole purchase price therefor. There is no provision in the agreement that any part of the purchase price shall be paid from moneys derived from any sales of any crops produced upon the premises.

It does not appear that said guardian has offered any legitimate excuse for his failure to comply with the provisions of the law in these many matters, and especially for his failure to file an inventory as required, and an order will be entered that his letters of guardianship be revoked and that he be removed from the office of guardian of the estates of said minors.

An application for the appointment of some other person as guardian in his stead will be considered by the court if seasonably made.

W. B. WALLACE,

J. A. ALLEN,

Superior Judges.

Dated, February 24, 1920.

4. KAWAOKA CASE.

In the Matter of the Estate and Guardianship of MITSUTO KAWAOKA
ET AL., Minors.

IN THE CALIFORNIA SUPERIOR COURT.

SONOMA COUNTY. No. 8468.

ORDER DENYING PETITION FOR LETTERS OF GUARDIANSHIP.

This is a petition on the part of an alien Japanese father for letters of guardianship of the estates of his three minor children.

At the hearing it appeared that the petitioner is a subject of Japan and ineligible to citizenship in the United States. He has resided in California for seventeen years, laboring as a farmer. During this period of time he has accumulated some \$7500 in cash. He has a wife, and three minor children aged four, six and ten years, respectively. The evidence is satisfactory to the effect that the children were born in this country, although there is a birth certificate of but one child duly signed by a physician as required by law. The other two birth certificates are signed by the father, indicating that there was no attending physician at the birth of these other two children.

The estate consists solely of a small poultry ranch in this county near Penngrove, with a dwelling house and improvements. The father, speaking through an interpreter, testified that he had invested practically all his earnings for the past seventeen years in this poultry ranch. A deed to the ranch was presented purporting to convey title directly from the former owner to these three minor Japanese children. The father testified that he had made an absolute gift of the premises to his children, and expected to account to the court, as guardian, for the entire investment, including the rents, issues and profits therefrom. He further testified that he expected to make the place his home, and the home of his wife and family; and that he intended to devote his entire time in the future to the operating and management of this ranch for the sole profit and benefit of his children. It must be presumed that he would also be compelled to account to the children for board and lodging of himself and wife. From the foregoing facts it will be seen that this transaction, if indeed it is a *bona fide* gift, results in petitioner voluntarily depriving himself and wife of the entire earnings of a lifetime and devoting himself and the remainder of his life to the management and increase of his children's estate. In effect, it means the pauperizing of petitioner for the welfare of his children. This is not in accord with our sense of justice or reason.

In view of the clear inhibition of the Alien Land Law prohibiting aliens ineligible to citizenship from acquiring, possessing, enjoying or transmitting real property in the State of California, and in view of the natural instincts of every normal human being to provide to some extent for his own needs and those of the wife who is dependent upon him, I am driven to the inevitable conclusion that this pretended gift to three helpless minor children is a mere subterfuge and attempt to circumvent the law.

Section 1747, C. C. P., provides that a court may appoint a guardian of the persons and estates of a minor who is an inhabitant or resident of the county, *and has estate within the county.*

Section 1751, C. C. P., provides that the father or mother of a minor child under fourteen years of age, *if found by the court to be competent to*

discharge the duties of guardianship, is entitled to be appointed guardian of such child.

In the *Estate of Yano*, 63 Cal. Dec. 515, the supreme court decided that a Japanese father had the right to be appointed guardian of the estate of the minor unless the petitioner was shown to be incompetent. It was there held that a native-born Japanese child could hold title to real estate. Also that delivery of the deed would be presumed; that the question of title to the real property could not be tried in the probate court; that the fact that the father paid the consideration for the land would not create a trust in his behalf. The facts of that case, related in the opinion, are as follows:

"It was made to appear on the hearing by undisputed evidence that the petitioner was a Japanese and not a citizen of the United States or the State of California; that he was and had been for several years a resident of California, and was of good character, a good father, sober and industrious. That the minor was his daughter, aged between two and three years, and a native-born citizen of the United States and of the State of California. That she had no guardian, and held title to fourteen acres of improved land in Butte County of the value of \$3000 or thereabouts, which required care and cultivation."

That case differs from the one at bar in at least two particulars. In the present case there purports to have been a gift of all the earnings of seventeen years, and of all the property the petitioner possesses, and an avowed devotion of all the remainder of his life to the increase of the minor's estate to the entire neglect and detriment of himself and wife. Unless, under the above authority, this court is bound to assume from the presenting of the deed of conveyance that the pretended gift is *bona fide*, I am convinced that the transaction is a subterfuge, and that the minors are possessed of no property whatever. While it is a well-settled rule that title to real property may not be determined in a probate court, it would seem that the trial court should have the judicial power to construe all of the facts and circumstances of a case in determining whether or not there is any property of which the court has jurisdiction. Otherwise, the very facts of this case would prove how helpless and impotent our courts would be in the face of the machinations of cunning and designing men who have no respect for the spirit of the law.

The purpose of the Alien Land Law and other enactments of our legislature is to protect our rapidly vanishing fertile soil against the invading horde of brown men who come here and shatter our standards of living and of citizenship; who substitute their philosophy of politeness and cunning for the enforcement of the "golden rule"; who bring to us their Oriental ideas and religion. This is the same race which has outgrown the boundaries of their native land and has infested the islands of the Pacific, including our own Hawaii. The schools, the business and the legislature of the Hawaiian Islands are today virtually in control of the Japanese, who possess a population of some 130,000 in that group of islands, being more than fifty per cent of the entire population including all nationalities. Yet they pay less than three per cent of the taxes for the maintenance of the public institutions there. This is the same race that circumvented the treaty with our Government, in the form of the "gentlemen's agreement", and brought their women into California for propagation purposes in the guise of "picture brides". Over 5000 of them were born in California last year and 4300 the previous year, each of whom is a citizen of our country and state. They monopolize our richest fields. Their standards of living are so low we do not wish to compete with them. Nor should we be compelled to forfeit the

advantages our nation has gained by generations of hardship and toil and intelligent progress.

Little wonder this danger stimulated the writing of that wholesome American story, "The Pride of Palomar", by Peter B. Kyne. Little wonder our legislators in their wisdom have found it necessary to defend our schools, our homes and our lands against this unwelcome and unscrupulous invasion by every legislative means within their power.

In order to remedy the apparent weakness of the law, as pointed out by the Supreme Court in the Yano decision, the legislature has since then enacted a new section of the code, 1751a, which provides as follows:

"No person ineligible to citizenship in the United States, and no company, association or corporation of which a majority of its members are aliens ineligible to citizenship in the United States, or in which a majority of the issued stock is owned by such aliens, may be appointed guardian of any estate which consists in whole or in part of real estate."

This amendment to the statute subsequent to the decision in the Yano case appears to be controlling in this case. Even though the presenting of the deed presumes delivery and title to the real property described, yet it appears that the estate of the minors consists wholly of real property, and that the petitioner is ineligible to citizenship.

Believing in the wisdom of our Alien Land Law, and similar enactments; believing that it is high time we Americans adopt and adhere to rigid regulations for citizenship and immigration applying to all aliens, and based upon high mental, moral and physical standards if we would preserve the heritage of our soil to our posterity, I would not be inclined to resort to nice distinctions, in conflict with the spirit of our law, in order to upset these deliberate and solemn enactments of our legislature. Our supreme court has repeatedly said that it was not the province of the superior courts to declare laws unconstitutional. If there be a question as to the constitutionality of this act as to the qualifications of a guardian, that question should be left for determination with the higher courts.

For the foregoing reasons the petition for guardianship is denied. It is so ordered.

R. L. THOMPSON,
Judge.

5. SAKURAI CASE.

MARY SAKURAI, a minor, by T. SAKURAI, her Guardian *ad litem*, and T. SAKURAI, Petitioners, vs. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, in and for the County of Los Angeles, and Honorable VICTOR R. McLUCAS, Judge thereof.

IN THE CALIFORNIA DISTRICT COURT OF APPEALS.

a. PETITION FOR WRIT OF MANDAMUS.

This, the verified petition of the above-entitled petitioners, who each and both are beneficially interested herein, respectfully shows:

I.

That Honorable Victor R. McLucas is now and at all times herein mentioned has been one of the duly elected, qualified and acting judges of the superior court of the State of California, in and for the County of Los Angeles, and during all of such times has been one of the judges presiding

over and sitting in department two of said superior court, that is to say, in the department of said court in which probate matters are usually heard and determined.

II.

That on the 20th day of July, 1923, your petitioner, T. Sakurai, caused to be filed in said superior court, and paid the fees thereon, his certain petition in writing, wherein he prayed that he be appointed as guardian of the person and estate of Mary Sakurai, the minor child of himself and his wife, Yoshino Sakurai; that his said wife joined in said petition and requested of said petitioner as such guardian; that said petition set forth that said Mary Sakurai was the minor child of said T. Sakurai and said Yoshino Sakurai; that said minor had no guardian legally appointed by will and was a resident of the City and of said County of Los Angeles, and had estate within said County of Los Angeles, State of California, which needed the care and attention of a fit and proper person; that said estate consisted of real property located within said County of Los Angeles, State of California, and particularly described as: Lot twenty-two (22) in block fifteen (15) of the Electric Railway Homestead Association, as per map recorded in book 14, pages 27 and 28, of Miscellaneous Records of said County of Los Angeles; that the rental value of said property was the sum of thirty-five (\$35.00) dollars per month; that said Mary Sakurai was of the age of five (5) years and at the time of the filing of said petition was under the care of said T. Sakurai and said mother of said minor; that said minor had no relatives residing in the County of Los Angeles other than said father and said mother; that a true and correct copy of said petition for the appointment of guardian for said minor is hereto annexed, marked "Exhibit A," and hereby specifically referred to as if herein set forth at length; that said petition was thereupon assigned to said department two of said superior court and was set on said 20th day of July, 1923, in said department for hearing to be had on the 5th day of August, 1923.

III.

That thereafter and on said 5th day of August, 1923, said petition for the appointment of said guardian of said minor regularly came on for hearing before Honorable Victor R. McLucas, presiding as judge of said superior court in said department two; that thereupon witnesses were duly sworn and testified upon the hearing of said petition and documentary evidence was introduced showing that said minor was born within the County of Los Angeles, State of California, and was possessed of said estate therein; that thereupon said court in said department made its order that said T. Sakurai be appointed as guardian of the person and estate of said Mary Sakurai and required that said T. Sakurai file bond to said minor in the sum of one thousand (\$1,000.00) dollars with sufficient sureties to be approved by the court, in accordance with the terms and provisions of section 1754 of the Code of Civil Procedure of the State of California.

IV.

That thereafter there was made and entered in the minutes of said court an order appointing said guardian, in words and figures as follows, to-wit:

"Be it remembered that on August 8th, 1923, in department two of the superior court of the County of Los Angeles, State of California, Honorable Victor R. McLucas, judge, presiding, the following proceedings were had, to-wit:

"In the matter of the estate and guardianship of Mary Sakurai, a minor. No. 63119. Order appointing guardian.

"The petition of T. Sakurai for the appointment of himself as guardian of the estate of said minor coming on regularly this day to be heard, and notice of said hearing being deemed unnecessary, the court, after hearing the evidence, grants the said petition.

"It is therefore ordered by the court that T. Sakurai be appointed guardian of the estate of said Mary Sakurai, and that letters of guardianship be issued accordingly upon his taking the oath as required by law and giving bond to said minor in the sum of one thousand (\$1,000.00) dollars.

"L. E. LAMPTON, Clerk.

"By E. J. THOMPSON, Deputy."

V.

That thereafter and on the 15th day of August, 1923, said T. Sakurai filed, for the approval of said judge, his bond as required by said order of said court, in accordance with the terms and provisions of said section 1754 of the Code of Civil Procedure of the State of California in said sum of one thousand (\$1,000.00) dollars; that said bond was executed and signed by said T. Sakurai as principal and by one G. Adachi and one G. Teramoto as sureties, each of whom were bound to said minor under the terms and provisions of said bond in the sum of one thousand (\$1,000.00) dollars that a true and correct copy of said bond is hereto annexed, marked "Exhibit B," and hereby specifically referred to as is herein set forth at length; that each and both of said sureties justified under oath as residents and householders within said state and as being each worth the sum of one thousand (\$1,000.00) dollars over and above all just debts and liabilities, exclusive of property exempt from executions.

VI.

That said bond was thereafter and on or about said 18th day of August, 1923, presented to said Honorable Victor R. McLucas as judge of said superior court for approval in accordance with the provisions of law; that said Honorable Victor McLucas has stated that he did not refuse to approve said bond for or by reason of any insufficiency in the sureties upon said bond or bound thereby, but solely and only because said T. Sakurai was a native and citizen of the Empire of Japan, and was not a person eligible to citizenship in the United States; that his refusal to approve said bond was based upon the sole point that said approval of said bond should be a step in the appointment of said T. Sakurai as guardian of said estate of said minor and that said estate of said minor consisted of real property; that he felt himself constrained to refuse the approval of said bond upon the ground that said bond was presented on the 18th day of August, 1923, that is to say, after a certain amendment of the Code of Civil Procedure of the State of California, entitled section 1751A of section of said Code of Civil Procedure went into effect, and that said section 1751A provided and does provide that no person ineligible to citizenship in the United States and no company, association or corporation of which a majority of the members are aliens ineligible to citizenship in the United States or in which a majority of the issued capital stock is owned by such aliens may be appointed guardian of any estate which consists in whole or in part of real property; that said amendment to said Code of Civil Procedure went into effect on the 18th day of August, 1923; that said Honorable Victor R. McLucas stated that he considered that he thereby was precluded from

approving said bond as presented by and on behalf of said petitioner T. Sakurai for the appointment of said T. Sakurai as guardian of the person and estate of said Mary Sakurai; said Honorable Victor R. McLucas further stated that in case said bond has been presented to him for approval at a date prior to said 16th day of August, 1923, he would have approved said bond and the sureties thereon;

VII.

That said action and proceeding of said Honorable Victor R. McLucas in refusing to approve said bond necessarily involves the result that letters of guardianship will not and cannot be issued to said T. Sakurai in the matter of the estate and guardianship of said Mary Sakurai in that no bond approved by the court or by a judge thereof has been or can be filed; that thereby said T. Sakurai is prohibited from qualifying as guardian of said estate of said Mary Sakurai under the terms and provisions of the order so made on said 8th day of August, 1923, whereunder and whereby said T. Sakurai was appointed guardian of said estate.

VIII.

That the law specially enjoins as a duty resulting from the office, trust and station of judge of said superior court, that said Honorable Victor R. McLucas pass upon and consider said bond upon the merits and upon the qualifications of the sureties thereon and bound thereby, irrespective of the terms or provisions of said section 1751A of said Code of Civil Procedure, in that your said petitioner was actually appointed by said respondents as guardian of the estate of said minor on said 8th day of August, 1923, and that the approval of said bond is not a step inhibited or prohibited by the terms or provisions of said section 1751A.

IX.

That the law specially enjoins, as a duty resulting from the office, trust, and station of judge of said superior court, that said Honorable Victor R. McLucas pass upon and consider said bond upon the merits and upon the qualifications of the sureties thereon and bound thereby, irrespective of the terms or provisions of said section 1751A of said Code of Civil Procedure in that said section 1751A of said Code of Procedure is void, unenforceable and of no effect:

A. In that said section is in conflict with the terms and provisions of articles 1 and 11 of the treaty now existing between the United States and the Empire of Japan.

B. In that said section denies to said T. Sakurai the equal protection of the laws and is thus in conflict with and contrary to the terms and provisions of section one of article fourteen of amendments to the Constitution of the United States.

C. In that said section denies to said Mary Sakurai the equal protection of the laws and is thus in conflict with and contrary to the terms and provisions of section one of article fourteen of amendments to the Constitution of the United States.

D. In that said section abridges the privileges and immunities of said Mary Sakurai, a citizen of the United States and is thus in conflict with the terms and provisions of section one, article fourteen, of amendments to the Constitution of the United States.

E. In that said section denies to said Mary Sakurai, a native-born citizen of the State of California and of the United States, privileges and immunities which are granted to other citizens of the State of California

and is thus in conflict with the terms and provisions of section 21 of article one of the constitution of the State of California.

X.

That said T. Sakurai is entitled, as the father of said Mary Sakurai and as the regularly appointed guardian of said Mary Sakurai, to the use and enjoyment of the right and office of guardian of the person and estate of said Mary Sakurai; and therein to have the bond, aforesaid, as presented to said respondent approved, allowed and filed inasmuch as said respondents have no conjection as to the form of said bond justification of the sureties thereon and therein to have letters of guardianship issued to said T. Sakurai by the clerk of said court.

XI.

That said Mary Sakurai is entitled to have her said father, T. Sakurai, admitted to the use and enjoyment of the right and office of guardian of the person and estate of said Mary Sakurai; and that said bond heretofore presented to respondents for approval be approved and filed.

XII.

That the law specially enjoins as a duty resulting from the office, trust, and station of judge of said superior court that said Honorable Victor R. McLucas pass upon and approve said bond upon the merits and upon the qualifications of the sureties thereon and bound thereby irrespective of the terms of provisions of said section 1751A; that said respondents are unlawfully precluding said T. Sakurai from occupying, using or enjoying the right and office of guardian of the person and estate of said Mary Sakurai; that there is no plain, speedy, or adequate remedy in the ordinary course of law for your petitioners in the premises.

Wherefore, your petitioners pray that an alternative writ of mandate issue from and out of and under the seal of this honorable district court of appeal of the State of California, second appellate district, directed to the respondents herein commanding them and each of them, immediately upon the receipt of said writ, or within thirty days thereafter, to approve said bond so filed and order letters of guardianship to be issued to said T. Sakurai by the clerk of said court in the matter of the guardianship of said Mary Sakurai or show cause before this honorable district court of appeals in the second appellate district, at a specified time and place to be designated by this said court, why said respondents should not have so approved said bond filed for the qualification of said T. Sakurai as guardian of the person and estate of said Mary Sakurai; that upon the final hearing herein, a peremptory writ of mandate issue to said respondents requiring them to pass upon and approve said bond and order the clerk of said court to issue letters of guardianship to said T. Sakurai in the matter of guardianship of the person and estate of said Mary Sakurai, a minor, and for the costs of the petitioners herein incurred, and for any and all such other relief as may be deemed meet and proper by this honorable court.

And your petitioners will ever pray.

b. DECISION OF THE COURT.

(1) GUARDIAN AND WARD—ORDER APPOINTING GUARDIAN—DECREE OF COURT.
—An order appointing a guardian, when duly made and entered, becomes a decree of the court.

(2) ID.—BOND OF GUARDIAN—APPROVAL OF—DUTY OF COURT.—It is the duty of the court, when a valid order of appointment of a guardian has been made, to approve a duly executed bond with sufficient sureties when such bond is made in compliance with the terms of the order appointing the guardian.

(3) ID.—SECTION 1751a, CODE OF CIVIL PROCEDURE—ORDER OF APPOINTMENT BEFORE PASSAGE OF—REFUSAL OF JUDGE TO APPROVE BOND—MANDAMUS.—The provisions of section 1751a of the Code of Civil Procedure that "no person ineligible to citizenship in the United States * * * may be appointed guardian of any estate which consists in whole or in part of real property," which became effective August 16, 1923, furnish no valid excuse for the refusal of a judge to approve a bond given by a guardian appointed before said section became effective, and mandamus will lie to compel the judge to approve the bond.

Application for writ of mandate prayed to be directed to the superior court of Los Angeles County, Victor R. McLucas, judge, to require respondent to approve bond of guardian. Writ granted.

For petitioners—Louis B. Stanton.

For respondents—U. S. Webb, attorney-general; John W. Maltman, deputy attorney-general; Robert M. Clarke, Louis P. Boardman.

On petition for writ of mandate. It is conceded by respondents that prior to the 16th day of August, 1923, it was lawful for the superior court in a proper case to appoint as guardian of an estate any suitable person, notwithstanding that such person was ineligible to citizenship in the United States. Section 1751a of the Code of Civil Procedure was added to that code by an amendment which became effective August 16, 1923. (Stats. 1923, p. 584.) That section provides that "no person ineligible to citizenship in the United States * * * may be appointed guardian of any estate which consists in whole or in part of real property."

On the 8th day of August, 1923, pursuant to proceedings leading thereto in due form, the superior court of Los Angeles County made and entered in its minutes an order that T. Sakurai be appointed guardian of the estate of Mary Sakurai, and that letters of guardianship be issued accordingly upon his taking the oath as required by law and giving bond to said minor in the sum of \$1,000. The said Mary Sakurai is a minor child born of Japanese parents in the State of California, and is the owner of real property situate in the County of Los Angeles. The said T. Sakurai is a native and subject of the Empire of Japan and is not eligible to citizenship in the United States. He is the father of the petitioner herein, the said Mary Sakurai.

On the 18th day of August, 1923, the said T. Sakurai presented for approval of the judge of the superior court in the department where said order of appointment of guardian had been made a bond as required by said order, which bond, with sufficient sureties, was executed in due form as the guardian's bond in accordance with the terms of section 1754 of the Code of Civil Procedure. The judge has refused to approve said bond, basing such refusal solely upon the fact of the status of said T. Sakurai as an alien ineligible to citizenship in the United States, and upon the ground that by reason of the provisions of section 1751a, Code of Civil Procedure, he was precluded from approving such bond. Thereupon said Mary Sakurai presented to this court her petition for a writ of mandate to compel respondent court to approve said bond.

(1) An order appointing a guardian, when duly made and entered,

becomes a decree of the court. The provisions of the code relative to the estates of decedents in so far as they relate to practice in the superior court apply to proceedings under the chapter relating to guardian and ward. (Code Civ. Proc., sec. 1808.) Section 1393 of the Code of Civil Procedure, relating to bonds of executors and administrators, provides that all such bonds must be approved by a judge of the superior court before being filed. Reading together the above-mentioned sections, (2) it clearly is the duty of the court, when a valid order of appointment of a guardian has been made, to approve a duly executed bond with sufficient sureties when such bond is made in compliance with the terms of the order appointing the guardian. The order here in question was a complete decree of the court prior to the 16th day of August, 1923. Nothing remained to give it all the force and effect of any decree of court. So far as the appointment of the guardian was concerned, the judicial action was finished. The qualification of the guardian by presenting and filing a sufficient bond and by taking the oath of office were not a part of the order of appointment, but were only proceedings required to be taken for the purpose of carrying into effect the decree as made and entered. There is nothing contained in section 1751a, Code of Civil Procedure which purports to interfere or can properly be construed as interfering with the qualification of any guardian under a valid order of appointment. (3) We therefore are of the opinion that the provisions of section 1751a furnish no valid excuse for the refusal of the judge to approve the bond. No other excuse is offered, since it is not denied that the bond was in due form and with sufficient sureties. It is well settled that mandamus will issue to correct an abuse of discretion in such a case. If the vested discretion under the facts can be legally exercised in but one way, mandate will lie to compel the inferior tribunal so to exercise it. (*Newlands vs. Superior Court*, 171 Cal. 741, 744.)

In the return to the alternative writ of mandate herein respondents state that at a session of said superior court duly held on November 26, 1923, the court entered an order vacating and setting aside the order of August 8, 1923, and placed upon its calendar for further hearing the matter of the appointment of a guardian of said minor's estate. This order appears to have been made *ex parte*, not only after the order of August 8th had been duly entered and thus had become a decree of court, but also after the expiration of the time within which an appeal from the order of appointment might have been taken. The code provides a procedure upon notice for the removal of a guardian where cause for such removal exists. (Code Civ. Proc., sec. 1801.) We find no authority in law for the arbitrary vacation by the superior court of a valid decree once entered by its order.

Let the peremptory writ issue.

CONREY, P. J.

We concur:

HOUSER, J.

CURTIS, J.

6. MATSUMOTO CASE.

In the Matter of the Estate and Guardianship of SHINICHI MATSUMOTO,
a minor.

IN THE CALIFORNIA SUPERIOR COURT.

TULARE COUNTY, No. 2918.

Hon. J. A. Allen, judge presiding. Visalia, California, January 5, 1920.
This being the time heretofore fixed for hearing the return on the order

to show cause why letters of guardianship should not be revoked, the parties appeared in court and thereupon the following proceedings were had and testimony taken, to-wit:

Mr. Bagby. The petition was filed August 7, 1917, and letters were granted in guardianship on August 27, 1917. The property of this estate resulted from a decree of distribution entered by this court in the matter of the estate of T. Matsumoto, deceased. The property consisting entirely of cash and personal property and no real property was involved. The property involved in the petition for appointment was an undivided one-half interest in the following described property heretofore distributed: Cash, \$2157.95, and a small list of personal property of the total value of \$135.00, which is a few farming tools principally. The guardian cited to appear here is ill and was not able to come, the ward, however, is present and can testify to his mother's illness. The mother was the widow, entitled to one-half of the estate and he the other half, and he is of age. He was, himself, 19 years of age when this was filed, and he is now past 21. We may now have him sworn.

The Court. Why wasn't an inventory filed, or was there an inventory?

Mr. Bagby. No inventory or account was filed, it was by laches on my part as well as the other. It is all personal property.

Judge Wallace. Why don't you file an account and ask that the guardian be discharged?

Mr. Bagby. The guardian cannot be discharged because the year has not elapsed. I have the account right with me if you desire to see it.

The Court. The inventory and account should be filed.

Mr. Bagby. I will be glad to receive an order to that effect. She is too ill to appear before the court.

The Court. Very well, let it be filed, and when it is filed this order will be discharged, the order to show cause will be discharged on the filing of the inventory and account.

Mr. Bagby. I might file it at this time, asking him to verify it, his receipts. He has all of the personal property, although he is only entitled to half.

The Court. That could be filed with your account.

In the Matter of the Estate and Guardianship of KIMIKO OKASAKI and
FUJIYE OKASAKI, Minors.

No. 3215.

Mr. Chase. In the case of the Okasaki minors, we have prepared a report of the moneys had and the moneys received and we offer to file it at this time.

Wallace, judge. You may file it.

The Court. It has to be set for hearing.

Mr. Chase. Yes, that is the usual way, I presume it will be set for two weeks ahead.

Wallace, judge. Now, I suppose, of course, excepting as to the accounts they are all practically alike, not much difference in the cases, excepting some of them, no accounts are filed, but those are minor matters, the main proposition can be argued in all. Now, we decided one case here on an application for appointment of guardian, and denied it because it appeared that it was an attempted evasion of the law, or to use the probate court for the purpose of assisting in violating the law. Now, in regard to these contracts, are they not all void? A minor cannot give a delegation of power, and he is forbidden, under the Civil Code, to enter into any contract relating

to real property; nor if he cannot do it himself, can it be done by another for him. Now, those are matters of very great importance. These things did not come up on the filing of the petition, or they might have been considered then. And it was important, of course, that inventories be filed, in order to show the extent of the claims of the ward and how they acquired their rights. While this matter is independent of the Alien Land Law, altogether because it is a matter of the Civil Code and applies to all minors, all classes, it is a very serious matter whether or not all these contracts are not void. I think we had better proceed and hear your argument now on all these matters.

Allen, judge. (After argument by Mr. Elliott.) The guardian should not put himself in a position where he would be antagonistic to the ward. When a guardian puts himself in a position to carry on the business of the ward, not merely to look out for the ward, but to conduct the business for the ward, he is putting himself in a position antagonistic to the ward, and it should not be allowed, and, in my opinion, will not be allowed in these cases.

Let me call your attention to case a good many years ago, when I was a young attorney. A man had deeded property to a friend with the understanding that this friend should take care of him for the balance of his life, pay his doctor bills, furnish him food and clothing, and the friend gave back a mortgage conditioned that he would do this or the mortgage would be foreclosed. Now, the question came up in court as to the appointment of a guardian. The old man was nearly blind and in some respects incompetent and the question arose as to who should be appointed guardian, and he wanted this friend. Judge Cross stated from the bench, "No. This friend of yours would probably make a good guardian, but he is a mortgagor to you, and there might be questions that might be antagonistic that would arise between you; therefore, somebody else should be appointed." Certainly where a guardian undertakes to carry on the business of the ward and to make money out of it himself, to make wages, or anything else, there is a position of antagonism and it cannot be allowed.

Mr. Smith. Does that apply merely to the question of residence, this matter of antagonism, or to farming?

Allen, judge. Well, we can determine that matter when it arises in court.

Mr. Smith. If your Honor is not going to pronounce on that question, it is proper to take it up when it arises.

Allen, judge. I think each case should rest on its own merits. (Here the matter was argued by Mr. Middlecoff and by Mr. Elliott.)

Wallace, judge. There is no doubt that title to property held by an alien, that only the government can interfere, but if the court in any proceedings should judge by the facts that it was being used as an instrument to get a title in such a way that aliens could enjoy the fruits of the property I think might undertake proceedings. I do not know, I should think so. I would be very much inclined to that view if I were convinced of that in any given case. We have concluded that the proper thing to do is to take this thing under advisement and go through it advisedly and probably write opinion of the—an opinion in regard to it, so our position may be understood.

There is no question of race prejudice or prejudice of any kind, it is simply a question of whether or not, under our views, an attempted violation of the Alien Land Laws has been made and whether we have the power to deal with it in this proceedings. Now there are only two questions we have to determine.

Mr. Elliot. Should your Honor determine to remove these guardians, will your Honor do it in such time and in such a way as to give the attorneys a chance to propose the other parent?

The Court. It might be that if one parent was disqualified the other parent would be also.

Mr. Elliot. We would like to have an opportunity of having the record show, if your Honor should remove the present guardian——

Wallace, judge. We do not propose to be hasty in this matter, to cut off any rights you might have.

Mr. Elliot. In other words, your Honor would not want some other guardian appointed without letting counsel know.

Wallace, judge. Oh, no.

Note—The guardian was discharged by the order of the court, because of the ward's passing 21 years of age.

7. WATANABE CASE.

In the Matter of the Estate and Guardianship of YAYE HIRUMA and TATSUKO WATANABE, minors.

IN THE CALIFORNIA SUPERIOR COURT.

TULARE COUNTY.

Hon. W. B. Wallace and Hon. J. A. Allen presiding.

Visalia, California, January 5, 1920.

This being the time heretofore fixed for the hearing of the above-entitled matter, thereupon the parties appeared in court and the following proceedings were had and testimony taken, to-wit: The guardian appearing by his attorneys, E. A. Bagby, Esq., and Albert H. Elliot.

Mr. Bagby. I would like to move the court that Mr. Elliot be associated with me in this matter.

The Court. Very well. Now, in response to this order to show cause, what proceedings have been taken?

Mr. Bagby. We present a verified report of the account of the guardian, as I say verified, a statement of all the property he received as guardian at the time he was appointed guardian; next a statement of all the property that he has acquired as guardian since that time.

The Court. Has a regular inventory been prepared?

Mr. Bagby. We have it presented to you—we have to present to you an order appointing an appraiser.

The Court. Why didn't you have that done as soon as the order to show cause was placed in your hands?

Mr. Bagby. Because I considered that when he was cited to show cause why he should not be discharged as guardian, it was his duty to disclose everything that he had done.

The Court. He has his account anyway.

Mr. Bagby. His account is here now.

The Court. I know, but the inventory—oh, you have it ready?

Mr. Bagby. No, I have an order appointing U. D. Switzer sole appraiser.

The Court. I think you ought to have taken that up earlier. That ought to be on file at this time, of course, manifestly such papers as you could have filed.

Mr. Bagby. After your Honor sees what the estate is composed of, I think your Honor will find that it is a formal matter.

The Court. It is never a formal in a guardianship matter.

Mr. Bagby. No, not in a guardianship matter, but showing the reason why he should not be discharged as guardian. This is not a contract—this is on a contract, and this account set forth in Schedule A, a statement of the estate that came into his hands as such guardian, which is a contract to purchase certain real property upon which \$500.00 has been paid, the terms as set forth in Schedule A. In Schedule B is set forth the personal property that was required after the appointment of the guardian, for the purpose of improvement of this estate. In Schedule C is set forth all payments made upon the real property and the contract for the purchase of the same, whether for principal or for interest. The total amount is \$2500.00 on the principal and \$1147.82 interest, all payments having been made to date. The next Schedule D set forth bills receivable, a small credit for raisins that were sold to the Raisin Association, in the Raisin Association hands and the amount that was sold to them, the price not being fixed, the exact value thereof cannot be given. The estimate is given in Schedule D, the estimated amount is \$600.00 in excess of the loan made on the crops for the purpose of having, which loan was the sum of \$880.00 advanced by the Raisin Association. Schedule E is a schedule of the cash receipts, cash on hand at the time of the appointment; next, cash contributed by the parents. There are two children who are not related in this guardianship, and half is contributed by the parents of one and half by the other, \$4000.00 each, making \$8000.00 contributed; amounts received for sale of raisins, \$580.00; total cash received, \$8500.00. A full report of every disbursement from the inception until practically to date of preparation of this is set forth, with all the vouchers, which we desire to file, vouchers for every item in excess of \$5.00, except a \$1.00 item for which the voucher was lost.

Joe Nishida, the guardian, being duly sworn in his own behalf, testified as follows:

Mr. Bagby. Now, I believe you can answer me without the use of an interpreter. There are two children Yaye Hiruma and Tatsuko Watanabe?
A. Yes, sir.

Q. Referring to Watanabe, what is the name of Watanabe's father?
A. M. Watanabe.

Q. What is the name of Watanabe's father? A. Chyoin.

Q. That is the name of the mother of Watanabe? A. No, should be spelled Shyoju.

Q. You are no blood relation are you, to the Hiruma child? A. No.

Q. Did you marry the mother of this child? A. Yes, sir.

Q. And what is the mother's name? A. Yosui.

Q. That is your wife? A. Yes, sir.

Q. Prior to the time you were appointed guardian then you married the mother of the child for which you are guardian, is that correct? (Through the interpreter.) A. Yes, sir.

Q. Are you any relation at all to Tatsuko Watanabe? A. No.

Q. Was Yaye Hiruma born in the United States? A. Yes, sir.

Q. Was Tatesuko Watanabe born in the United States? A. Yes.

Q. Their parents, none of them were born in the United States, were they, none of the parents of these children were born in the United States?
A. No, sir.

Q. I refer to the report and account that you have made which I hold in my hand. In Schedule A you set forth that you received certain real property under a contract of purchase; how much was paid on that contract at the time you were appointed guardian? A. \$500.00.

Q. Is this the contract? (Showing paper to witness.) A. Yes, sir.

Mr. Bagby. We might file that as an exhibit, if the court please.

(The following is the copy of the contract referred to:)

This agreement, made and entered into this 28th day of April, 1917, by and between G. G. Duerksen and Eva Duerksen, his wife, of the County of Tulare, State of California, the parties of the first part, and Masagi Watanabe and Yasue Hiruma, of the same county and state, the parties of the second part,

Witnesseth, that the parties of the first part, for and in consideration of the covenants and agreements hereinafter mentioned and contained, to be kept and performed by the parties of the second part, agree to sell unto the parties of the second part, and the parties of the second part agree to buy of and from the parties of the first part in the name of and for the use and benefit of Yaye Hiruma and Tatsuko Watanabe, natural-born citizens of the United States, in joint tenancy and to the survivor of them, all that certain real property situate, lying and being in the County of Tulare, State of California, particularly described as follows, to-wit:

The west half of the northwest quarter of the northeast quarter, and the west half of the east half of the northwest quarter of the northeast quarter of section twenty-three (23) in township sixteen (16) south of range twenty-three (23) east, Mount Diablo base and meridian, in the County of Tulare, State of California.

Together with the tenements, hereditaments and appurtenances thereof belonging or in any wise appertaining, and the rents, issues and profits thereof;

For the sum of eight thousand two hundred (\$8200.00) dollars, in gold coin of the United States of America, to be paid at the times and in the manner hereinafter specified;

And the parties of the second part, in consideration of the premises and on behalf of Yaye Hiruma and Tatsuko Watanabe, as joint tenants, promise, covenant and agree to and with the parties of the first part to buy said real property for the said Yaye Hiruma and Tatsuko Watanabe in joint tenancy, and to and for the survivor of them, and to pay therefor the said sum of eight thousand two hundred (\$8200.00) dollars, in gold coin of the United States of America, at the times and in the manner as follows, to-wit:

The sum of five hundred (\$500.00) dollars, cash in hand paid upon the execution of this agreement, the receipt whereof is hereby acknowledged; the sum of three thousand (\$3000.00) dollars according to the terms and conditions of one certain promissory note and mortgage, given by the parties of the first part herein to C. L. Adams, which said note and mortgage were both dated April 24th, 1917, and which mortgage is given to secure the payment of said note which is in the principal sum of three thousand (\$3000.00) dollars and is payable five years after the date thereof with interest at the rate of seven per cent per annum, interest payable annually, and which said mortgage appears of record in the office of the county recorder of the County of Tulare, having been recorded April 25th, 1917, and bears Fee Book Number 5708, which said note and mortgage as a part of the consideration and purchase price herein, the said parties of the second part agree and assume to pay according to the tenor thereof; the balance of four thousand seven hundred (\$4700.00) dollars, shall be paid in the manner following: \$1000.00 on or before October 1st, 1918; \$1000.00 on or before October 1st, 1919, \$1000.00 on or before October 1st, 1920, \$1700.00 on or before October 1st, 1921, together with interest on the deferred pay-

ments at the rate of seven per cent per annum, payable annually, beginning October 1st, 1918.

It is understood and agreed that the said Yaye Hiruma and Tatsuko Watanabe shall have immediate possession of the said real property as joint tenants; that the parties of the second part herein shall pay all taxes and assessments, whether state, or county, water, irrigation or otherwise, that may hereafter be levied or imposed upon said land for the use and benefit of the said Yaye Hiruma and Tatsuko Watanabe.

It is further understood and agreed that the parties of the second part will at all times during the life of this contract take good and farmer-like care of said property and of the vines growing thereon.

Time where mentioned herein is of the essence of this agreement and should the said Yaye Hiruma and Tatsuko Watanabe, or the parties of the second part for them, fail to make any payment of either principal or interest, at the time the same is herein agreed to be paid, whether upon the contract proper or upon the note and mortgage herein referred to, then the parties of the first part may re-enter said premises and remove all persons therefrom, and may retain all sums of money theretofore paid as liquidated damages; but the parties of the first part, on receiving the full payments of principal and interest, at the time the same are herein agreed to be paid agree to execute and deliver to the said Yaye Hiruma and Tatsuko Watanabe, or the survivor of them or their legal representatives or assigns, a good and sufficient deed of grant, bargain and sale, conveying the said real property unto the said Yaye Hiruma and Tatsuko Watanabe as joint tenants or to the survivor of them, free and clear of all incumbrances, done, made or suffered by the parties of the first part, subject only to the said mortgage of three thousand (\$3000.00) dollars if the same shall not have been paid or discharged by the parties of the second part or by the said Yaye Hiruma and Tatsuko Watanabe.

It is understood and agreed that a good and sufficient certificate of title, showing the title to be merchantable and acceptable, has been furnished by the parties of the first part unto the parties of the second part and that no further evidence of good or merchantable title need be furnished.

In witness whereof the parties hereto have hereunto set their hands the day and year first hereinabove set forth.

G. G. (X) DUERKSEN,
(His mark)

EVA DUERKSEN,

Parties of the First Part.

MASAGI WATANABE,

YASUE HIRUMA,

Parties of the Second Part.

I hereby witness the signature of G. G. Duerksen, I having written his name, at his request, he being unable to write, but having made his cross (X) mark.

EARL A. BAGBY.

Witness: PAUL BEN TAKESHITA.

State of California, County of Tulare, ss.:

On this 28th day of April, in the year one thousand nine hundred and seventeen, before me Earl A. Bagby, a notary public in and for the County of Tulare, personally appeared G. G. Duerksen, Masagi Watanabe and Yasue Hiruma, known to me to be the persons whose names are subscribed to the within instrument, and they each duly acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the County of Tulare, the day and year in this certificate first above written.

(Seal)

EARL A. BAGBY,

Notary Public in and for the County of Tulare, State of California.

State of California, County of Tulare, ss.:

On this 1st day of May, in the year one thousand nine hundred and seventeen, before me, H. J. Barrett, a notary public in and for the said County of Tulare, personally appeared Eva Duerksen, known to me to be the person whose name is subscribed to the within instrument, and she duly acknowledged to me that she executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office in the said County of Tulare, the day and year in this certificate first above written.

H. J. BARRETT,

Notary Public in and for the said
County of Tulare, State of California.

Oct. 1, 1918	Paid acct.	Contract Prin.	\$1000.00	Balance \$3700.
Oct. 1, 1918	" "	Interest	 468.82	paid to 10-1-18

\$1468.82

First National Bank, Dinuba, Calif.

By C. R. Morton.

Oct. 1, 1919	" "	Contract Prin.	\$1000.00	Balance \$2700.
Oct. 1, 1919	" "	Interest	 259.00	paid to 10-1-19

First National Bank, Dinuba, Calif.

By C. R. Morton.

Mr. Bagby. Have you made all the payments since that time that have been required under this contract? A. Yes, sir.

Q. And it has been fully paid up, principal and interest therein?
A. Yes, sir.

Q. Where do you live? A. At Dinuba.

Q. Do you live on this land? A. No.

Q. On this land mentioned in this contract? A. No.

Q. Are you a landowner yourself? A. Yes.

Q. How far is that land from land that you hold by this guardianship?
A. About a mile and a half south.

Q. How long have you owned your land, how many years? A. About 7 years.

Q. Did you acquire title to this land that you now own prior to the enactment of the Alien Land Law?

The Court. He may not know when that was passed.

Mr. Bagby. You had it before 1913? A. Yes, sir.

Q. You live there now on that land? A. No.

Q. Where do you live now? A. One or two miles south.

Q. From your own land? A. No, from the contract.

Q. You have a contract on your own land? A. Yes, sir.

Q. Have you at any time since your appointment as guardian, lived on this land of the two children? A. No, I have not lived there.

Q. Where did the money come from that made these payments? A. Well, you mean for the whole part?

Q. The money you spent as guardian, where did you get it? A. Mr. Watanabe and myself and my wife.

Q. Did you or your wife or Mr. Watanabe contribute equal amounts of this money that was spent? A. Yes, sir.

Q. Your Schedule B sets forth a list of the property that you have acquired since you were appointed guardian, such items as \$4000.00, grape stakes, and horses, and set of double harness, cultivator, shovel, and so forth, the total of which purchase amounted to \$1346.83, is that the property that you have in possession now? A. Yes, sir; it is on the premises where we bought it.

Q. Was all this list of personal property purchased for use only on the lands of these minors? A. Yes, sir.

Q. Your Schedule C sets forth a total amount of interest payments as \$1147.82. Have you filed your receipts and vouchers in your account showing all these payments of interest? A. Yes, sir.

Q. Is the same true with the payments of principal since you were appointed guardian, \$1000.00 paid October 1st, 1918, and \$1000.00 September 30th, 1919; have you filed your receipts? A. Yes, sir.

Q. How many acres have you altogether in this guardianship? A. 30 acres.

Q. At the time that you acquired this as guardian, was there any bearing vines on it? A. It was purchased for the children when it was first planted out and consequently there were no grapes to be found on the place.

Q. Since that time, however, have a few acres come into bearing?

Mr. Middlecoff. I suggest that his questions all have been very leading.

Mr. Bagby. Yes, I can take more time and get at it. Counsel suggests that my questions have been leading, I do not desire to make them more leading than is necessary under the circumstances.

The Court. Go ahead. A. The first few acres had a crop, produced a crop two years ago.

Mr. Bagby. How many acres entirely produced a crop last year? A. About 7 acres, more or less, I am not sure.

Q. Then you have had the crop of 2 years, is that correct? Off of 7 acres? A. Yes, sir.

Q. Your report shows the crop of 1918 to have been 8295 pounds of raisins, that were sold to Guggenheim and Co., for 6¼ cents, making a total selling price of \$580.00. Was that the best price that you could receive for raisins for the year 1918? A. It was.

Q. What did you do with the crop of 1919? A. It was contracted and sold to the association.

Q. The California Associated Raisin Company? A. Yes, sir.

Q. Under their contracts, the exact price to be paid is not fixed, is it? A. No, sir, it is not fixed.

Q. Did you secure any advance from the Raisin Association? A. I have.

Q. How much? A. \$1280.00.

Q. Do you think that the crop will exceed this advance when the final payments are made? A. Well, I think so.

Q. About how much do you think you will receive for the crop when the final payment has been made? A. I figure between \$500.00 and \$600.00 to be received.

Q. Your account of disbursements is shown in Schedule F, bearing 92 vouchers. Have you made any expenditures that are not shown in this Schedule F, have you made any other expenditures that are not shown in that list?

The Court. Well, he has verified that.

Mr. Bagby. Yes, that is verified.

The Court. It is not necessary to examine him in detail on that.

Mr. Bagby. Very well. The vouchers are all on file.

The Court. What did you do with the money you got? A. Do you mean my own money?

Q. No, the money he got off this crop on this land that he bought for the children. A. Paid out all necessary expenditures and what was left was kept in the bank in their account.

Q. How was it deposited in the bank, in your name or in the minors' names? A. Beg your pardon. I spent more than what I got and had no time to make any deposits so far in their name and any deficiency caused so far I have paid out of my own pocket.

Q. Before he spent the money to pay out debts, what did he do with it, how did he handle it, did he deposit it in the bank then when he first received it?

The Interpreter. May I explain to him a little further?

The Court. I want to know how he handled it, whether he kept it himself or put it in the bank. A. Before the payments were made I have deposited in my own name, with addition of guardian, under my own name to it.

Q. What bank? A. First National Bank of Dinuba.

Q. With regard to those sales, did you have any order of court to sell the place? A. I did not, no. I did not know that I had to do it.

The Court. Any questions, Mr. Middlecoff?

Mr. Bagby. May I ask another question? You did not file any inventory or account with the court, did you? A. I did not.

Q. Have you had any other attorney beside myself, Mr. Bagby, in this matter? A. No, sir.

Q. There are things that are required by law to have been done that appear not to have been done. Why didn't you do them, such as inventory and account and orders of sale? A. Why, I suppose it was due to my ignorance, because I never knew that I had to file those papers, except that I had to keep strict account of them in my own books, therefore I neglected to do it.

Q. At the time that you were served with order to show cause in this present matter, did you have all of your vouchers, receipts that were filed there, except those that are still in the bank, did you have all of those on file and on hand at that time? A. Yes, sir.

Q. Had you at that time in your possession the books wherein had been entered, as they occurred, all items of receipts and disbursements? A. I have them.

Q. Had you from time to time disclosed all your receipts and disbursements to the parents of Watanabe, one of the minors? A. I was.

Q. Who does this land that is being purchased under this contract belong to?

The Court. He cannot answer that, that is a matter that the papers themselves will show, his opinion would be of no value.

Mr. Bagby. I thought many questions asked by the attorney representing the attorney-general was directed to that question.

The Court. I know, but notwithstanding that, it cannot depend on what he thinks.

Mr. Bagby. His intention in this matter is the whole bulk of the court's investigation now.

The Court. It does not make any difference what you understand in regard to that, it is not his belief that fixes the title. If it is real property,

he must show the papers by which it was procured, that is, it is guardian-ship property, that is what you are referring to.

Allen, judge. What relation are you to this minor Hiruma? A. She is my stepdaughter.

Q. Have you any children of your own? A. I have.

Q. How many? A. Two.

Q. What relation is Watanabe to you? A. We are no relatives.

Q. Are your children minors—your two children? A. They are very small children.

Q. Who furnished the money to buy this property for Hiruma? A. A majority of the money was put up by my wife and the rest by myself.

Q. How much did you put up? A. I think I have put nearly \$3000.00 of my own money, gave it to the child.

Q. That is about all that has been paid, is it not—I am asking what has been paid for Hiruma, not for anybody else.

Mr. Bagby. He paid out over \$8000.00 as total disbursements that have been made, and he is referring to that.

Allen, judge. You have not paid anything for Watanabe, have you, that is, out of your money? A. No.

Q. All that you have paid out of your money has been for Hiruma? A. Yes, sir.

Q. Who furnished the \$500.00 that was paid out when this contract was made? A. Mr. Watanabe and my wife jointly.

Q. Is that all your wife furnished? A. No, sir.

Q. How much has she furnished since the contract was made? A. I am not sure, but she must have put up nearly \$1000.00 or slightly more.

The Court. I notice in these vouchers, a good many of them are Japanese characters, how is the court to deal with them?

Mr. Bagby. The items and amounts, they refer to the number on the account, he never had these vouchers, he had no others.

Mr. Middlecoff. Where were you born? A. In Japan.

Q. Where was this child born? A. In Dinuba.

Q. She was born in Dinuba, Tulare County? A. Yes, sir.

Q. And where is that child's mother? A. She resides with him. Tulare County, too.

Q. Where, what time, I mean what town? A. In Dinuba.

Q. Where is the father of Tatsuko Watanabe? A. He is a resident of Dinuba also.

Q. And where is that child's mother? A. She resides with him.

Q. What is the business of the father and the mother of Tatsuko Watanabe? A. He is Japanese foreman for Mr. Frank Wilson of Dinuba, and I do not know the wife's business, except that she is helping around the house.

Q. Where were the father and mother of the child Tatsuko Watanabe born? A. In Japan.

Mr. Elliot. Will your Honor permit me to take the same objection and the same exception as to the attorney-general appearing in this case, I forgot this was another case.

The Court. Yes, sir.

Mr. Elliot. May that be considered in all these cases?

The Court. In all cases before me, yes.

Mr. Middlecoff. Why was not this contract taken in the name of the parents of these children? A. Why, I cannot state it authoritatively, but I believe that the parents of the children wanted to leave some substantial

sum or piece of real property for the future of their children, and having considered the proposal carefully, they decided that land in this county on from 5 or 10 years from now on, when the children will be eligible to purchase the property will be 3 or 4 times higher in price, therefore, they considered this a very good investment for the children to have.

Q. When do you intend that the children shall themselves use this property? A. When they attain their majority.

Q. When you said that you wanted to leave something to the children and you thought this would be a good way, to invest so as to leave them something, did you mean to say that the children would have this land after you died? A. I did not mean after my death particularly, but when they arrive at their majority.

The Court. If you put in a good deal of money yourself to help get title to this land, did you expect to get that back from your children later? A. No, sir, I did not expect to get anything out of it.

Mr. Middlecoff. Has the mother of the child Hiruma any other property besides what she has put into this? Ask him if Yasha Nihaida, the mother of Hiruma, has any other property now left. A. She has.

Q. How much? A. I cannot state the amount.

Q. Well, approximately, what is it? A. Real property.

Q. Where is that real property? A. At home.

Q. In Japan? A. Yes, sir.

Q. What other property has the father of Tatsuko Watanabe? A. He has.

Q. Where? A. He has some money in a bank at Dinuba.

Q. How much? A. I do not know.

Q. And how much has the mother of the child Watanabe? A. I cannot state as to her estate.

Q. Is your wife here in Visalia today? A. Yes, sir, she is here.

Q. The court room? A. No.

Q. Is the father of Tatsuko Watanabe here in the court room? A. He is.

Q. Is the mother of the child Watanabe here? A. No, sir, she is not here.

Q. Where is she? A. She is at Dinuba.

Mr. Elliot. Is she in bad health or good health, is she sick now? A. She is.

Here the court took an adjournment until 1:30 o'clock P. M.

AFTERNOON SESSION.

Joe Nishida resumes the stand and testifies as follows:

Mr. Middlecoff. At the time that you entered into this contract to purchase this property, the child had no property did it? A. No, sir.

Q. And neither child had any money or property at the time the contract was entered into, did it? A. I could not say as to the other child, but the child whose mother I married later did not have any.

Mr. Middlecoff. I believe that is all.

Mr. Bagby. That is all.

The Court. Mr. Bagby, I will ask you this question: When the petition for letters of guardianship were filed, these contracts were not produced, were they? The petitioner testified orally that the minor had real property that needed a guardian, was that it?

Mr. Bagby. I believe that is correct, that is my memory, the contract was in existence and made previous to letters of guardianship.

The Court. It was not produced in court.

Mr. Bagby. No, not that I remember.

Mr. Middlecoff. I would like to ask this question. Has the child ever had any property with which it would or could carry out this contract other than what was given to it by its parents? A. Not that I know of.

Q. Is it not a fact that at the time that this contract was entered into, on behalf of these children, that the parents of the children intended to put up the money with which to buy the property? A. Yes, sir.

Mr. Middlecoff. That is all.

Earl A. Bagby, a witness on the part of the guardian, being first duly sworn, testified as follows:

Mr. Elliot. You have given your name and address I presume, and what is your business? A. Attorney and a few other things, attorney principally, I guess.

Q. How long have you been a practicing attorney? A. Since 1908.

Q. And how long have you been in this county practicing law? A. Since July, 1909.

Q. You represented the guardian in this case when he filed his petition for letters of guardianship. A. Yes, sir.

Q. And have represented him ever since? A. Well, I left the law practice for about a year, just recently, and I have, anyhow, I have done all the law business that I know of, that has been done for Mr. Nishida.

Q. Do you remember whether or not you told this guardian to file his inventory and report in this matter? A. I have no memory. I was attorney for the Japanese Association, and through the association matters were often submitted to me, different secretaries they have had, and most all the information and advice I have given to any matters were given to the secretary of the association; and whether in this particular matter I told the secretary of the association about filing an inventory, I do not know.

Q. And how about the report? A. I was under the impression that no accounting of the guardian was required to be filed until one year after the filing of the inventory.

Q. That was your view of the statute? A. That was my impression.

Q. Do you remember whether you communicated your views of the law to the guardian in this case? A. I hardly think I did, to the guardian in this particular matter, I think I informed the secretary of the association generally that in guardianship matters, they would have to file an accounting once a year.

Q. When the citation was served on the guardian, did he bring it to you? A. It was brought to me by the secretary of the association, I believe.

Q. And what did you do? A. I asked him to bring the guardian to me, immediately, his books and papers, and I looked over his books and papers and immediately started preparing his account from those papers.

Q. That is the account that was filed? A. That is the account that was filed.

Q. You did not prepare an inventory and appraisement in this case? A. I prepared an order asking the court to appoint an appraiser, and by not filing the inventory was due to my judgment and not the guardian's, because I presumed that when evidence was to be heard on the question of the discharge, that his rights to act further in the estate, other than furnish evidence of what he had done, was for the time upheld. I was going to ask at this hearing that we be allowed to file an appraisement of the estate.

Q. If the court permits you, on behalf of the guardian, you will file that inventory and appraisement of the estate? A. Yes, sir; if the court

permits me, I will file that inventory and appraisement of the estate, if the request is granted; that order is here.

Mr. Elliot. That is all.

Mr. Middlecoff. Prior to the time that you ever saw this guardian were you employed by the Japanese Association to file the petition? A. No, I can't answer particularly, only in this way, that I remember of no instance where I was employed by the association. The secretary of the association acts as interpreter, as a rule, and he applied to the secretary to come with them, and any of the attorneys do their talking with the secretary as interpreter in the matter. However, the parties themselves present themselves to the attorney in all instances. The association does not pay the attorneys' fees or employ the attorneys, they simply act in an advisory capacity.

Q. In this matter was the representative of the association simply acting as a friend of the applicant? A. That is it. It is not the duty of the secretary of the association to carry on any law business for any individual, but whenever any individual Japanese has legal difficulties, why he goes to the secretary of the association, and with the secretary to the attorney, and the secretary acts as interpreter. There is no employment between the association and the attorney that I know of.

Q. But you were at that time the general counsel for this Japanese Association? A. Well, to this extent, that I prepared their articles of incorporation whereby they were incorporated, and drew their by-laws, and had received most of the business of the association, of the secretary, whenever any of the Japanese required an attorney that didn't have any.

Q. Is that a local association of the Japanese? A. It is the Japanese Association of Tulare County.

Q. Is it commercial, fraternal or a social organization? A. I should say it was more social than anything else.

Q. Is it organized for profit? A. Absolutely no profit; it is for the education and general welfare of the Japanese residing in the county.

Mr. Middlecoff. That is all.

The court ordered the removal of the guardian.

8. HOSHIDE CASE.

In the Matter of the Estate and Guardianship of TORU HOSHIDE and AKIRA HOSHIDE, Minors.

IN THE CALIFORNIA SUPERIOR COURT.

TULARE COUNTY. No. 3076.

Hon. J. A. Allen, judge, presiding.

Visalia, California, January 5, 1920.

This being the time heretofore fixed for hearing the return on the order to show cause why the guardian should not be removed, thereupon the parties appeared in court and the following proceedings were had and testimony taken, to-wit:

N. F. Bradley, a witness on the part of the guardian, being first duly sworn, testified as follows:

The Witness. Now, if the court please, in that matter, the citation served upon Mr. Hoshide, who is the guardian of the persons and estates of Toru Hoshide and Akira Hoshide, minors, minor children born in this country, cites him to appear and show cause why he should not be removed

as such guardian, upon the ground that said guardian has returned no inventory of the property of said minor and that he has rendered no account of his guardianship. In that matter I would like to say that perhaps why an inventory and appraisalment were not filed before or any account filed was due to not advising them to do it. But since the citation, or just about the time, I do not know whether the citation had been filed, the citation was served on the 17th day of December, and it was filed in this court an appraisalment on the 18th day of December, I do not know whether the citation had been brought to my attention at the time that was filed or not, but, at any rate, there was an inventory and appraisalment filed, also an inventory filed by the guardian, also a petition filed to sell this real estate, and the court had made an order to show cause and that proceeding is going ahead now.

The Court. Yes, but I stated at the time you presented this petition and order to show cause that it might not do any good in this matter.

Mr. Bradley. I am just stating the status of affairs to the court.

The Court. I want to make it clear that I let you understand that the petition and order might not be acted upon.

Mr. Bradley. The facts are in this case that this property was bought in the name of the minors stands in the names of these native-born Japanese minors and that we are now or have heretofore filed our petition that the property be sold.

The Court. When was the appointment made, I want the exact date?

Mr. Bradley. Letters of guardianship were issued December 2nd, 1918, and the inventory was filed December 18, 1919.

The Court. The inventory was filed since this order to show cause?

A. Yes, sir; the inventory was filed since this order to show cause.

Q. What property did your petition show the minors had? A. It showed that they owned the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 33, in township 17 south, range 26 east, the property which is this 80 acres of land which we have made an inventory on; we have never lived on the land.

Q. Is the guardian here? A. The guardian is here.

Mr. Bradley. Does the court desire any testimony on this?

The Court. Yes. Let him be sworn.

Mr. Hoshide, the guardian, being duly sworn, testified as follows:

The Court. My voice is not in very good condition and I will ask Mr. Middlecoff to examine this guardian.

Mr. Middlecoff. Very well. Mr. Hoshide, where were you born? A. In Japan.

Q. And where was Toru Hoshide, the four-year-old child—

Mr. Elliot. May it be understood that in the four cases in your department the same objection and exception will be observed with reference to the appearance of the attorney-general?

The Court. Yes, sir; and the same ruling.

Mr. Middlecoff. Where was Toru Hoshide, the four-year-old child mentioned in the petition, born? A. In Tulare County, Visalia.

Q. In Visalia? A. Yes, sir.

Q. And where was Akira Hoshide, the two-year-old child, born? A. In Tulare County, Woodlake.

Q. Where was—when was this property purchased that is stated in the petition for guardianship belonged to the children? A. I do not understand it well. (Interpreter sworn.) It was first contracted for August 20th, 1918.

Q. Have you got that contract here? A. I think all the papers including that contract are in the office of Mr. Bradley.

Mr. Middlecoff. What was the total price that was to be paid for the 80 acres? A. \$12,000.00.

Q. Did any one of the children have any property at the time the contract was entered into? A. Did not.

Q. How much did you pay down for the property cash, when the contract was made? A. \$4,000.00.

Q. Whom did that \$4,000.00 belong to? A. I made it a present to the children from my own savings.

Q. When did you make that present? A. A few days prior to this contract was entered into.

Mr. Bradley. They keep talking about a contract; there was no contract. Here is the deed, that is, a deed to the children from the American-born owner. It was not a contract. It was a deed, I do not know anything about a contract.

Mr. Middlecoff. Well, counsel for the guardian says he has no contract.

Mr. Bradley. He must mean that when he said contract.

A. Well, this is the only paper that I was referring to. We will ask that this be marked as exhibit 1.

(Paper received in evidence and marked as exhibit 1, a copy of which is as follows):

This indenture, made this 20th day of August, A. D. 1918, between Ernest Austen of the County of Tulare, State of California, a single man, the party of the first part, and Toru Hoshide and Akira Hoshide, native-born residents of the County of Tulare, State of California, United States of America, parties of the second part.

Witnesseth, that the said party of the first part, for and in consideration of the sum of ten dollars, gold coin of the United States of America, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold, conveyed and confirmed, and by these presents does grant, bargain and sell, convey and confirm unto the said parties of the second part, and their heirs and assigns forever, all that certain lot, piece or parcel of land situate, lying and being in the County of Tulare, State of California, and bounded and particularly described as follows, to-wit:

The west half of the northeast quarter of section twenty-three, township seventeen south, range twenty-six east of Mount Diablo base and meridian. Excepting therefrom, however, all rights of way for roads and ditches of record and also excepting the right-of-way of the Visalia Electric Railroad Company along the north side of said land.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said parties of the second part, to their heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

ERNEST AUSTEN. (Seal)

State of California, County of Tulare, ss.:

On this 20th day of August, in the year one thousand nine hundred and eighteen, before me, N. F. Bradley, a notary public in and for said county and state, residing therein, duly commissioned and sworn, personally appeared Ernest Austen, a single man, known to me to be the person

described in, whose name is subscribed to the within instrument, and he duly acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal)

N. F. BRADLEY,

Notary Public in and for the County of Tulare, State of California.

Endorsed: Recorded at the request of Toru Hoshide, August 20, A. D. 1918, at 52 minutes past 11 o'clock a. m., in vol. 261 of Deeds, page 303, Tulare County Records.

IRA CHRISMAN, Recorder.

S. E. BURUM, Deputy Recorder.

The Court. How did he give him this money?

Mr. Middlecoff. Did you have any other written contract to pay money except this deed? A. I do not know, there might be a piece of paper on record in this county covering this property, but as well as I can remember, we got this deed and gave a mortgage, if I can remember right.

Wallace, Judge. Was there a mortgage to secure this balance of the money? A. As far as I can remember, I do not remember having signed a mortgage, but I do remember having given a note for the balance of the payment.

Wallace, Judge. Maybe Mr. Bradley knows.

Mr. Bradley. I do not think there was any mortgage given.

The Court. He says he paid \$12,000.00 and only \$4000 down.

Mr. Bradley. What difference would it make what he paid for it? We got a deed to this property, and the title on the face of it vests in these children.

The Court. You do not understand the purpose of the court in making these inquiries perhaps.

Mr. Bradley. Perhaps I don't, but I do not see what difference it makes to anybody, if the title is vested in the children, whether there is any indebtedness or not. The guardian has to account for it, if he sells this property under petition to the court he will have to account to the court for the proceeds and we are willing to do that. Of course, we have not objected to these questions, but I think they are beside the board.

The Court. Proceed.

Mr. Middlecoff. When did you make this payment of \$4000.00? A. \$2000.00 on August 20th and another \$2000.00 on November 20th.

Q. When did you pay the rest of the \$12,000.00? A. I have not paid it yet.

Q. Have the children any property other than this real property, than the interest they have in it? A. They do not.

Q. Where was this money, this \$2000.00 that you made the first payment with, at the time that you made the payment, was it paid in the bank? A. In the office of the real estate agent.

Q. And where was the money before you gave it to the real estate man? A. In the bank.

The Court. When were you to pay the \$8000.00?

Mr. Bradley. If the court please, I might clear this matter up a little bit. This property had an \$8,000.00 mortgage on it which was assumed at the time it was bought for the children.

Wallace, Judge. And the mortgage was on it at the time?

Mr. Bradley. Yes, sir; the mortgage was on it at the time. Those are the facts; we recite that in our petition which we filed here in court for an order of sale.

Mr. Bradley. Well, it is against the land, it is like a mortgage against the land, it will have to be paid by somebody; we will have to pay it. Of course, I do not know whether it was brought out or not; Mr. Hoshide is a man of considerable means and he is just making a present of this land to his children; he bought this 80 acres as a present for his children, and he is going to sell it and keep the money for the children.

Mr. Middlecoff. What is your business? A. A farmer.

Q. Do you own some land in your own right? A. I do not.

Q. Have you given your children anything besides this land? A. I cannot state the amounts deposited in their name in the savings bank, without going to the bank and finding out.

Q. Well, approximately how much? A. When the amount reached \$200.00 I converted them into Liberty bonds, and since then we have deposited \$40.00 or \$50.00, which amount I cannot state at this time.

Q. Do those amounts which you speak of as being in Liberty bonds and \$40.00 or \$50.00 in the bank, represent all amounts given to the children from time to time as savings? A. Not only by myself, but my wife occasionally gave them.

Q. How many children have you. A. Three.

Q. How old is the youngest child? A. Three.

Q. When was she born? A. May 23, 1917.

Q. Have you given it any land? A. I have not.

Q. Has it any guardian? A. I have not taken out any guardianship on that child.

The Court. Where do you live? A. Near Woodlake.

Q. Near Woodlake? A. 6 miles northwest of Woodlake.

Q. You say you are farming out there? A. I am.

Q. Do you own the land you are farming? A. No, sir.

Q. Who does own the land? A. J. D. Martin.

Q. Do you rent the land, or do you farm it for yourself, or do you farm it for Martin. I mean? A. I am working it on a share basis.

Q. How long have you been on that land? A. Four years.

Q. You say you have no land, what property have you? A. Farming implements and some cash.

Q. How much property? A. I could not exactly state the amount at this time.

Q. Do you know how much cash you have? A. I think I have between \$40,000.00 and \$50,000.00.

Q. In the bank? A. I have got all the cash in the bank, which represents everything that I have.

Q. You have other property besides cash and your farming implements? A. Why a large part of it is represented by bank deposits with Japanese banks and some shares of the capital stock of the Raisin Association.

Mr. Middlecoff. Is any of this cash which you have with the Japanese bank, is anybody interested in that money except you? A. It stands in my own name and every bit of it belongs to me.

Q. How long have you been in California? A. Nineteen years.

Q. Do you ever expect to live on this land you bought for your children, the 80 acres? A. I do not expect to.

The Court. Is the land improved? A. No, sir.

Q. What did you do with it? A. Why we bought the bare land for the children, but did not improve it, so would like to sell it for that reason and use the money for some other and more profitable and useful purpose.

Mr. Middlecoff. Why did you buy land for the children rather than to make some other investment? A. Why I thought the real property would be the best investment to give to the children when they grow old enough.

Q. Why didn't you take the title in your own name and give it to the children when they get old enough to handle it? A. Simply because I had no way of buying it and giving it to the children when they get older.

Mr. Middlecoff. I believe that is all.

Mr. Bradley. How many acres were you farming out there for J. D. Martin? A. Thirteen hundred acres.

Q. That was all improved, was it not? A. Not exactly all.

Q. A great portion of it was planted to vineyard? A. Yes.

Q. And you have been farming that on shares? A. Yes, sir.

Q. When he said that he had \$40,000.00 or \$50,000.00, ask him how much he is worth altogether? A. Between \$40,000.00 and \$50,000.00, as I stated before.

The Court. Who is this deed from?

Mr. Middlecoff. The deed is from Ernest Austen, a single man. It has a consideration of \$10,000 and purports to grant the land in fee.

The Court. Purports to grant the land described in the petition?

Wallace, Judge. Is the land granted to one or two?

Mr. Middlecoff. To the two of them. The deed is made to the parties of the second part as tenants in common. The words "tenants in common" is not expressly made.

The Court. Doesn't it provide that they shall hold it in survivorship?

Wallace, Judge. It is given direct to the minors, is it not?

Mr. Bradley. Yes, sir. It is given direct to the minors; it recites in there that they are native-born American citizens.

In the Matter of the Estate and Guardianship of KAIGE KAKU and TOSHIK KAKU, Minors.

No. 3054.

Hon. J. A. Allen, Judge, presiding.

Visalia, California, January 5th, 1920.

This being the time heretofore fixed for hearing the return on the order to show cause why letters of guardianship should not be revoked, thereupon the parties appeared in court and the following proceedings were had and testimony taken, to-wit:

N. F. Bradley, being sworn as a witness on the part of the guardian, testified as follows:

The Witness: In this matter the citation was served upon the guardian citing him to show cause why he should not be removed because he has filed no inventory and rendered no account of his guardianship. If the court please, I will state in that matter that after the time of the appointment of the guardian there was no property; since that date there is a contract entered into for the purchase of some real property.

Wallace, Judge. How did he come to be appointed if there was no property to exercise guardianship over?

Mr. Bradley. Well that happened to be done because they were going to purchase the property. The petition recites that they desired to purchase some property for the minors and he was appointed, and thereafter they entered into a contract. I might say in this regard there has been nothing paid and—and we did not through my fault—the guardian is not

in fault. I have the report here citing those facts, but we have no property, we had a contract, had an equitable interest on some property upon which nothing was paid except some interest, the payments are not due yet.

The Court. When was this guardian appointed?

Mr. Middlecoff. The petition was filed on June 19th, 1918.

Mr. Bradley. Letters of guardianship were issued on April—letters of guardianship were issued on June 27th, 1918, and he entered into the contract in July, 1919. Of course, we do not care, if the court wants to discharge this guardian and let the contract go, we will let it go that way.

Wallace, Judge. Doesn't he want the property?

Mr. Bradley. If he can go ahead with his guardianship and keep the property, all right; if the court don't want to let him do it, we do not want it. Now this man has been living—he contracted for this property and went there and lived on it.

The Court. That is what we want to know about, we want to have the record here.

Mr. Bradley. This is all being of record, I am sworn and all these statements I make were taken down in testimony here.

The Court. We want to hear from the Japanese on the subject.

Danbe Kaku, the guardian, being duly sworn, testified as follows:

Mr. Bradley. Your name is Danbe Kaku? A. Yes, sir.

Q. You are the father of Kaige Kaku and Toshik Kaku? A. I am.

Q. You were also appointed guardian of Halco Kaku, but Halco Kaku died, did she not? A. Yes, she dies a little after I was appointed guardian.

Q. You entered into a contract for the purchase, or you bought 40 acres of land, or signed a contract for 40 acres of land from Mr. Herman Bienhorn? A. I have.

The Court. When was that contract entered into?

Mr. Bradley. This contract was entered into last summer. A. I forget the date but it was during the month of July last year.

Q. He—July, 1918, that was after the death of Halco Kaku? A. Yes, sir.

Q. You want to buy this property for your children? A. Yes, sir; I wanted to, but I was told that it was awful hard to obtain guardianship to manage their property, so I would not care at this time whether it is canceled or not.

Q. If you could live on the property and work it for your children, you would be willing to buy it that way? A. Well, that is the only way I could manage to make it a paying proposition for my children when they grow up.

The Court. Where is this contract?

Mr. Bradley. I do not care about introducing the contract in the record unless we can get it out.

The Court. You can file a certified copy and withdraw it or read it into the record if you want to. I want to say right here that it will be very seldom that the court would permit a guardian to occupy the property and carry on the business of the property for the benefit of his ward. There might be cases where a mother and father was left in possession of property that had been the minors', where that might be permitted, but it is a very exceptional case, and certainly in these cases, it looks simply as though they were buying themselves.

Mr. Smith. Would that really apply where the guardian is occupying property for the benefit of developments?

The Court. It would apply in every case of this kind, they would be

permitted to occupy the land and farm it. In the first place, it looks as though it was a mere subterfuge and I think it is; I think every person in the cases believes it is; in the second place, there is no possibility of the court having had the truth of how the property and business was conducted.

Mr. Bradley. If they make their reports?

The Court. Well, there are reports and reports and there are guardians and guardians, and the court wants a guardian of the property of the ward that the court knows he can depend on; and he knows that in these cases that they cannot be depended upon. There might be cases, for instance, in this case we have just heard, Hoshide, there might be cases; still even that is doubtful; because eventually that man bought, not for the purpose of giving it to the children particularly, but to evade the law of this state.

Mr. Bradley. The native-born children have a right to own land in this state, and if a man wants to make a present to native-born children, it seems to me like he can do so.

The Court. It is a little strange that it was not done before the law went into effect.

Mr. Bradley. There would be no object in buying it before the law went into effect, because the land would go to his children. In regard to this matter of occupying the land, a man like Mr. Hoshide who is worth a lot of money, he can buy property and give it to them, but a man like Kaku, he can't do it without occupying it. Now, of course, we want the country developed, and they are developing it. Of course, he can make his home next door and work it.

The Court. I do not think he could even work it.

Mr. Elliot. I suppose your Honor, sitting as a chancellor, could lay down some rules to the effect that guardians could do thus and so with the property, or, as suggested by your Honor, that the guardians could not live upon the property of their ward, I say your Honors, I presume, could lay down a rule of that kind, and I say a rule of that sort, which I say very frankly comes as a new rule, should not be invoked at this particular time as a cause for revoking letters of guardianship. Now, I could conceive of a case where a ward had been left a growing, live and active business. It might so happen that the ward was an owner by inheritance of that particular business, I am talking of an American ward; it might also happen that his father was particularly skilled in that kind of business. In that case I believe it would be against the interests of the ward for anybody else except the father of the child as his guardian to run the business. In the cases before your Honors, if there is one thing that has convinced me thus far in all these cases investigated, it is that, whatever may be said against the Japanese who have appeared upon the stand, they are skilled and expert farmers; they know how to handle land. And if an attorney at law after a practice of nine years could have amassed \$50,000.00 or \$60,000.00 I would think he was skilled in the practice of the law.

The Court. If he conducts the business of the ward, I do not mean looks out for the business, he is putting himself in a position which might be antagonistic to the ward, and that ought not to be allowed except in a very exceptional case.

Mr. Middlecoff. I will ask permission to say a few words in reply to Mr. Elliot, but I think we had better get through with the witness.

The Court. Very well, get through with the witness.

Mr. Middlecoff. Have these children any money now? A. No.

Q. Where do you propose to get the money with which to buy the land in this proposed contract? A. I expected to pay it out of my savings, and if that wasn't enough, for whatever I earned thereafter.

Q. What did you expect to do with the land? A. I wanted to improve it so it would be paying by itself, and wait until the children grow up enough to get that and manage that themselves.

Q. How much did you propose to pay for this particular land you had in view? A. \$22,000.00.

Q. How much are you worth? A. I think I am worth at least \$5,000.00 or \$6,000.00 today.

Q. \$5,000.00 or \$6,000.00? A. Yes, sir.

Q. At the time that you filed this petition for guardianship you intended to go upon this land you bought and live upon it yourself?

A. Yes, sir; until every bit of it was improved and bringing in an income.

Q. How many acres of it were there? A. Forty acres.

Q. And how long have you lived in California? A. Fifteen years.

Q. What is your occupation? A. Nursery man and sometimes a fruit buyer.

Q. How old are you? A. I am 32.

The Court. In order to improve this land you would have to devote all your time to it, would you not? A. Wouldn't have to.

Q. Do you mean that it would not take one man all of his time to improve 40 acres? A. Twenty acres of this 40 was already in oranges, young oranges just set out, and with the rest of the 20 acres, I do not mean to say that I could do all the work myself, it may require some hired help to do the work, but what I meant by saying that I would work out the whole 40 just to oversee the work and paying the men whenever help was required besides my own services.

Q. You would have had to devote all your time and labor to improving and paying for this property, would you not? A. Yes, sir; it would take the majority of my time if I were doing it myself.

Q. Now, all that you might earn? A. Why I could not say, but my opinion was that I would have some saved, after paying all the expenses out of my own funds.

Mr. Middlecoff. Why didn't you take the contract in your own name? A. In the first place, I knew I could not acquire it myself and then give it to the child when they get old enough, but by this means it would go to them as soon as they got old enough to take it.

Q. Did you realize that when the child got old enough that you might be put off of it and have no more management of it? A. Why I did not imagine anything of the kind, but I was pleased to get off before that if I see the very minute that they are able to take care of themselves from that property.

Q. Well, it would take more property than you have altogether to pay for this land now, what would you do for a livelihood after you had given away all you had to your child and the child had become sufficiently old to handle his property himself? A. I never dreamed of that.

Q. Never dreamed of that? A. I did not.

Q. Would you be willing to give it to your child in this way if you knew the child had a right to take it all and keep all of it from you after the child became of age? A. I did.

Q. You would be willing to do that if you knew that the child would become of age by the time you were 50 years of age? A. No, I never thought of any consequences.

Mr. Middlecoff. That is all.

The Court. What was the date of this contract?

Mr. Bradley: I could not find the contract, but it was in July, 1919. The petition for letters of administration were issued in 1918, it was long after the letters were issued, July 2nd, I think it was 1919.

Mr. Middlecoff. The letters of guardianship or the petition for the letters of guardianship is based upon a desire to purchase property.

The Court. Were you born in Japan? A. I was.

Q. And your wife was born in Japan? A. Yes, sir.

Q. How long did you say you had lived in Tulare County? A. About 11 years in this county.

Q. Was this child born in Tulare County? A. Yes, sir.

Q. How old?

Mr. Bradley. There are two children; there were three children in the original petition, and one of them died, and there are two remaining. One is about 3½ years old and the other a little over 5.

Wallace, Judge. Was this contract made in favor of the three?

Mr. Bradley. No, only two, the other one died before entering into the contract.

Mr. Middlecoff. The other was on—the other one was not mentioned in the petition for letters of guardianship.

Mr. Bradley. In the original petition there were three mentioned.

Mr. Middlecoff. All right, that is all.

NOTE.—The court discharged the guardian because of property being sold.

9. OKASAKI CASE.

In the Matter of the Estate and Guardianship of KIMIKO OKASAKI and FUJIYE OKASAKI, Minors.

IN THE CALIFORNIA SUPERIOR COURT.

TULARE COUNTY. No. 3215. DEPT. 1.

It appearing from the files and records of this court in the above-entitled proceeding that Charley Kuraso Okasaki filed a petition in this court on April 21, 1919, praying that he be appointed guardian of the persons and estates of said minors; that thereafter upon a hearing of said petition in this court, said Charley Kuraso Okasaki was appointed guardian of said minors and qualified as such guardian, and thereafter, on June 14, 1919, letters of guardianship of the persons and estates of said minors were issued to said Charley Kuraso Okasaki.

It further appearing that said guardian has not filed in this court an inventory of his said wards' estate, but has neglected so to do, in violation of section 1773 of the Code of Civil Procedure;

It is hereby ordered, that said guardian, said Charley Kuraso Okasaki, show cause before this court on Monday, December 22, 1919, at 10 o'clock a. m. of said day, why his letters of guardianship of the persons and estates of said minors should not be revoked.

It is further ordered that a copy of this order be served upon said guardian at least five days prior to Monday, December 22, 1919.

Dated December 6th, 1919.

W. B. WALLACE,
Judge of said Superior Court.

Visalia, California, January 5th, 1920.

This being the time heretofore fixed by the court for hearing upon the order to show cause why letters of guardianship in the above-entitled estate should not be revoked, thereupon all parties being present, the following proceedings were had and testimony taken, to-wit:

W. W. Middlecoff appearing on behalf of the attorney-general of the State of California, and J. A. Chase, Esq., and Albert H. Elliot, Esq., appearing as attorneys on behalf of the guardian.

Mr. Chase. At this time I would like to have associated Mr. Albert H. Elliot as attorney for the guardian.

The Court. This is an order to show cause; what has been done, has the inventory been filed?

Mr. Chase. The inventory has not been filed; I have the inventory in my hand now, and the appraisement was made by Mr. Switzer. The reason it has not been filed has been negligence on my part in not advising him to file it.

The Court. Why has it not been filed since this order?

Mr. Chase. I thought it was not proper to file it after the making of this order until we came into court.

The Court. That is all right.

Mr. Chase. I will file the inventory at this time. The fact, as shown by the petition and also by the inventory, was that the only property the children had in this case was an executory contract, and if you wish to take proof as to the exact terms of that contract, we are prepared to give that proof at this time. There was only a small payment, I believe, \$500.00 on a \$5,000.00 contract.

The Court. You can introduce your testimony now.

Charley Okasaki, the guardian, being duly sworn, in his own behalf, testified as follows:

Mr. Chase. Do you wish to take the proof on the contract?

The Court. Yes.

Mr. Chase. What is your name? A. Charley Kuraso Okasaki.

Q. Where do you live? A. Near Orosi.

Q. Are you a married man? A. I have.

Q. Have you children? A. I have.

Q. How many children have you? A. I have 4.

Q. What is the name of your children? A. The eldest is a girl named Hatsuka.

Q. How old is she? A. Well, she was 16 on the 3rd of last month.

Q. And where was she born? A. She was born in Japan.

Q. And what is the name of another child that you have? A. She was 10 on the 13th of April, 1919.

Q. What is her name? A. Kimiko.

Q. And where was she born? A. In Tulare County.

Q. Have you other children? A. I have.

Q. What is the name of the other children? A. Fujiye.

Q. And how old is she? A. She was 9 on May 15th, 1919.

Q. Where was she born? A. In the same County of Tulare.

Q. Have you other children? A. I have.

Q. What is the name of the other child? A. Masimi.

Q. And how old is that child? A. The last one is a male child and he was 2 years old on June 18th of last year.

Q. And where was he born? A. Near Orosi.

Q. Did you buy some land in the month of April for some of these children? A. I have.

Q. For which of the children did you buy the land? A. I buy them for Kimiko and Fujiye.

Q. Were both of these children born in Tulare County? A. Yes, sir.

Q. How did you buy that land? A. I bought it on contract the children just holding it, the first payment on it was \$500.00 on the entire purchase price of \$5,000.00 and the balance annual installments, if I remember right.

Q. Where is the land located in this county? A. It is located about 4 miles east of Orosi.

Q. Where do you live? A. I live a little ways west from this land.

Q. Then you do not live upon the land described in this contract. A. I am not.

Q. Why did you not file an inventory in this matter? A. I did not know that I was to file one, and at the time of this proceeding I was not advised by the attorney that I had to do it.

Q. You filed an inventory now, that is, you made out the inventory, that is, the one that we have handed in here now, did you not? A. Yes, sir.

Q. The facts contained in the inventory, being a lease of the property which you bought for the children, that is true, is it not? A. Yes, sir, I believe it is a fact.

Q. And that is all the property you bought for these children, is it not? A. Yes, sir.

Mr. Chase. I believe that is all for the purpose that we are here for at this time. We have shown the property that he purchased for the children and the fact why the inventory has not been filed. It has now been filed and I believe that is about as far as it is necessary to go.

The Court. Has any account been filed with the inventory?

Mr. Chase. No account, except the inventory. We are prepared to file an account, if that is the order of the court, but, under the order, it is purely for filing the inventory.

The Court. The statute provides that it must be filed.

Mr. Chase. No, within one year, I think.

The Court. Why, you must file an account earlier than that, I think.

Allen, Judge. When was he appointed guardian?

The Court. He must render an account on oath of the property estate and moneys of the ward in his hands, and all proceeds of interests derived therefrom, and of the management and disposition of the same, within three months after his appointment.

Allen, Judge. And annually thereafter.

Mr. Chase. Well, we have an accurate account of every cent that has been spent upon the land, but we have not prepared it in shape to be filed at this time. We will file it, if that is the order of the court.

The Court. It goes to his question of negligence at this time, not what he may do in the future.

Q. Whereabouts do you live? A. I live on lots 20, 22, 24 and 26 in section 13.

Q. Have you never lived on this lot 23? A. I have not.

Allen, Judge. Have you farmed this lot? A. I have farmed it for the children last year.

Q. What did you raise on it? A. Orange trees.

Q. No other crops? A. No, sir; I have raised no other products on the place.

The Court. Do you talk English? A. Yes, a little.

Q. You write your name, do you not? A. Yes, sir.

Q. Do you write English? A. Yes, a little.

Q. You wrote your name here to the inventory, did you not? A. I have.

Q. Did you write that? (Showing inventory to witness.) A. Yes, sir.

The Court. Now, let me see that contract. Mr. Middlecoff, do you appear in this matter?

Mr. Middlecoff. I would like to appear for the attorney-general and ask a few questions when your Honor is through.

The Court. That will be all right, go ahead.

Mr. Elliot. If your Honor please, and with the permission of the attorney-general, meaning no disrespect to him, we should not like to have it appear that there has been any attempt to cut them off, but should not like to have it appear that the attorney-general on behalf of the people of the state has manifestly anything to do in this proceeding; because if he now does offer and propose to interfere, we would make the specific objection at this time that the attorney-general has no concern with this proceeding; that this court is sitting as a court of chancery in a special proceeding, and thus acting as a court of chancery cannot possibly try out any question of title to any lands testified to.

The Court. I suppose he would have only a limited right, he would have a right to appear as a matter of inquiry to see how the property was held.

Mr. Elliot. Of course, your Honors can understand that I am making the point that this court has a limited jurisdiction; that we could not, representing these people, take any chances whatever that the attorney-general here appears as the attorney-general making some inquiries with a view of office found, as to where the property came from, and thus excluding some ward from holding real estate. We must make this objection that the attorney-general should not appear at this time in this proceeding.

Mr. Middlecoff. The request of the attorney-general, which I now convey to the court, is not to be permitted to intervene here in his official capacity, but merely to be permitted to appear here as necessary as a friend of the court and as a matter of public policy in pursuance of his duty to take notice of any question or investigation that may be at the time taking place, in which he might possibly gain information, in a legitimate way, of proceedings which might affect the ownership of land of those who are not entitled to own it. We do not claim that we have any right to appear here at this time or that we should have power to move the court for any judgment, except a judgment which this court, in this case, might make, under these pleadings in this matter. We are not seeking to establish a proceeding here of office found, or bring an action of escheat in this proceeding; but on behalf of the estate and as *amicus curiae*, and that public interest would be prompted by it, the attorney-general does ask permission of the court at this time to ask questions about this matter to assist the court to arrive at the truth of this matter, and as a friend of the court, but not in an action to escheat and with no intention of filing any pleadings of that nature.

Mr. Elliot. This is a proceeding in the nature of a special proceeding, in which your Honors have cited the guardian, an officer of this court, to appear and show cause why letter of guardianship should not be revoked, for failure, so far as official duty of the guardian is concerned. The proceeding does not in any way, directly or indirectly, involve the title to any real estate or title to any personal property. It cannot specifically involve that question unless it be charged that the guardian has been derelict in securing property which the ward owns and which the guardian has failed to secure. But the whole question is that the guardian has been too zealous in securing the property, too much property. Now, we fail to understand, with all proper respect to the court and the attorney-general, how the attorney-general can be of any special aid to your Honors. Now, how is the attorney-general interested in the question of whether this guardian, this

officer of the court, has been derelict in the performance of his duty? I imagine the court officials and your Honors, too, would resent the interference of a state official on a charge that a guardian had been derelict in his duty, and if your Honors permit the attorney-general to come into this proceeding at this time, with any ultimate object he may have, it would not be proper. It appears, so far as the record is concerned, he is assisting your Honors in determining the fact whether or not this guardian has been derelict in his duty. That being so, it being rumored around that there is going to be, sometime, somewhere, an attempt to bring a proceeding in the nature of office found to escheat property claimed to belong to some alien, we think in the interest of our client that we should ask your Honors to try this proceeding a little more strictly than any other proceeding, not having our good friend, the attorney-general, investigating or searching or whatever he may be doing in this action, where title to real property is not involved.

The Court. We think it is proper enough if he choose to ask questions, that he may do so in regard to this matter. He is here for that purpose as a friend of the court or otherwise, and certainly the court would have the right to ask the assistance of any attorney in asking questions, where he thought matters ought to be brought out, or it could ask questions itself. It is only an inquiry to determine the facts, and while, as you say, title to real property is not involved, if it should appear in the inquiry and from the inventory and from all proceedings that the ward had not, and could not, under any of the contracts or agreements or proceedings have title or interest in real property, that is an important fact notwithstanding the order is limited to a failure to file an inventory, because that may be one of the reasons why the inventory was not filed, I think the objection should be overruled.

Mr. Elliot. May we have an objection and exception to the appearance of the attorney-general and to any questions asked?

The Court. Very well.

Allen, Judge. I think, perhaps, this man can talk English.

Mr. Chase. He talks some English, but not very fluently.

Mr. Middlecoff. Where did you get the \$500 with which you made the first payment upon the contract? A. I have that.

Q. You have that? A. Yes, sir.

Q. Where did you get it? A. Well, of course, I am working and made it.

Q. Made it where? A. Well, now, I just now, I living while ago I sell the place, that place I take care so much acre for year, so that I make money.

Q. When did you come to California? A. 1903.

Q. Did you bring any of this \$500 with you at that time? A. No.

Q. Whose money was that \$500 prior to the time that you paid it upon the contract? A. My own money.

Allen, Judge. You do not own the land on which you live? A. No.

Q. You simply farmed that so much per acre? A. Yes.

Mr. Middlecoff. When did your wife come to California? A. 1908.

Q. Where do you expect to live from now on? A. Now on?

Q. Yes, in the future? A. Oh, by itself.

Q. No, not—on what land do you expect to live in the future? A. Where I am living now, place I got the contract.

Q. You are living on the 20 acres now? A. No, sir.

Q. You are not living on that land? A. No.

Q. Have you a contract on land where you now live? A. Live now?

Q. Yes. A. Yes, I got contract.

Q. On what land? A. What is it?

Q. You have a contract on the land where you live? A. Yes, sir.

The Court. Well, that is a contract of farming, is it not? It is not a contract to buy, is it? A. No, not to buy.

Q. You farm it at so much per acre? A. Yes, I farm it at so much per acre.

Q. You do not own any of the land? A. No, I do not own any of the land.

Q. From whom did you buy this 20 acres, for your children? A. Yes, I buy it for children.

Q. Who was it you bought it from? A. I do not know just the place, but M. Kuwahara and S. Kuwahara.

Q. Who first suggested to you that you buy this land for your children? A. I can't understand it, please interpreter. (Here an interpreter was sworn and the witness testified through the aid of the interpreter.) A. Why, nobody. Myself and wife talked the matter over of buying something secure for the future of the children.

Q. Why didn't you buy some property for your child that was born in Japan? A. She was not here at the time this purchase was made.

Q. When did she come here? A. She arrived in this country on July 25th, last year.

Allen, Judge. How many children have you? A. I have four children.

Q. Do you own any other property, have you any personal property of your own? A. I have.

Q. What is it? A. Farming implements and some cash in the bank.

Q. You have in your inventory two mules, valued at \$200. A. They do not belong to me, it belong to the land where my children own.

Q. Did you buy them with the land? A. Yes, sir.

Q. And farming implements valued at \$200, did you buy those with the land? A. Yes, sir.

The Court. These two children you bought this land in the name of, or made this contract for the benefit of, they were born here in Tulare County, were they not? A. They were born here.

Q. Your eldest daughter was born in Japan, I understand? A. Yes, sir.

Q. Well, now, the third one, there is another one? A. She was born in this County of Tulare.

Mr. Middlecoff. A boy, two years old, it is the fourth child.

The Court. Who were the men who gave you this contract? They are described as M. Kuwahara and S. Kuwahara, do they live in this county? A. Yes, they are residents of this county.

Q. Were they born in Japan? A. Yes, sir.

Q. Do you know who they got the contract from? A. I do not remember the party's name very well, but it sounded like "Ruth".

Mr. Middlecoff. May I ask another question?

The Court. Yes.

Mr. Middlecoff. Why didn't you buy this land in your own name? A. Why, I could not buy the land in my name, and they convey it to my children, because I know I was born in Japan and in no position to acquire it for the children.

Q. Who told you that you could not buy land in your own name? A. Why, nobody in particular. I got the idea from the Japan press in a general way, the law was enacted not long ago.

Mr. Middlecoff. I believe that is all the questions I have to ask.

The Court. Have you kept any account of the moneys you have been out since you got this contract? A. I have.

Mr. Middlecoff. If the law had not prevented you, would you have bought this land in your own name? A. I have no intention of buying it for myself, it was intended for the future of the children and I could not say whether I would have bought it in my name if I was permitted to do so, I could not say.

Mr. Middlecoff. That is all.

Mr. Chase. I will ask this one question: Are you willing to file an account at any time, if the court so orders? A. I will.

Mr. Elliot. Will it be admitted that a bond was given in this case?

Mr. Chase. The bond is on file.

Mr. Elliot. And that the bondsmen are good?

The Court. Yes, I am satisfied that the bonds are filed.

J. A. Chase, sworn as a witness on the part of the guardian, testified as follows:

Mr. Elliot. Your name and address are well known, and what is your business? A. I am an attorney-at-law.

Q. How long have you been practicing as an attorney-at-law? A. For nine years.

Q. How long have you been practicing in this county? A. For seven and one-half years.

Q. Do you know the guardian, Charley Okasaki, who has appeared upon the stand in this case? A. Yes, sir, I do.

Q. Did you ask for—did you act for him at the time as his attorney, at the time that he applied for letters of guardianship? A. I did.

Q. Have you been his attorney continuously since that time? A. I have.

Q. Did you suggest to him that he file an inventory and appraisement in this case, and his account, his first account? A. As I remember it, I did, it would be necessary to file an inventory at some time, but we did not proceed to prepare it at that time, and it was probably negligence on my part that he did not do it.

Q. You were the only attorney, so far as you know, that he consulted with? A. So far as I know I was the only attorney.

Q. Regarding the account, were you under any misapprehension as to the time in which that account should be filed? A. As far as the inventory was concerned I was aware of the fact that it must be filed within three months; so far as the account was filed, I was acting under the information received from sections 1773 and 1774, and I was under the opinion, from a reading of these sections, that the account was not necessary to file for one year after the appointment of the guardian.

Q. Can you state that the guardian relied upon you to do this work, the work of the preparation of the inventory and the account, for him? A. So far as I know, he relied upon me entirely. I have his account on my desk office of the expenditures and any receipts he has had with reference to this property.

Q. You will file it for him at any time? A. I will file it for him at any time, the account lays on my desk and could be filed at any time.

Q. When he was served with a citation issued from this court in the matter now before the courts what did he do? A. He brought it to me immediately.

Q. What did you do in and about that matter as soon as you received it? A. Soon after that I prepared an order to have an appraiser appointed and the order was signed.

Q. How soon after that did you have the appraiser appointed? A. Well, I do not recollect the date.

Q. About how many days after? A. I did not take any action in it until the first Monday he came here, the records will show.

Q. But a few days? A. Three or four days, yes, sir.

Q. Then you prepared the inventory and had an appraiser appointed and prepared the inventory and appraisal, did you not? A. I did.

Q. And filed it? A. And filed it. It has been filed this morning.

Q. You say that is a statement on your desk of the account of the guardian? A. There is a statement on my desk of the account of the guardian, as he says, of all the expenses he has been to and the moneys he has spent upon this place.

Mr. Elliot. I think that is all.

Mr. Middlecoff. When did you first receive a statement from him showing his expenditures in managing this estate? A. I think it was on Monday, two weeks ago today?

Q. And after his qualifications by filing his oath and bond and after the issuance of letters of guardianship, which were filed on June 14th, 1919, has he been back to your office until he brought with him this citation issued in this matter and which is being heard now? A. I would not want to say for certain, I do not recollect of him being back since that date.

Q. Since he has been appointed you do not recollect of him being back since he was appointed? A. I do not recollect of him being back, no.

Mr. Middlecoff. That is all.

Mr. Chase. That is all the testimony we have to offer. We might make an argument on the matter if you wish.

The Court. There are two of these matters to be heard, they are pretty closely allied, maybe we had better hear the other matter and then hear the legal phase of it. There are just two in this court and we had better hear the proof in the other cases first.

NOTE.—The guardian resigned and consequently the case was dismissed.

10. FUJIMOTO CASE.

In the Matter of the Guardianship of FRANK T. FUJIMOTO, a Minor.
APPEAL FROM SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 18686. DEPT. 1.

A. BRIEF OF APPELLANTS.

STATEMENT.

The question in this case is whether chapter 50 of the Laws of 1921 is constitutional, in so far as it prohibits the appointment of an alien as guardian of his American-born child's estate, when any part of that estate is real estate, even though the court may have affirmatively found that in all respects the father is a fit and suitable person to be appointed such guardian and has denied the appointment wholly on the ground of the father's alienage.

R. Fujimoto and Hisano Fujimoto filed their petition in the above matter in which they set forth that they are husband and wife, residents of the City of Seattle, King County, Washington, and that they are Japanese, born in the Empire of Japan; that said Frank T. Fujimoto is the son of the petitioners, and was born in the City of Seattle, King County, Washington,

on the 13th day of September, 1913, and during his entire life has lived with the petitioners, his parents, in said city, county and state, where he is now residing; that said minor was the first nephew born to H. H. Okuda and Clara E. Okuda, his wife, and on the 21st day of December, 1915, said Okuda and wife, by deed, in writing, duly acknowledged, conveyed to said Frank T. Fujimoto, lot three (3), block thirteen (13), Coutler's Addition to the City of Seattle, King County, Washington, in consideration of love and affection, and said Frank T. Fujimoto ever since has been and now is the owner of said real estate; that said property needs the care and attention of a guardian; that said minor had no guardian, and that a guardian should be appointed for him; that said R. Fujimoto, one of the petitioners, the father of said minor, is in all respects a fit and suitable person to be appointed guardian of said minor. (Tr., 1.)

An order fixing the time for hearing said petition was entered by the court and notice of the hearing of the petition was given by the clerk of the court. A copy of the petition and of the order and notice was served on the prosecuting attorney of King County. (Tr., 4.)

A hearing on said petition was duly had on the 3d day of May, 1923, and the court entered an order denying the petition, which, omitting formal parts, is as follows:

"This cause coming on for hearing regularly before the court on the 3d day of May, 1923, upon the petition of R. Fujimoto and Hisano Fujimoto, for the appointment of a guardian of the person and property of Frank T. Fujimoto, the minor above named, the petitioners appearing by Guie & Helverstadt, their attorneys, and Ewing D. Colvin, as deputy prosecuting attorney for King County, Washington, appearing pursuant to the statute in such case made and provided, and it appearing that due notice of the hearing was duly given as by the statute in such case made and provided, and it further appearing that the minor above named is the son of said petitioners, was born in the city of Seattle, King County, Washington, on the 13th day of September, 1913, and that during all of his lifetime he has lived with his parents, the said petitioners in the said city of Seattle, and it further appearing to the court that said minor is the first nephew born to H. H. Okuda and Clara E. Okuda, his wife, and that they, on the 21st day of December, 1915, by deed in writing, duly acknowledged, so as to entitle it to be recorded, conveyed to said Frank J. Fujimoto, lot three (3), in block thirteen (13), of Coutler's Addition to the City of Seattle, in King County, Washington, in consideration of love and affection, and that said minor has ever since been the owner of said real estate; that said H. H. Okuda has ever since paid the taxes and assessments levied on said real estate and the whole thereof as a part of the said gift, and that neither the father nor the mother of said minor have at any time paid any taxes, liens or assessments of any kind, name or nature on said real estate or invested any money at any time therein, and it further appearing to the court that said real estate is owned by the said minor free and clear of any right, title or interest of any person or party therein or thereto, and is owned absolutely and in fee simple, and that the said property needs the care and attention of a guardian, and that said minor has no guardian. And it further appearing to the court that said R. Fujimoto, the father of said minor, is in all respects a fit and suitable person to be appointed guardian of his son, the said minor, except that he is disqualified therefor by reason of the fact that he is a member of the Japanese race, and is a subject of the Empire of Japan, but that in all other respects he is fully qualified to

be appointed and act as such guardian, and the court being fully advised in the premises,

It is ordered that the said petition for the appointment of R. Fujimoto as guardian for said minor, be, and the same hereby is denied on the sole ground that said R. Fujimoto is a member of the Japanese race and a subject of the Emperor of Japan, and therefore disqualified to act as guardian of said minor by virtue of chapter 50 of the Laws of the State of Washington for the year 1921, but that in all other respects the said R. Fujimoto is a fit and suitable person to be appointed guardian of the person and estate of said minor." (Tr., 6.)

This appeal is from that order.

ASSIGNMENTS OF ERROR.

1. The court erred in not adjudging chapter 50 of the Laws of 1921 unconstitutional in so far as it prohibits the appointment of an alien as guardian for his American-born child when a part of the estate of the minor consists of real estate.

2. The court erred in refusing to appoint the petitioner, R. Fujimoto, guardian of the minor, after finding that the said R. Fujimoto was in all respects a fit and suitable person to be appointed guardian of the minor and his estate, and in denying the petition on the sole ground that he was a member of the Japanese race and a subject of the Emperor of Japan.

3. The court erred in not adjudging chapter 50 of the Laws of 1921 to be in contravention of the Fourteenth Amendment to the Constitution of the United States in that it denies to the petitioners and said minor the equal protection of the law.

4. The court erred in not adjudging chapter 50 of the Laws of 1921 to be in contravention of the Fourteenth Amendment to the Constitution of the United States in that it deprives the petitioner and said minor of their property without due process of law.

ARGUMENT.

The court having adjudged that the petition be denied on the sole ground that R. Fujimoto is a member of the Japanese race and a subject of the Emperor of Japan, and therefore disqualified to act as guardian by virtue of said act, but that in all other respects said petitioner is a fit and suitable person to be appointed guardian of the person and estate of said minor, the question of the constitutionality of the act is squarely presented.

Section 3 of chapter 50 is as follows: "An alien is not qualified to be trustee under a will, executor, administrator or guardian, if any part of the estate is land: Provided, an alien, now lawfully acting in any such capacity may continue for not more than two years."

The general probate code is chapter 156 of the Laws of 1917. Section 196 of that chapter is as follows:

"Guardians shall have the same qualifications as executors and administrators except that a non-resident, otherwise qualified, may be guardian of the estate in this state of a non-resident ward.

Section 61 of the same chapter is as follows:

"Administration of the estate of the person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order:

"1. The surviving husband or wife, or such person as he or she may request to have appointed.

"2. The next of kin in the following order: 1, child or children; 2, father or mother; 3, brothers or sisters; 4, grandchildren.

"3. One or more of the principal creditors.

"4. If the persons so entitled shall neglect for more than forty days after the death of the intestate to present a petition for letters of administration, or if there be no relatives or next of kin or they waive their right, or if there be no principal creditor or creditors, then the court may appoint any suitable person to administer such estate."

Section 50 of the same chapter is as follows:

"If the executor be a minor or absent from the state, letters of administration with the will annexed shall be granted, during the time of such minority or absence, to some other person unless there be another executor, who shall accept the trust, in which case the estate shall be administered by such other executor until the disqualification shall be removed, when such minor, having arrived at full age, or such absentee, having returned, shall be admitted as joint executor with the former."

Indeed the right of a parent to the custody and control of a minor child and its estate is fully recognized by section 210, giving the surviving parent the power by will to appoint a guardian for his minor child. The section is as follows:

"When either parent is deceased, the surviving parent of any minor child may, by a last will in writing appoint a guardian or guardians for his minor child, whether born at the time of making such will or afterwards. * * *"

In *Lovell vs. Home of the Good Shepherd*, 9 Wash. 419, this court said:

"We have carefully examined the testimony in this case, and are not satisfied that such a showing is made out against the parents as ought to deprive them of the custody of their child. While it is true that the welfare of the child should be the first consideration of the court, yet the right of the parent is not to be disregarded, and it is assuming a grave responsibility to deprive parents of the care, control, custody and education of their children because they do not come up to the standard of perfection that we have established for our own action in that respect. There is, perhaps, scarcely a day but that children may be seen who, in the ordinary estimation, are neglected, and of whom the popular verdict would declare, that they would be better off and stand a better chance of becoming useful members of society if they were removed from the pernicious influence of their parents. Yet it would not do for that reason to interfere with the domestic relations, or to set up our particular standard for the guidance of families in general. There is such diversity of religious and social opinions and of social standing and of intellectual development and of moral responsibility in society at large, that courts must exercise great charity and forbearance for the opinions, methods and practices of all different classes of society; and a case should be made out which is sufficiently extravagant and singular and wrong to meet the condemnation of all decent and law-abiding people without regard to religious belief or social standing before a parent should be deprived of the comfort or custody of a child. It is doubtful in our minds if such a case is made out here. It is true that the appellant Mrs. Lovell has not been the most exemplary mother; that the care of her children has not been of that kind which would commend itself to many mothers; that she is a passionate woman with an uncontrollable temper, coarse, vulgar and pugnacious, is evident from the record; but if every coarse, vulgar and passionate woman were deprived of the custody of her children our orphan asylums would be filled to overflowing; and if every man who is given to brutalizing himself by the excessive use of intoxicants, and by other debasing habits, were to be deprived of the custody of his children, the said institutions would be found altogether inadequate.

"Even immorality of the mother is not always a sufficient reason for depriving her of the custody of her child. It is the universal holding of the courts, and in many states is made a provision of the statute, that the mother of an illegitimate child, in the absence of special reasons, is entitled to its custody, and of course the fact of its illegitimacy is proof of the mother's immorality. The maternal instinct can generally be relied upon to protect the child far better than strangers who act simply from a cold and unsympathetic feeling of duty to society. Of course, when it becomes apparent that nature's appeal to the parental heart meets with no response, and a parent has become so brutalized and lost to the promptings of nature that she is willing to sacrifice either the physical or moral well-being of her children to the gratification of her own debased propensities or vicious habits, it becomes the imperative duty of the court to reach forth its hand for the protection of the children. But as we have said, we do not think the result in this case shows a necessity for judicial interference; and even though it may appear that three years ago the mother was not a competent person to maintain control of this child, the difficulties then alleged to exist have now passed away. Hence the necessity of separating the mother and child has ceased to exist."

In the case of *Russner vs. McMillan*, 37 Wash. 417, 419, is the following:

"The natural rights of the father to the care, control, and custody of his minor children cannot, and ought not to, be denied or disturbed in the absence of good and substantial reasons—reasons made imperative by the necessities of such children and the interest in, and the duty owing to, them by the state."

"That no guardian can be appointed of the person of an infant having father or mother living not declared unsuitable by a court of competent jurisdiction, nor a guardian or curator to an infant whose father or mother is entitled, under the law, to take charge of its estate as natural guardian, has already been pointed out as the law in most states." (Sec. 31, *The American Law of Guardianship*—Woerner.)

Even at common law the father is entitled as a matter of right to the appointment as guardian of his minor child unless he is wholly unfit therefor. (*Weldon vs. Keen*, 37 N. J. Eq. 251; *People vs. Wilcox*, 22 Barb. [N. Y.], 178; *Johnson vs. Kelly*, 44 Ga. 485; *Dame*, Probate Law, sec. 495.)

Likewise, at common law, a minor over fourteen, has a right to nominate his own guardian, absolute in all respects except the nominee be unfit. (*Lunt vs. Aubens*, 39 Me. 392; *Palmer vs. Oakley*, 2 Doug. [Mich.] 433, 47 Am. Dec. 41; *Sherman vs. Ballou*, 8 Cow. [N. Y.] 304; *Arthur's Appeal*, 1 Grant [Pa.] 55.)

In 21 Cyc., page 24, it is said:

"It is a rule well settled by statute and judicial decision that the father and after his death the mother are entitled, if they desire it, to appointment as guardian of their minor children, under fourteen years of age, and their claim to preference cannot be disregarded except on the most compelling reasons proven as the same before the court."

In 28 C. J., page 1078, it is said:

"Parents being the natural guardians of their children, it is the rule well established by judicial decision, and in many jurisdictions by express statute, that when a guardian is to be appointed by the court, the parents are entitled to preference over all other persons, the father being usually first entitled to the appointment and in case he is dead the mother."

The same rule is recognized by this court. (*In re Hogan*, 104 Wash. 265, 267.)

The common-law rule above mentioned is clearly recognized by the probate code of this state, and is in full force and effect in this state. By the terms of section 197 it is expressly provided that if the petition of appointment be made by a parent, asking the appointment of himself, as guardian of his minor child under the age of fourteen years, or if over fourteen years with the minor's written consent, the court may, at once, upon presentation of the petition and without notice of hearing thereon, appoint him such guardian. In all other cases, even in those cases in which a parent petitions for appointment of some one other than himself as guardian, notice must be given as provided by the act. It is provided in section 210 that when either parent is deceased, the surviving parent of any minor child, may, by his last will in writing, appoint the guardian or guardians of his minor child, whether born at the time of making such will or afterwards, to continue during the minority of such child, or for any less time. The very fact that the legislature gave the surviving parent the power of testamentary appointment of a guardian for his minor child clearly recognizes the common-law rule of the right of the parent to be appointed guardian for his child. If this were not true we would then have the anomaly of a parent having the power to control the appointment of the guardian for his minor child after his death but not in his lifetime. Likewise the provision permitting the parent's application for his own appointment to be heard without notice but requiring notice in all other cases clearly recognizes the right of the parent to the appointment, and the necessity of the minor's consent, if fourteen years of age recognizes his right to nominate. It remains to be seen whether this common-law right so generally regarded as such, and not as a mere privilege, can be denied to the father because he is an alien, and can likewise be denied to the child, although an American citizen, because his father is an alien, when that right is freely granted to and enforced in favor of all American citizens and fathers and all minors who are American citizens.

From the foregoing, it is evident that the law has the highest regard for the relation of parent and child. Indeed it is obvious that no more unselfish emotion exists than that of the parent for the child. Eliminating the exceptional cases always existing, welfare of the child is the first consideration actuating the parent. Even though some of the characteristics of morality may be absent in the parent, yet, unless the lack is so pronounced as to be detrimental to the welfare of the child, the relationship existing between the two is never disturbed by law, or the parent's custody of the child terminated. Indeed, the entire plan of creation is such that the child's welfare is the first consideration actuating a parent, and that sacrifices without limit will be made by a parent for the child. In this case all these characteristics are present, and the court affirmatively found that the father was in every respect a fit and suitable person to be appointed guardian for the minor, except that he was an alien.

This brings us to a consideration of chapter 50 of the laws of 1921, commonly known as the Alien Land Act. In the discussion of the foregoing errors, they naturally fall in two classes, that is, (1) the denial to the child of the equal protection of the law contrary to the Fourteenth Amendment and article 1, section 12, of the constitution of the State of Washington, and (2) the denial of the father of the equal protection of the law contrary to the same constitutional provision. However, they may very well be discussed under one head, namely, the denial of the equal protection of the law.

This proceeding can in no event be characterized as an attempt to evade the Alien Land Law. The property involved was a gift to the minor by

his uncle and aunt in 1915, and the grantors have paid all taxes and assessments levied on the property subsequent to that date. The father and mother have no interest of any kind, name or nature in the land, and have contributed nothing whatever thereto. In other words, the minor has ever since the making of the gift owned the land in fee simple.

The minor is an American citizen, and of course is entitled to the right of an American citizen. The question is whether the legislature can discriminate against him because he happens to be born of alien parents. In other words, is he to be discriminated against by the law because of an event over which he had no control whatever? A child born of American parents has the privilege of having his estate cared for by his father as his guardian. According to the act, his estate may enjoy the care and attention characteristic of a father towards his child. His estate may have the attention which is not limited by the actual dollars and cents which the guardian will receive therefor, or for the efforts he may expend upon the estate, but is permitted the care and attention which is limited only by the welfare of the child and the advantage of his estate. His estate is not relegated to the realm of cold, legal representatives, but is permitted to have the loving care and attention of the father whose flesh and blood he is. On the other hand, by the terms of the Alien Land Act, the minor in this case is denied all of those things. His estate may have only such care and attention as a guardian will be paid for in cold money of the realm. His estate will receive that care and attention, and only that care and attention, which money can buy. He may not have efforts actuated by loving care, he may not have efforts actuated wholly and solely by his welfare and the welfare of his estate, but will get only, and only, what his meager estate will pay for in cold, hard money. Yet, both of the minors mentioned are American citizens; both of them are guaranteed the protection of equal laws.

It will be borne in mind that there is no element of ownership of land involved in this case. If the father were appointed guardian, he could do those things only which the court instructed or permitted him to do. He would be an officer of the court, and nothing more. His act would be the act of the court. If he were in possession, that is, physically on the land, he would not be in possession in his own right, but would be in possession only as a representative of the court. He would have no control over the land, except such as the court directed him to exercise. He would be in no position whatever to violate the Alien Land Act, and could even be removed by the court at pleasure. Hence, the appointment would not be within any of the purposes which the legislature must be presumed to have intended by the enactment.

It cannot be contended that the physical presence of the father on the land is contrary to the terms of the act, because the act excepts from its operation possession and control of land for any purpose permitted by an existing treaty. Article 1 of the treaty in force between the United States and the Empire of Japan permits nationals of either of the high contracting parties to rent land for residential purposes in the domain of the other. The father has the right to rent the land for residential purposes and to live on it with the minor and his family. His continuous presence on the land certainly could not be less harmful than his presence at such times as his duties as guardian might require. As guardian, he could not be on the land more completely, or more constantly than he would be as a tenant thereof. As tenant he would have actual and exclusive control and possession of it. As guardian he would have neither control nor possession of it in his own right, but would merely be the representative of the court.

Verily it seems to us that an attempt has been made to draw it a little too fine, in furtherance of political ambitions.

Section 12, article 1, of the constitution of the state reads as follows: "No laws of the past granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

We shall now give a few definitions of the expression "privileges or immunities" as viewed in respect of citizens.

"The 'privileges and immunities' referred to in Const. Ind., art. 1, sec. 23, prohibiting any law granting privileges or immunities to one class of persons which upon the same terms are not open to all citizens, and Const. U. S., Amend. 14, sec. 1, prohibiting the abridgment of the privileges and immunities of citizens of the United States, are general abstract personal rights, in their nature fundamental and pertain to all citizens in free governments, and which they are entitled to enjoy throughout the several states as well as in the state of residence, such as freedom of travel, pursuit of any lawful vocation or of pleasure, enjoyment of life and liberty, acquisition of property, the right to control it in security and peace, and the right to resort to the courts for its protection without restriction other than those usually affecting all persons." (*Strange vs. Board of Comrs. of Grant County*, 91 N. E. 242, 173 Ind. 640; *Id.*, 91 N. E. 506.)

"The words 'privilege and immunity,' as used in the Illinois constitution, providing that the general assembly shall not pass any special law granting any special or exclusive privilege, immunity, or franchise whatever, include all the rights which the state government was created to establish and every right which can be conferred or granted by any law of the state, and by the provision of the constitution a guaranty is given that all valid enactments of the legislature shall operate uniformly on persons and property, and all citizens are assured the equal protection of the laws of the state. (*Jones vs. Chicago, R. I. & P. R. Co.*, 83 N. E. 215, 216, 231 Ill. 302, 121 Am. St. Rep. 313)." (*Black's Law Dictionary*, p. 1044.)

We cite as being closely in point the case of *Sacramento O. & C. Home vs. John S. Chambers*, 25 Cal. App. 536.

The question involved in this case was the constitutionality of section 2289 of the California Political Code as amended 1913, subdivision 4 of which reads as follows:

"4. That no child whose parent or parents have not resided in this state for at least three years prior to the application for aid, or whose parent or parents have not become citizens of this state shall be deemed a minor orphan, half-orphan or abandoned child within the intent and meaning of this chapter."

The facts show that a child seven years old and a citizen of California and of the United States had parents who were aliens and who had never become citizens of the United States or of the State of California and both of whom were dead. The petitioner in the case applied for an allowance for said child from the state board of control. Denial of the claim was based upon the section above cited and petitioner contended that the said section was unconstitutional. After citing section 1, article 21 of the state constitution, the court, speaking through Mr. Justice Burnett, says:

"The child for whose support aid is herein sought is a citizen of this state. He was born in this state while his parents were residents thereof. It is undoubtedly true, as stated by respondent, that 'every child born here is a citizen of the state if its parents are residents of the state. Thus, a child born here, whether its parents are citizens or aliens immediately

becomes a citizen of the United States, but its second citizenship follows the residence of its parents.' The child is and was an orphan under the age of 14 years and was cared for by such an institution as it contemplated by said statute providing for state aid. What is the basis, then, for discrimination between him and other citizens who are orphans under the age of 14 years and under the care of the same or of similar institutions? Is it any quality or condition affecting him personally, that would make such classification reasonable and just? Is there any 'natural intrinsic or constitutional distinction' differentiating him from the other minor orphan citizens who are receiving and who are entitled to receive state aid? The answer, of course, must be in the negative. *The distinguishing quality or condition relates not to him but to his parents. It would be a strange construction of the constitutional provision that would permit privileges to be conferred upon one citizen of the state and withheld from another for the reason that there was a difference in the political status of the parents.* Mentally, morally, and physically, no doubt, the sins and infirmities of the parents are often visited upon their descendants, but in the realm of civil and political rights and privileges no such principle can be recognized or tolerated. *To affirm the proposition contended for by respondent, that one citizen is, and another is not entitled to this privilege in consequence of the difference in the citizenship and residence of their parents is to deny all efficacy to the constitutional mandate that privileges and immunities must be granted to all citizens upon the same terms."*

"The purpose of the legislature is unquestionably a commendable one, but it must be accomplished in a legal and constitutional manner. Restrictions affecting all citizens alike might be imposed which would prevent abuse of the privilege and which would be open to no valid objection.

"If the condition of residence or of citizenship related to the minor orphan himself it probably could be said that the classification was just and reasonable and within the purview of the constitution. No doubt the legislature might require the beneficiary to be a citizen of the state and a resident therein for a certain period. If he were not a citizen, said constitutional provision could not, of course, be invoked, and three years might not be an unreasonable requirement as to residence. There would thus be presented in the condition and status of the minor a just basis for valid discrimination. But this is entirely different from the requirement here as to the citizenship and residence of the parents. The injustice of the rule contended for could not be more impressively illustrated than in the present instance. If said provision as thus understood is to be enforced no aid can ever be granted to said minor for the reason that death has rendered it impossible for either of his parents to become a citizen or resident for the requisite time. *No such arbitrary and extraneous discrimination is sanctioned by our fundamental law."* (Italics ours.)

The court in the above case then proceeds on page 542 of the opinion to discuss the definition of the words "privileges or immunities" and concludes that the right to orphan's aid is a constitutional right included within the scope of the definition of privileges and immunities. If we concede that the right of a citizen child to have his own parent act as his guardian, is of the same dignity and importance as his right to orphan's aid, then the above case is a decision on all fours with the instant case. The parallelism between a child citizen, whose parents are dead and who can therefore never become citizens, and a child citizen whose parents are permanently disqualified from becoming citizens is so close as to be startling, and in view of this situation we quote again the one sentence in the learned court's

opinion which is the best recent statement of the fundamental basis of democracy which we have found:

"No such arbitrary and extraneous discrimination is sanctioned by our fundamental law."

In *Bushell vs. Gill*, 58 Wash. 468, 476, the court said:

"Discussing the term 'privileges and immunities,' this court said:

"These terms, as they are used in the Constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property and persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from. (Cooley, Constitutional Limitations [6th Ed.], 597.) By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the Federal Constitution."

In the Slaughter-House cases, 16 Wall. 3676, 21 Law Ed. 395, 408, 409, the court, in defining "privileges and immunities," said:

"Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield vs. Coryell*, decided by Mr. Justice Washington in the circuit court for the district of Pennsylvania in 1823. (4 Wash. C. C. 371.)

"The inquiry," he says, 'is, what are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the Government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole.

"This definition of the privileges and immunities of citizens of the states is adopted in the main by this court in the recent case of *Ward vs. Maryland*, 12 Wall, 430, 20 L. Ed. 452, while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a state. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the state governments were created to establish and secure."

Of course it is fundamental that the minor has the right to acquire, hold, improve, use and enjoy real estate in this state and no citation of authority is necessary in support of that fundamental proposition, affirmed and reaffirmed by not only this court but by the Supreme Court of the United States. But, if this law is to be sustained, the minor may not have the benefit of the same care and attention to his estate that other

minor American citizens may have. He is denied a privilege which other American minors not only have but are accorded by the constitution and the laws of the state, and is likewise denied that which is essential to his welfare, contrary to the universal rule that the minor's welfare is paramount.

Not only are the minor's rights discriminated against, in violation of above mentioned equal protection clauses, but the right of the father to act as guardian of his minor son is likewise made the subject of an invidious discrimination.

Excepting (1) the right of the state to prohibit the ownership or leasing of lands within its borders, there being no treaty to the contrary (*Chirac vs. Chirac*, 2 Wheat. 259, 272; *Haucenstein vs. Lynham*, 100 U. S. 483, 484; *DeVaughn vs. Hutchinson*, 165 U. S. 565; *Clarke vs. Clarke*, 178 U. S. 186; *Blythe vs. Blythe*, 180 U. S. 333; *Terrace vs. Thompson*, decided November 12, 1923); (2) the right of the state to limit the right to take the common property of the state, such as game and fish, to citizens of the state (*McCready vs. Virginia*, 94 U. S. 391; *Patson vs. Pennsylvania*, 232 U. S. 138); (3) the right of the state, and (there being no statute to the contrary) of any municipality therein to employ none but citizens on public work (*Atkin vs. Kansas*, 191 U. S. 207; *Heim vs. McCall*, 239 U. S. 173); and, (4) the power to limit the right of the franchise to citizens of the state (*Yick Wo vs. Hopkins*, 118 U. S. 336, 370); aliens are within the equal protection clause as fully as citizens.

Ex parte Virginia, 100 U. S. 339, 345; *Yick Wo vs. Hopkins*, 118 U. S. 356, 359; *Fong Yue King vs. United States*, 149 U. S. 698, 724; *Wong Wing vs. United States*, 163 U. S. 228, 242; *United States vs. Wong Kim Ark*, 169 U. S. 649, 694; *American Sugar Refining Co. vs. Louisiana*, 179 U. S. 694; *Truax vs. Raich*, 239 U. S. 33; *Buchanan vs. Warley*, 245 U. S. 60, 76; *Re Tiburcio Parrott*, 1 Fed. 481; *Ah Kow vs. Nunan*, 5 Sawy. 552; *Re Ah Fong*, 3 Sawy. 144; *State vs. Montgomery*, 94 Me. 192; *Templar vs. Board*, 131 Mich. 254; *Re Opinion of Justices*, 207 Mass. 601; *Commonwealth vs. Titcomb*, 229 Mass. 14; *McKnight vs. Hodge*, 55 Wash. 289, 292.

In the case of *Yick Wo vs. Hopkins*, 118 U. S. 356, 359, the court said: "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are *universal* in their application, to all persons within the territorial jurisdiction without regard to any difference of *race, color or of nationality*; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes that, 'All persons within the jurisdiction of the United States shall have the right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of *every citizen* of the United States *equally* with those of the strangers and *aliens* who now invoke the jurisdiction of the court."

In the case of *American Sugar Refining Company vs. Louisiana*, 179 U. S. 89, 92, this court said:

"The act in question does undoubtedly discriminate in favor of a

certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, *race*, *nativity*, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism and a denial of the equal protection of the laws to the less favored classes."

In the case of *Truax vs. Raich*, 239 U. S. 33, 39, the court said:

"Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws. The description, 'any person within its jurisdiction' as has frequently been held, includes aliens. 'These provisions,' said the court in *Yick Wo vs. Hopkins*, 118 U. S. 356, 369 (referring to the due process and equal protection clauses of the amendment), 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.'"

In *Re Opinion of Justices*, 207 Mass. 601, the legislature submitted to the court the following inquiry:

"If the legislature is of the opinion that public order, decency, and morality require that girls and young women be excluded from Chinese restaurants and hotels, is it within the constitutional power of the legislature to enact a law making it a criminal offense for any woman under the age of twenty-one years to enter a hotel or restaurant conducted by Chinese or to be served with food or drink therein, or for the proprietor of any such hotel or restaurant to admit thereto a woman under the age of twenty-one years or to serve her with food or drink therein?"

The court quoted from *Powell vs. Pennsylvania*, 127 U. S. 678; *Yick Wo vs. Hopkins*, 118 U. S. 356, and *Barbier vs. Connolly*, 113 U. S. 27, and cited with approval *Re Tiburcio Parrott*, 6 Sawy. 346, 1 Fed. 481, and *Re Lee Sing*, 45 Fed. 359, and then said:

"The business of keeping a hotel or restaurant to which the proposed legislation relates, is a necessary and proper kind of business that is entitled to the protection of the laws. It may be conducted legally or illegally, by a person of any nationality. The proposed law, without reference to the way in which it is conducted, puts a restraint upon it which might be expected very seriously to interfere with the successful management of it, whenever it is carried on by any person of a particular nationality, which is not put upon it when it is carried on by any person of any other race and nationality. By the strict terms of the proposed law it would be criminal offense for a Chinese proprietor of a hotel or restaurant to permit his wife, if she were under the age of twenty-one years, or his grown-up daughter of less than that age, to enter his hotel or restaurant, or to be served food or drink therein. This is a very great interference with the liberty of the subjects of a foreign ruler, lawfully residing within the jurisdiction of this state. It is a harmful discrimination against persons of the proscribed class, founded wholly upon their race and nationality, and it plainly falls within the constitutional prohibition quoted above. It subjects Chinese to an oppressive burden that deprives them of liberty which others enjoy and interferes with their right to carry on business, acquire property and earn a livelihood, and denies them the protection of equal law.

"The only question that can be regarded as doubtful by anybody is that which arises on the supposition that the legislature may be 'of the opinion that public order, decency and morality requires that girls and

young women be excluded from Chinese restaurants and hotels.' This brings us to the consideration of the police power. There is no doubt of the right and duty of the legislature to enact laws for the promotion of public order, decency and morality. But when such legislation interferes with the exercise of personal rights, it must be directed to the prevention of real evils, in the interest of morality. The proposed legislation does not assume to forbid anything that is necessarily evil in itself, or to deal directly with any offense against order, decency or morality. There are good hotels and bad hotels, good restaurants and bad restaurants, kept by men of the Caucasian race, and there are others of both kinds kept by men of other races. The legislation does not refer to the character of the hotel or restaurant that a young woman may not enter, but refers only to the nationality of the person who conducts it. The enactment of such legislation is not a proper exercise of the police power. It has no direct relation to the evil to be remedied. It forbids the entry of a young woman into the hotel or restaurant of a Chinese proprietor, even if it is a model of orderly and moral management, and it permits the entry of a young woman into a hotel or restaurant kept by an American, which it is known to be maintained in part for the promotion of immoral or criminal practices. The classification of hotels and restaurants into those that are open to young women and those that are closed to young women is not founded upon a difference that has any just or proper relation to the professed purpose of the classification. The only classification is into hotels and restaurants kept by the Chinese and those kept by persons of other nationality.

"In reference to classifications made in an attempted exercise of the police power, Mr. Justice Brewer said, in *Gulf, Colorado & Santa Fe Railway vs. Ellis*, 165 U. S. 150, 165: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is based upon some reasonable ground—some difference which bears a just and reasonable relation to the attempted classification—and is not a mere arbitrary selection.' See also opinion by Mr. Justice Field in *Ho Ah Ow vs. Hunan*, 5 Sawy. 552, Fed. Cas. No. 6, 546.

"The fact that a man is white, or black, or yellow is not a just constitutional ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of another color.

"We answer the question in the negative."

In the case of *Commonwealth vs. Titcomb*, 229 Mass. 14, the court said: "It (the legislature) cannot prescribe one class upon the basis of race."

The precise question involved in this case, in both its forms, was before the supreme court of California, in *In re Tetsubumi Yano's Estate*, 206 Pac. 995, arising under a provision of the Alien Land Act of that state, adopted by the initiative at the November, 1920, election, prohibiting, as in this case, the appointment of an alien father guardian of his American-born minor child when any part of the estate is land. In that case, as in this one, it was undisputed that the father was a fit and suitable person to be appointed the guardian. The supreme court held that, by the common law, as well as by the statute, the father had a right to the appointment, and held invalid that provision of the Alien Land Act prohibiting the appointment. The opinion is so conclusive that we quote from it at length, thus:

"The petition for guardianship was filed October 23, 1920, and alleged that petitioner was the father of said minor daughter; that she was of the age of two years; that she had an estate in Butte County consisting of

fourteen acres of land more or less, and that she was in the care and custody of petitioner and his wife, the mother of said minor, who were her only relatives in said County of Sutter.

"It was made to appear on the hearing by undisputed evidence that the petitioner was a Japanese and not a citizen of the United States or the State of California; that he was and had been for several years a resident of California; that he was of good character, a good father, sober and industrious, that the minor was his daughter, aged between two and three years, and a native-born citizen of the United States and the State of California. That she had no guardian, and held title to fourteen acres of improved land in Butte County of the value of three thousand dollars or thereabouts, which required care and cultivation.

"Under this state of facts the petitioner was entitled to letters of guardianship unless the fact of his being a Japanese alien defeated his right.

"It is settled law in this state that the father of a minor under the age of 14 years is entitled as a matter of right under the provisions of the codes to the guardianship of such minor, unless shown to be incompetent. Competency is presumed and should be so found by the court in the absence of evidence to the contrary. (Code of Civil Procedure, sec. 1751; *Matter of Forester*, 162 Cal. 493; *Guardianship of Mathews*, 169 Cal. 26; 174 Cal. 679; *Guardianship of Galleher*, 2 Cal. App. 364; *Estate of Moore*, 179 Cal. 302; *Guardianship of Person and Estate of Akers*, 60 Cal. Dec. 686.)

"The code makes no distinction as to this preferential right to letters of guardianship between guardianship of the person and guardianship of the estate. The last above cited expression of the rule of the statute involved guardianship of both person and estate. *Indeed, the parents' right to letters of guardianship of the person of a minor child scarcely needs the protection of section 1751, Code of Civil Procedure, as such parent is by law the natural guardian and entitled to the custody of the person of a minor child.* (Civ. Code, sec. 197; *In re Hunt*, 103 Cal. 355.) The mere fact, if such were shown, that the minor would receive better care, training and support, and be under better influences under other guardianship, cannot defeat the right of the parent to letters, except under the circumstances set out in subdivision 4 of section 246 of the Civil Code. (*In re Mathews, supra.*) No such showing was made here.

"There was no finding of incompetency and no evidence which would have justified such finding.

"The sole ground for denying the petition, as appears from the record, is contained in the statement of the court refusing letters to the petitioner as follows:

"The guardianship is denied. It appears that the child had no property. The property or deed was taken in the child's name, solely to evade the laws of the State of California."

"It appears from the transcript that, subsequent to the Alien Land Act of 1913 (St. 1913, p. 206, denying the right to acquire real estate to aliens disqualified to become citizens, and about a year prior to the Initiative Act of 1920 (St. 1921, p. lxxxiii), which adds the further disqualification of such alien to act as guardian of a minor, for property which the alien himself is incompetent to acquire under the act, the petitioner bargained for, and caused to be conveyed to his daughter, the minor named in this proceeding, the tract of land referred to in the petition. The deed was introduced in evidence, showing the conveyance by the grantors directly to the minor. The petitioner testified that he had the land deeded

to his infant daughter because he was Japanese and could not take title himself; that his baby was a citizen of the United States; and that he had the land conveyed to her for that reason alone.

"The ruling of the court in this matter cannot be sustained on the ground stated in the order, that the minor took no title to the property.

"She was a native-born American citizen and as such entitled to acquire and hold property, real and personal. Her infancy did not incapacitate her from becoming seized of the title to real estate. (22 Cyc. 527, 529; *Master-son vs. Cheek*, 23 Ill. 72; *Scanlon vs. Wright*, 13 Pick. [Mass.] 523.)

"Delivery to and acceptance by an infant will be presumed. When a deed clearly beneficial to an infant is given to him his acceptance will be presumed, and the recording of the deed is a sufficient delivery. (22 Cyc. 529; *Masterson vs. Cheek*, *supra*; *Hadden vs. Neighbarger*, 9 Kan. App. 529, 58 Pac. 568; *Spencer vs. Carr*, 45 N. Y. 406; *DeLevillain vs. Evans*, 39 Cal. 120; *Turner vs. Turner*, 173 Cal. 782.)

"Even a conveyance to an alien disqualified under the law to hold real estate has been generally held to convey title to such alien, until the same is divested by the state or by inquisition had upon its denouncement. This was so even under the common law which excluded aliens from acquiring and holding real property. (*Merle vs. Matthews*, 26 Cal. 455; *Phillips vs. Moore*, 100 U. S. 208; *Norris vs. Hoyt*, 18 Cal. 217; *Santa Paula Water Co. vs. Peralta*, 113 Cal. 44.) It is apparent that the present Alien Land Law recognizes the same rule as it provides that action shall be brought by the state for the escheat of any lands conveyed to aliens in contravention of the act.

"In any event, the nature and extent of the minor's property rights under the deed in question, she being qualified to own real estate, could not be determined in this guardianship proceeding. She would require a guardian to represent her in the settlement of just such a controversy.

"The fact that the father paid the consideration for the transfer of this land to the minor does not establish a trust in the father's favor under section 853 of the Civil Code. Where aliens are prohibited from holding lands, an implied trust by operation of law will not arise in their favor. (*Corp. Juris*, 1057, sec. 5; *Phillips vs. Crommond*, 19 Fed. Cas. No. 11092; *Hubbard vs. Goodwin*, 3 Leigh [30 Va.] 492; *Leggett vs. Dubois*, 5 Paige Ch. 114, 28 Am. Dec. 413.) Besides, the attempt of the alien to obtain title through such a trust would be in violation of the Alien Land Law, and could not be enforced.

"The act of the petitioner in securing conveyance of land to his daughter, while confessedly carried out because the laws of California did not permit him to buy it for himself, was in no sense unlawful since the daughter is a citizen of the United States and entitled to acquire and own real estate. There is nothing in the evidence to indicate that it was not the purpose of this conveyance to vest absolute title to the land in the minor. If any legal ground appears in the record for denying letters of guardianship it must be found elsewhere than in the reason stated in the order of the court.

"There is no claim that an alien Japanese was disqualified merely by reason of his being an alien from qualifying as a guardian, at the time this petition was filed and acted upon.

"The very fact that the Act of 1920, in terms, creates such disqualification, is the recognition of the right of such aliens to qualify and serve as guardians in the absence of such inhibition.

"All the proceedings in the superior court, including the final order denying the petition, were had in this matter before the Initiative Alien

Property Act of 1920 went into effect, though the final order was not made until after the adoption of the law by popular vote at the election of November 2, 1920. (Stats. 1921, lxxxiii.)

"That act provided that thereafter no alien disqualified to acquire and hold real estate 'may be appointed guardian of that portion of the estate of a minor which consists of property which such alien * * * is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of this act.' It further provides that the 'public administrator of the proper county or any other competent person or corporation may be appointed guardian of the estate of a minor citizen whose parents are ineligible to appointment under the provisions of this section.' (Sec. 4.)

"Section 12 of the act declares that it 'shall not affect pending actions or proceedings, but the same may be prosecuted and defended with the same effect as if this act had not been adopted.'

"The act did not take effect until December 9, 1920, five days after the official declaration of the vote thereon by the secretary of state. The order appealed from, having been made on November 6, 1920, was of course, unaffected by the act. What we have already said sufficiently shows that the order was erroneous and that it must be reversed. The appellant, however, has presented and elaborately argued certain additional points upon which he claims the right to a reversal, to the effect that the Initiative Act of 1920, in the respect here involved, is invalid upon constitutional grounds. Section 4 of the act also authorizes the superior court to remove a guardian whenever it appears 'that facts exist which would make the guardian ineligible to appointment in the first instance.' If the court below, upon a retrial, should believe that the provisions of the act declaring the petitioner ineligible are valid, it may be that it would refuse to issue letters to him, or, having done so, it might immediately revoke them on the ground that as the facts showing ineligibility appeared in the proceedings it was its duty to do so. Under these circumstances we deem it advisable to consider and determine the additional points presented. * * *

"These points are:

"(1. That the law in question violates the treaty between the United States and Japan); 2. That it denies to the Japanese parent, the equal protection of the laws, contrary to section 1, Article XIV, of the Constitution of the United States; 3. That it denies to the child, who is a native-born citizen of the United States, the privileges guaranteed to her by section 21, article I, of the constitution of California and the privileges and equal protection of the laws secured to her by the Fourteenth Amendment aforesaid. * * *

"2. Our law provides that the father or mother of a minor child less than fourteen years of age, if competent, is entitled to be appointed guardian of such child in preference to any other person. (Code of Civ. Proc., sec. 1751.) This law is general in terms. It is not confined to citizens in its application, but purports to confer the right upon all residents regardless of citizenship. The Initiatory Act of 1921 (Stats. 1921, lxxxiii, sec. 4) by its terms forbids the appointment of any alien not eligible to citizenship as guardian of a minor with respect to property of the minor of a character which such alien cannot acquire for himself, that is to say, with respect to agricultural land belonging to such minor. Its effect is that a citizen of Japan who is the parent of a native-born child cannot be appointed guardian of the property of the child where that property consists entirely of agricultural land. This restriction is not put upon a citizen of any country whose citizens are eligible to citizenship here, nor upon any other class of

residents of this state who are not citizens thereof. It is clearly a discrimination against citizens of Japan residing in this state.

"Section 1 of Article XIV of the Constitution of the United States declares that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' We had occasion to consider this language in *Ex parte Kotta*, decided on September 12, 1921. (200 Pac. 957.) We there said that 'the word "person" as used in this amendment includes aliens,' and quoting from *Yick Wo vs. Hopkins*, 118 U. S. 396, that it applies 'without regard to any differences of race, of color, or of nationality,' and that the guarantee of 'the equal protection of the laws is a pledge of the protection of equal laws.' These statements are also quoted and approved by the Supreme Court of the United States in *Tuvar vs. Raich*, 239 U. S. 33. In *Barbier vs. Connolly*, 113 U. S. 31, the court declared that this guarantee means that 'equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights.' It needs no argument to demonstrate the proposition that a law which gives to one person the right or privilege of becoming the guardian of his child and withholds it from another, both being alike competent in all respects, is not equal as between the two persons. The person from which it is withheld is not in such a case accorded the protection of equal laws. In this respect the Initiative Act of 1920 is clearly a violation by this state of the guarantee contained in the Fourteenth Amendment, that no state shall deny to any person the equal protection of its laws.

"It cannot be successfully contended that the laws may be declared valid in this respect on the ground that persons who are ineligible to citizenship under the laws of the United States form, by reason of that fact alone, a class by themselves, for which the state may enact peculiar legislation depriving them of rights or privileges which are accorded to others not in that class. The rule in regard to classification, peculiarly applicable to such an attempt, is that the classification 'must be founded upon differences which are either defined by the constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purposes of classification, that legislation really local or *special* may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation.' (Italics ours.) (*Darcy vs. Mayor, etc.*, 104 Cal. 645.) A law 'makes an improper discrimination if it confers particular privileges or imposes peculiar restrictions or disabilities upon a class of persons arbitrarily selected from a larger number of persons, all of whom must stand in the same relation to the privileges granted or burdens imposed, and between whom and the persons not so favored or burdened no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privileges or burdens. The difference on which the classification is based must be such as, in some reasonable degree, will account for or justify the peculiar legislation.' (*Ex parte Miller*, 162 Cal. 698.) 'While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, having a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial bases. Arbitrary selection, it has been said, cannot be justified by calling it classification.' (*Southern R. Co. vs. Greens*, 216 U. S. 417.) The right or privilege of a father to be the guardian of his own minor child does not in any respect depend upon or arise out of his nationality or his eligibility to citizenship

in this country. It has no relation thereto. Such privilege is no doubt as much prized by a Japanese resident of good character who is not a citizen of this country and cannot become such, as by any other father of like character who is a citizen or is eligible to become one. A law denying the privilege to one class and giving it to the other cannot be said to be a law justified by a classification based on a distinction which calls for such peculiar legislation. Such attempted classification does not relieve the act from the charge that it violates the Fourteenth Amendment.

"3. The foregoing observations apply with equal force to the proposition that the Act of 1920, taken in connection with section 1751 of the Code of Civil Procedure, denies to the child, Tetsubumi Yano, the privileges guaranteed to her by the Fourteenth Amendment to the Constitution of the United States and by section 21, article I, of the constitution of this state. Section 21 declares that no *citizen* or class of *citizens* shall 'be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.' The child is a native citizen of the United States and of the State of California. Nothing can be denied to her because of her race or color that is not denied to all citizens regardless of race or color. Any privileges that are given generally to citizens of other races must also be given to her upon the same terms, and her race cannot be considered as a factor in the problem, or as a cause for denial thereof to her. The effect of the two laws would be that all native minor children possessed of agricultural land in this state, whose parents are aliens residing in this state and eligible to citizenship, would have the privilege of having their father or mother appointed guardian of that part of their estate, while, on the other hand, all native-born minors who are possessed of agricultural land in this state, whose parents are aliens and reside here, but are ineligible to citizenship, if a guardianship of such land is necessary or convenient, would be compelled to have strangers as such guardians. Furthermore, while a native California child of alien Japanese parents, if over fourteen years of age, could nominate its own father as the guardian of its personal property or of its real property leased for purposes of trade or residence solely (Code of Civ. Proc., sec. 1748), it must nominate some stranger as guardian of any farming land it may own. No such burdensome disability is imposed upon any native-born child whose parents are citizens or eligible to citizenship. All such discriminations are forbidden by the constitutional provisions above mentioned.

"It is argued on behalf of respondent that the object of the law is to prevent evasion of the law forbidding aliens ineligible to citizenship to acquire, possess, or enjoy agricultural land, that the only class doing so is composed exclusively of aliens who cause land to be vested in their own minor children, with a view of being appointed guardian of the estate of such children, and that it is permissible for the state to regard the persons who are producing the evil which it desires to prevent, as a class by themselves and to enact such measures operating only upon that class as may be necessary to accomplish the desired object, as has been pointed out in *Patson v. Pennsylvania*, 232 U. S. 138, and *Ex parte Spencer*, 149 Cal. 401. But even in such case, as has been shown, the differences on which the classification is based must suggest a reason for the peculiar legislation and the legislation must be such as will have some tendency to remove the evil intended to be prevented. The appointment as guardian would not enable such parents to acquire, possess or enjoy agricultural land, and therefore their ineligibility to such appointment could not prevent their so doing. A guardian neither acquires, possesses, nor enjoys the prop-

erty belonging to the ward, in any accurate or legal meaning of those terms. At most, he merely has, for some purposes, the control of the property, but the control is not in his own right and does not inure to his benefit. He controls it as trustee only, and is held to strict accountability to the child for all the benefits accruing from the use of it. He must render such accounts annually, or oftener, if required by the court. (Code of Civ. Proc., secs. 1773, 1774.) He must hold all the receipts from the farming operations as the property of the native-born child, and must use so much of it for the support and education of the child as may be necessary and no more, and must safely invest the remainder as the property of the child and for its sole use and benefit. In all of his acts as guardian he is under the supervision and control of the superior court of the county. His compensation is limited to the reasonable value of his services and is to be fixed by that court. The use is in the child, not in the guardian. When the child becomes of age the control of the guardian immediately ceases. If the child should die, the control would pass forthwith to its heirs, and the alien parent, in that event, would not even inherit the property or any part thereof. It seems plain that since the alien parent could not by this means evade the operation of the law, nor acquire, possess, or enjoy agricultural land, the law cannot be upheld on the ground that such persons constitute a class, and the only class, who attempt to evade the law forbidding alien ownership. They could not by the use of such guardianship enjoy the rights of ownership. The classification is therefore clearly arbitrary and does not "suggest a reason which might rationally be held to justify" the peculiar legislation addressed to the class, as is said in *Darcy vs. Major, supra*.

"The object sought to be attained by these statutory provisions, that is, to discourage the coming of Japanese into this state, may be a proper one, and may be even desirable for the promotion of the welfare and progress of the state. The court can only consider its validity under the limitations of the constitution. A similar object prompted the adoption of the anti-Chinese provisions of the constitution of 1879, which, so far as they were effectual, were declared invalid by the federal courts. This entire question is international in character and is a matter properly to be disposed of by the Federal Government. Appeal for its adjustment should be made to Congress, rather than to attempt to accomplish it by discriminatory legislative measures of the state.

"Our conclusion is that the provisions of the Initiative Act of 1920 forbidding the appointment of an alien resident, ineligible to citizenship, as guardian of the farming land of his native-born child, and authorizing the removal of such parent, if previously appointed as such guardian, are invalid.

"The order appealed from is reversed."

That case is squarely in point in all particulars, and the logic of the opinion is beyond question.

In answer to this argument can it be shown that there is any reason for discriminating against a Japanese parent as distinguished from parents of other races? If the legislation made the speaking of the English language a necessary qualification for a guardian, we do not think any complaint could be made at least so far as guardianship of the property of the child is concerned. There might be other qualifications added by statute to those already existing as necessary for a guardian, *providing the qualifications apply to all parents regardless of race*. The point of the argument is that a Japanese parent is discriminated against, not on the

basis of any lack of qualification incapacitating him to be guardian, but entirely on the basis of an arbitrary qualification, to-wit: eligibility to citizenship, which does not bear any relation to the question of guardianship so far as it affects his fitness or unfitness. Pressing the argument one point further, the citizen child complains because his father is discriminated in the matter of guardianship, while other alien fathers no better qualified than his Japanese father, are permitted to act as guardian of their children (either citizen or alien).

We trust that we have shown clearly that in denying to a Japanese citizen child the right to have his own parents act as his guardian we are discriminating against him and denying him the equal protection of the law under the Fourteenth Amendment and his privileges and immunities under the Washington constitution because the discrimination is an arbitrary one of race. The child as a citizen of Washington and of the United States is certainly denied the equal protection of the law as well as "privileges and immunities" when he is compelled to accept a public administrator as his guardian as against his parents, otherwise qualified. We shall not take up the time of the court arguing the obvious advantage to a child of having his own parent administer his property. We can not conceive how it could be successfully claimed that a public administrator would handle the property of a child as inexpensively, as sympathetically and to such advantage as the child's parent and whether the child be under or over fourteen years of age his right to have his property managed by his father in the absence of the unfitness of the father is a property right. His constitutional right to equal treatment with all other children citizens of Washington is so clear that we deem it almost an axiom of American judicature.

Small qualifications of the great fundamental principle of equality of all persons before the law, may be permitted to creep into the structure of our government. The Fourteenth Amendment and the great body of law which has flowed therefrom, may be sacrificed to the demands of an assumed expediency in the settlement of race problems. The rights of a humble Japanese father or a Japanese minor child may amount to nothing in American jurisprudence. All of this may be true and yet the day of reckoning may come when later substantial rights under the forms of law shall be taken from all or any of us, because we have permitted the great principles of democracy to be cut down. Once we leave the safe anchorage of the Constitution, "Twill be recorded for a precedent and many an error, by the same example will rush into the state; it cannot be."

GUIE & HALVERSTADT,
Attorneys for Appellants.

b. BRIEF OF RESPONDENTS.

THE JURISDICTION.

Before entering into the merits, it is necessary to point out a matter which goes to the jurisdiction alone. Nowhere in the record is it shown whether the estate of the minor for which letters of guardianship are sought consists of agricultural or residential property. Under the treaty with Japan (37 Stat. at L. 1504-1509) citizens of Japan are given the right "to lease land for residential * * * purposes." Section 3, chapter 50, Laws of 1921, provides that "an alien is not qualified to be * * * guardian, if any part of the estate is *land*." Section 1, which defines "land" says it shall not include "a right to the possession, use or enjoyment

of land for a period of not more than ten years for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen."

It is clear that if lot 3, block 13, of Coulter's Addition to the city of Seattle is residential property, it is within the terms of the treaty, and excluded from the definition of the word "land" as used in section 3, and the appellant-petitioner, R. Fujimoto, is fully entitled to appointment as guardian of the property of the minor without infringing the provisions of the statute. It seems patent that if the lot is residential property the petitioner, under the terms of the treaty and chapter 50, would have the right to lease and enjoy the use and possession of the property for at least ten years and we do not think that section 3 should be given a more restricted interpretation than section 1.

This question, however, was not raised by petitioner in the court below, and under the familiar rule that a litigant cannot urge on appeal questions not properly raised in the court below, it is too late to be urged in the appeal to this court. At least, it is not raised in the assignments of error. There is an important exception to that rule, however, and that is that matters may be raised for the first time in this court if they go to the jurisdiction of the court. (*Burdette vs. Broadview Dairy Co.*, 123 Wash. 158, 161, and cases cited therein; *Peterson vs. Dillon*, 27 Wash. 78.)

Obviously the question of the character of the realty and of the resultant effect of the treaty upon the petitioner's rights under section 3 does not go to the jurisdiction of the superior court to entertain the guardianship proceeding. We are compelled to assume, therefore, before this court, that the estate in question is, in fact, "land" as that term is defined by the act.

THE MERITS.

STATEMENT.

The question involved in this case is that of the constitutionality of section 3, chapter 50, Laws of 1921 (sec. 10583, Rem. Comp. Stat.), which provides in part:

"An alien is not qualified to be * * * guardian, if any part of the estate is land: Provided, an alien, now lawfully acting in such capacity, may continue for not more than two years."

The section is a part of the Alien Land Law of 1921. It places a disability upon aliens not only to act as guardians, but also to act as trustee under a will, executor or administrator, but inasmuch as the present action involves only a guardianship matter, we can, of course, limit our discussion to a consideration of the validity of only that part of the statute disqualifying aliens from acting as guardians, if any part of the estate is land.

It must further be kept in mind that the word "alien" within the meaning of the act includes all aliens except those who have in good faith declared their intention to become citizens of the United States.

We are content to accept appellant's statement of the facts, and will proceed therefore to the argument.

ARGUMENT.

I.

PROHIBITION AGAINST ALIEN OWNERSHIP OR CONTROL IS VALID.

It would be impossible to properly consider the question here involved without a brief review of the Alien Land Law. Section 2 provides:

"An alien shall not own land or take or hold title thereto. No person

shall take or hold land or title to land for an alien. * * * Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state."

Section 1 defines the terms employed in section 2, and provides that "land" includes: "*Every interest therein and the right to the control, possession, use, enjoyment, rents, issues or profits thereof*" except a mortgage and rights granted under treaties.

To "own" is defined to mean "to have the legal or equitable title to or the right to any benefit of."

This act was sustained as against the objection that it unconstitutionally discriminates against those aliens who are by the federal naturalization laws incapable of becoming citizens, in *Terrace vs. Thompson*, — U. S. —; 68 L. Ed. 35, affirming the decision of the district court in 274 Fed. 841. See also *Porterfield vs. Webb*, 68 L. Ed. 42, upholding the Alien Land Law of California, and *O'Connell vs. State*, 121 Wash. 542, holding void a trust agreement whereby an alien was entitled to "the right to the benefit" of lands, even though he had neither legal nor equitable title nor the right to control, possession or use thereof.

And in *Webb vs. O'Brien*, — U. S. —; 68 L. Ed. 109, the United States Supreme Court, reversing the federal district court, held that the California act invalidated a cropper contract whereby an alien was to farm land on shares, while in *Frick vs. Webb*, 68 L. Ed. 113, the court upheld that part of the California act prohibiting aliens from acquiring stock in a corporation authorized to acquire and hold land for agricultural purposes.

It is to these cases that we must look for guidance in the solution of the present inquiry rather than cases dealing with the abstract question of the inherent right of persons to act as guardians. The cases just cited lay down these fundamental propositions: (1) That a state, in the absence of a treaty to the contrary, has the power to deny to aliens the right to own land within its borders, and such denial does not deprive aliens of property or liberty without due process of law; and (2) that the classification, with reference to ownership of land or any interest therein, between ineligible and non-declarant aliens on one hand, and eligible declarant aliens and citizens on the other, does not deny the equal protection of the laws.

The latter point was especially stressed before the Federal Supreme Court in the Terrace case, the contention being very strenuously urged that Congress, not being fettered by the Fourteenth Amendment, could enact and had enacted a naturalization act wholly arbitrary and unreasonable and discriminatory against races of certain color, including the Japanese, but the states, being limited by the Fourteenth Amendment, could not make the right to take or hold land dependent upon the Naturalization Act without infringing the equal protection clause of the Fourteenth Amendment. This contention was overruled in language that cannot be misunderstood. We quote from the opinion:

"The rights, privileges, and duties of aliens differ widely from those of citizens; and those of alien declarants differ substantially from those of nondeclarants. Formerly in many of the states the right to vote and hold office was extended to declarants, and many important offices have been held by them. But these rights have not been granted to nondeclarants. By various acts of Congress declarants have been made liable to military duty, but no act has imposed that duty on nondeclarants. The fourth paragraph of article I of the treaty invoked by the appellants provides

that the citizens or subjects of each shall be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces or in the national guard or in the militia; also from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions. The alien's formally declared *bona fide* intention to renounce forever all allegiance and fidelity to the sovereignty to which he lately has been a subject, and to become a citizen of the United States and permanently to reside therein, markedly distinguishes him from an ineligible alien, or an eligible alien who has not so declared.

"By the statute in question all aliens who have not, in good faith, declared intention to become citizens of the United States, as specified in section 1 (a), are called 'aliens', and it is provided that they shall not 'own' 'land', as defined in clauses (d) and (b) of section 1, respectively. The class so created includes all, but is not limited to, aliens not eligible to become citizens. Eligible aliens who have not declared their intention to become citizens are included, and the act provides that unless declarants be admitted to citizenship within seven years after the declaration is made, bad faith will be presumed. This leaves the class permitted so to own land made up of citizens and aliens who may, and who intend to, become citizens, and who in good faith have made the declaration required by the naturalization laws. The inclusion of good faith declarants in the same class with citizens does not unjustly discriminate against aliens who are ineligible, or against eligible aliens who have failed to declare their intention. The classification is based on eligibility and purpose to naturalize. Eligible aliens are free white persons and persons of African nativity or descent. Congress is not trammelled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. *But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy.* The state properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not. Appellants' contention that the state act discriminates arbitrarily against Nakatsuka and other ineligible aliens because of their race and color is without foundation. *All persons of whatever color or race who have not declared their intention in good faith to become citizens are prohibited from so owning agricultural lands.* Two classes of aliens inevitably result from the naturalization laws—those who may and those who may not become citizens. *The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act.* We agree with the court below (274 Fed. 841, 849) that: 'It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens.' And we think it is clearly within the power of the state to include nondeclarant eligible aliens and ineligible aliens in the same prohibited class. Reasons supporting discrimination against aliens who may, but who will not, naturalize, are obvious.

"Truax vs. Reich, 239 U. S. 33, 37, 38, 60 L. Ed. 131, 133, 134, L. R. A.

1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283, does not support the appellants' contention. In that case the court held to be repugnant to the Fourteenth Amendment an act of the legislature of Arizona making it a criminal offense for an employer of more than five workers at any one time, regardless of kind or class of work, or sex of workers, to employ less than 80 per cent qualified electors or native-born citizens of the United States. In the opinion it was pointed out that the legislation there in question did not relate to the devolution of real property, but that the discrimination was imposed upon the conduct of ordinary private enterprise covering the entire field of industry, with the exception of enterprises that were relatively very small. It was said that the right to work for a living in the common occupations of the community is a part of the freedom which it was the purpose of the Fourteenth Amendment to secure.

"In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the state. The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance, and affect the safety and power of the state itself.

"The Terraces, who are citizens, have no right safeguarded by the Fourteenth Amendment to lease their land to aliens lawfully forbidden to take or have such lease. The state act is not repugnant to the equal protection clause, and does not contravene the Fourteenth Amendment." (*Italics ours.*)

It will readily be seen, therefore, that the California supreme court in the Tetsubumi Yano case, 206 Pac. 995—the case upon which appellant relies on this appeal—proceeded upon a fundamentally wrong basis. At pages 999 and 1000, under headnotes 14 and 15, the court holds that a classification based upon alienage is clearly a denial of equal protection to Japanese and other aliens who by reason of the Naturalization Act cannot become citizens. It is, of course, not necessary to show the fallacy of this proposition in view of Justice Butler's opinion in the Terrace case. Such classification is proper if made in reference to "ownership of land, or any interest therein, or the *right to control*, possession, use, enjoyment, rents, issues or profits thereof, or the right to any benefit thereof", so the Yano case can only be sustained on the theory that guardianship is in no way connected with those things. We will therefore proceed to a consideration of that question.

II.

A GUARDIAN HAS A RIGHT TO THE CONTROL OF WARD'S ESTATE.

In order to substantiate the above statement it seems to us only to be necessary to refer to section 1575, Rem. Comp. Stat., which provides:

"It shall be the duty of the guardian of any estate:

"(1) To make out and file, within three months after his appointment, a full inventory, verified by oath, of the real and personal estate of his ward, with the value of the same, and failing so to do, it shall be the duty of the court to remove him and appoint a successor.

"(2) To manage the estate for the best interest of his ward.

"(3) To render on oath to the proper court an account of his receipts and of his expenditures, with vouchers therefor, at least once in every two years, and whenever cited to do so, and failing so to do, he shall receive no allowances for services, and be liable to said ward on his bond in damages for ten per cent of the whole amount of the estate, both real and personal, in his hands belonging to such ward.

"(4) At the expiration of his trust fully to account for and pay over to the proper person all the estate of said ward remaining in his hands.

"(5) To pay all just debts due from such ward out of the estate in his hands, and to collect all debts and demands due such ward, and in case of doubtful debts, to compound the same, and to appear for and defend, or cause to be defended, all suits against such ward.

"(6) When any ward has no father or mother, or such father or mother is unable or fails to educate such ward, it shall be the duty of his guardian to provide for him such education as the amount of his estate may justify."

It seems clear that in managing the estate for the ward a guardian has not only the right to control, but possession of the estate as well. It is true it is limited in duration, but this makes no difference in view of the decision in the cropper contract case (*Webb vs. O'Brien, supra*). The statute draws no fine distinction between ownership of title and possession for a determinable period, even though for the benefit of a citizen. The thing prohibited is dominion by aliens over agricultural lands at all. The *Webb* case is conclusive. The lower court had held that a cropper contract was not inhibited, because it constituted in effect a mere contract of *employment* and did not confer any interest or estate in land. In *Truax vs. Raich*, 239 U. S. 33, it had been held that aliens have the right to be *employed* in any common occupation on equal terms with citizens. The Federal Supreme Court said:

"The act, as a whole, evidences legislative intention that ineligible aliens shall not be permitted to have or enjoy any privilege in respect of the use or the benefit of land for agricultural purposes. * * *

"The term of the proposed contract, the measure of control and dominion over the land which is necessarily involved in the performance of such a contract, the cropper's right to have housing for himself and to have his employees live on the land, and his obligation to accept one-half the crops as his only return for tilling the land, clearly distinguish the arrangement from one of mere employment. The case differs from *Truax vs. Raich*, 239 U. S. 33, 60 L. Ed. 131, L. R. A. 1916 D. 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283. In that case a statute of Arizona making it a criminal offense for an employer of more than five workers, regardless of kind or class of work or sex of workers, to employ less than 80 per cent native-born citizens of the United States, was held to infringe the right, secured by the Fourteenth Amendment, of a resident alien to work in a common occupation—cooking in a restaurant. The right to make and carry out cropper contracts such as that before us is not safeguarded to ineligible aliens by the Constitution. A denial of it does not deny the ordinary means of earning a livelihood or the right to work for a living. *The practical result of such contract is that the cropper has use, control and benefit of land for agricultural purposes substantially similar to that granted to a lessee.* Conceivably, by the use of such contracts, the population living on and cultivating the farm lands might come to be made up largely of ineligible aliens. The allegiance of the farmers to the state directly affects its strength and safety. (*Terrace vs. Thompson, supra.*) We think it within the power of the state to deny to ineligible aliens the privilege so to use agricultural lands within its borders. * * *

"The privilege to make and carry out the proposed cropping contract, or to have the right to the possession, enjoyment and benefit of land for agricultural purposes, as contemplated and provided for therein, is not given to Japanese subjects by the treaty. The act denies the privilege because not given by the treaty. No constitutional right of the alien is infringed. It therefore follows that the injunction should have been denied." (*Italics ours.*)

The courts are concerned with practical results of contemplated arrangements, not with finely drawn distinctions or theoretical niceties of logic. In other words, they will regard the substance rather than the form of instruments or means by which aliens may seek to obtain control or dominion over agricultural lands. The legal principle is the same as that stated in *Standard Oil Co. vs. Graves*, 249 U. S. 389, to the effect that courts will consider the substantial effect of an imposition rather than what it is called by a lawmaking body or by a state court in determining whether it places an undue burden upon interstate commerce.

See, also, *Baldwin vs. Escanaba Liquor Dealers' Assn.*, 130 N. W. (Mich.) 214, and *Ford vs. Chicago Milk Shippers' Assn.*, 39 N. E. (Ill.) 651. In the last case the court at page 655 stressed the point that the state will not create a body with authority to evade its laws. So in the present case the state, through its courts, should not give anyone the authority or means by which its laws or policies could be transgressed.

We submit that under this rule chapter 50 would have prohibited an ineligible alien from acting as guardian of an estate consisting of agricultural land, even if section 3 had been omitted, and how can it be said, then, that the inclusion of section 3 invalidates the act.

The O'Connell case is also very clear upon the question of what was intended to be accomplished by the act and how it should be construed in order to accomplish that end. The court said:

"For the purpose of this discussion it may be conceded that, under the declaration of trust involved here, the alien does not have the right to the control, possession and use of the lands involved, and that he does not own the legal or equitable title; but that he owns the 'right to the benefit of' the land, and has the 'right to' the 'enjoyments, rents, issues and profits thereof', there cannot be any doubt. *These rights are by the legislature defined to be land or an interest in or benefit of land, and they are most surely in violation, not only of the spirit of our legislative act, but the very words thereof.*" (Italics ours.)

As an example of the measure of control a guardian may exercise over the ward's estate, we refer this court to *Burgert vs. Caroline*, 31 Wash. 62, in which it was held that a guardian merely by paying taxes on the property out of his own funds can acquire a lien on the property. Quoting from the opinion:

"The law does not, therefore, inquire too nicely into the interests or motives of those who pay taxes lawfully assessed upon property. But it will, whenever the interests of justice require it, allow those who have an interest or a *bona fide* claim of interest in the property of another, and who have paid taxes thereon which rightfully should have been paid by that other, a lien against the land for the amount of the taxes paid.

"But it is said that the appellant does not fall within the rule of one having an interest or a *bona fide* claim of interest; that she was at most only guardian of some one who had an interest and who might have paid the taxes, but had personally no such interest as would authorize her to pay them out of her own funds. It seems to us, however, that she had such an interest as would bring her within the provisions of the rule above cited."

The case involved a construction of section 11270, Rem. Comp. Stat., which provides as follows:

"When any tax on real estate is paid by or collected of any occupant or tenant, or any other person, which, by agreement or otherwise, ought to have been paid by the owner, lessor or other party in interest, such occu-

pant, tenant or other person may recover by action the amount which owner, lessor or party in interest ought to have paid, with interest thereon at the rate of ten per cent per annum, or he may retain the same from any rent due or accruing from him to such owner or lessor for real estate on which such tax is so paid; and the same shall, until paid, constitute a lien upon such real estate."

Under this section as construed in the *Burgert* case the way is opened for aliens to evade and completely nullify the prohibition against alien ownership of land if this court should hold section 3 unconstitutional. By taking title to land in the name of their minor children and securing appointment as guardians of their children's estates, the aliens, by virtue of section 11270, can acquire liens against the lands for taxes paid, then foreclose these liens under the statute and the precedent set in the *Burgert* case, thereby acquiring valid title to the land in themselves under the pretense that it was acquired "in the ordinary course of justice in the collection of debts", as provided in section 33, article II, of the constitution, and subparagraph (f), section 1, of chapter 50.

It is well known that in the cases in which aliens hitherto have been appointed guardians of the estates of their minor children, the proceeds from the land have not been accumulated in any substantial sum for the benefit of the wards, but in every instance, so far as we have been able to discover, there is only enough money earned from the land to pay the costs and expenses of operation, including a "wage" for the alien parent. How easy would it not be for them to go just a step further and show that the land was not producing enough to pay taxes, which must perforce be paid by the alien parent, thus giving him a lien against the land which enables him to obtain a legal title. We submit that it was this very subterfuge which the legislature sought to make impossible by the enactment of section 3.

The fallacy of the *Yano* case upon this point is self-evident. The opinion in the *Yano* case states:

"A guardian neither acquires, possesses nor enjoys the property belonging to the ward, in any accurate or legal meaning of those terms. At most he merely has, for some purposes, the control of the property, but the control is not in his own right and does not inure to his benefit. He controls it as trustee only," etc.

Generally the quoted statements are theoretically true. But those who are acquainted with the actual conditions of the agricultural districts of this state know that this quotation is true theoretically only, and fails to picture with approximate correctness the actual conditions in the daily life about them. The ineligible alien acting as guardian, the quotation admits, possesses and enjoys the property belonging to the ward, but seemingly would avoid the consequences, because such possession and enjoyment is not in his own right, but is in a representative capacity. Hence, the opinion states, the guardian does not possess or enjoy the property "in any accurate or legal meaning of those terms".

The legislature which enacted this measure in 1921 was not so much concerned with the accurate and legal meaning of these terms as it was with the actual conditions of land occupancy, cultivation and use; and dealing with the practical, and not with the theoretical, what difference does it make whether the dominion of agricultural lands by ineligible aliens flows from a title in fee in themselves, or from a trust relation to the owner which may continue for a period of, say, nineteen years?

The legislation prohibits the acquirement of the title, it is true, but it

did not stop there. It prohibited the acquirement of dominion through such trust relation. Whether the acquirement of title should be prohibited is a political question lying exclusively within the province of the legislature. Likewise is the acquirement of dominion by means other than through the acquisition of title a political question within the exclusive province of the law-making body—in this instance the legislature. This law-making body has exercised its power in reference to each of these conditions. It has prohibited them both.

The prohibition of the trust relation, namely, the guardianship, was not upon any theory that the guardian held title, as the opinion seems to assume. The acquisition and holding of title was prohibited in another section. But this trust relation, this guardianship, was directly prohibited in terms most appropriate to express such intent. The adoption of this act was a determination by the legislature that the control of agricultural lands by ineligible aliens through acquisition of title, and the control through a fiduciary relation to the legal owner, were like evils, to be prohibited. And this determination is the exercise of a legislative and not a judicial function, and is a power to be exercised by the law-making and not by the law-interpreting department of the Government. The opinion appears to recognize the propriety of the exercise by the law-making department of this function in the one instance, but denies the propriety of its exercise in the other, in absolute disregard of the well-established rule that the power of the legislation is plenary excepting where limited by federal or state constitutions. (Lewis' Sutherland Statutory Construction, 2d Ed., vol. 1, p. 122.)

The court in the Terrace case very properly assumes, in order to reach a correct conclusion, that "every foot of land within the state might pass to the ownership or possession of noncitizens."

So in this case do we now assume that every foot of the agricultural land of this state might pass to the "*possession and enjoyment of*" alien guardians. Again do we assume that the bulk of these alien guardians, having such control over a period of, let us say, some nineteen years, over all the agricultural land of this state, determine upon a policy which they actually put into effect of employing ineligible alien help for the cultivation of these great tracts of our agricultural lands.

Looking to the fundamental justification for alien land legislation of any character as so clearly laid down in the decided cases and in the textbooks, what is the relationship between the condition which we have assumed to exist in this state and the proper exercise of control by the state?

Of what practical interest is it to the people of this state to realize as a matter of elementary law, with which even the man on the street is familiar, that these guardians are really holding the land for the ultimate benefit of their citizen infant children? The people of this state have determined as a matter of political necessity that irrespective of this ultimate ownership in these infant children the state will not tolerate a condition that would permit of the bulk of its agricultural lands being actually possessed, enjoyed, controlled, improved and cultivated over a long period of years by and under the immediate direction of ineligible aliens.

III.

LEGISLATURE HAD POWER TO PREVENT EVASION AND EFFECTUATE MAIN OBJECT.

Even if this court should feel that the statutory relation of guardian and ward does not give the guardian a sufficient interest in, or possession or

control of, the ward's estate to bring it within the condemnation of the substantive provisions of chapter 50, we submit that it was within the legislative power to outlaw such a relation, when a part of the estate is land, and prohibit it to an alien under such conditions, because of the well recognized principle of constitutional law which holds that a state may, under the police power, not only establish a prohibition but also include within the operation of the law transactions, which though innocuous in themselves, furnish the means whereby the main legislative object may be defeated. To state it otherwise, should we concede that alien guardianship of agricultural property is wholly innocent and legitimate in itself in that it confers no direct control of the property upon the guardian in violation of the legislative edict, nevertheless, the legislature had the power to include such a transaction because it concluded that it was a means to the end of defeating the main purpose of the act.

This was the basis of Justice Lawlor's dissenting opinion in the Yano case. We quote at length therefrom:

"The several cases cited in the prevailing opinion state the general rules relating to classification for purposes of legislation. In this instance the aliens coming within the inhibition of the legislation seek by indirection, to control agricultural land which the Alien Land Law, the validity of which is not questioned by the majority opinion, denies them the right to own. To hold that, under the federal guarantee of equal protection of the laws, the state is powerless to prevent circumvention of a law it had the authority to enact, is in effect to declare that it cannot, by an exercise of its sovereign will, effectuate the purpose of the original legislation—to prevent its agricultural land from passing under the control of such aliens. I am not prepared to assent to such a conclusion. It seems clear to me that the state, having the power to enact the original law directed at these aliens, may classify them in supplemental legislation, the object of which is to make the parent legislation effective.

"The statute held constitutional in *Patson v. Pennsylvania*, 232 U. S. 138, 34 Sup. Ct. 281, 58 L. Ed. 539, made it unlawful for any unnaturalized foreign-born resident to kill any wild bird or animal, except in defense of person or property, and 'to that end' made it unlawful for any such person to own or be possessed of a shotgun or rifle, with a penalty of \$25 and a forfeiture of the gun. In that case the Supreme Court of the United States, speaking through Mr. Justice Holmes, said:

"'But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that, if the class discriminated against is, or reasonably might be, considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. * * * The question therefore narrows itself to whether this court can say that the legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent.'

"It appears from that case that unnaturalized foreign-born residents were the chief slaughterers of wild birds and animals, and to prevent violations of a statute which made the killing of the game unlawful, such persons were denied the right to own property, consisting of certain kinds of firearms, which they might use to kill game. Here, the object is not to prevent a violation of a statute, but to prevent an evasion of it, for, while it is true the alien parent does not acquire title to the land, as a

practical matter he does secure control of it in his capacity as guardian. The only persons who would evade such a statute are those against whom it is directed, namely, aliens ineligible to citizenship—a definite class of the population, as between the members of which the act makes no discrimination. To prevent the circumvention of the law, such aliens are denied the right to be guardians of these estates by use of which form of guardianship they would control them. I perceive no distinction in principle between the two cases.

“Viewed purely as a question of guardianship, it may be true, as stated in the prevailing opinion, that—

“The right or privilege of a father to be the guardian of his own minor child does not in any respect depend upon or arise out of his nationality or his eligibility to citizenship in this country. It has no relation thereto.”

“But, when it is considered that out of all the persons who may become guardians of this class of property, these aliens alone seek to be appointed as such with the definite object of evading the Alien Land Law, there is a relation established between them and the right to be guardians, which places them in a distinct class with reference to that subject.”

The case of *Patsone vs. Pennsylvania*, 232 U. S. 138, cited by Judge Lawlor, is directly in point. There was involved an act which made it unlawful for a resident alien to kill wild game except in defense of person or property, and *to that end* made it unlawful for such alien to possess a shotgun or rifle. We quote a part of the argument of counsel for plaintiff in error, as it appears in the official report:

“Shotguns and rifles are articles of property not harmful in themselves, necessary for legitimate uses, and there is no manifest necessity to forbid their possession in order to prevent aliens from hunting game.”

Answering this, the Supreme Court said:

“Under the Fourteenth Amendment the objection is two-fold: unjustifiably depriving the alien of property and discrimination against such aliens as a class. But the former really depends upon the latter, since *it hardly can be disputed that if the lawful object, the protection of wild life (Geer vs. Connecticut, 161 U. S. 519), warrants the discrimination, the means adopted for making it effective also might be adopted.* The possession of rifles and shotguns is not necessary for other purposes not within the statute. It is so peculiarly appropriate to the forbidden use that if such a use may be denied to this class, the possession of the instruments desired chiefly for that end also may be. The prohibition does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defense. So far, the case is within the principle of *Lawton vs. Steele*, 152 U. S. 133. See further *Silz vs. Hesterberg*, 211 U. S. 31; *Purity Extract Co. vs. Lynch*, 226 U. S. 192.” (Italics ours.)

The analogy to the present case is striking. The object of chapter 50 was to prevent aliens from obtaining dominion over the state's agricultural lands. *To that end* it prohibited the various means whereby this may be accomplished indirectly, and among those means is the appointment of aliens as guardians where the estate is land.

In *Lawton vs. Steele*, 152 U. S. 133, an act prohibited fishing with appliances other than hook and line, and to the end of making the prohibition effective declared nets, pounds, etc., public nuisances and subject to summary destruction. The court said:

“The main and only real difficulty connected with the act in question is in its declaration that any net, etc., is to be treated as a public nuisance.

* * * The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually *than by destroying the means of the offense.*" (Italics ours.)

In *Silz vs. Hesterberg*, 211 U. S. 31, in speaking of an act making possession of all game unlawful during a closed season, the court said:

"In order to protect local game during the closed season it has been found expedient to make possession of all such game during that time, whether taken within or without the state, a misdemeanor. * * * We cannot say that such purpose, frequently recognized and acted upon, is an abuse of the police power of the state."

In *Purity Extract Co. vs. Lynch*, 226 U. S. 192, an act forbade the sale of malt liquors. The question was whether it could constitutionally be held to forbid the sale of an innocent beverage containing malt but being non-intoxicating. The language of Justice Hughes is especially applicable. He said in part:

"It is also well established that, when a state exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a *transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government.* (*Booth vs. Illinois*, 184 U. S. 425; *Otis vs. Parker*, 187 U. S. 606; *Ah Sin vs. Wittman*, 198 U. S. 500, 504; *New York ex rel. Silz vs. Hesterberg*, 211 U. S. 31; *Murphy vs. California*, 225 U. S. 623.) With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system." (Italics ours.)

In *Fuller vs. Jackson*, 100 Miss. 650, in considering the same question, the Mississippi court said:

"Poinsetta may or may not be an intoxicant, but it is a malt liquor, and as such is prohibited from being sold in the state. *The prohibition law cannot be made effective unless it excludes all subterfuges.*" (Italics ours.)

It may be urged that our argument must fail in any event because there was in fact no necessity for declaring that alien guardianship must be prohibited in order to make effective the prohibition of alien control over agricultural land. Courts, however, will not pass upon the necessity or expediency of a legislative enactment. That question is political. As stated in the *Purity Extract* case, it is sufficient if it was regarded as essential *in the legislative judgment* to accomplish a purpose within the admitted power of government, the "admitted power of government" in this case being the power to deny to aliens the right to own, possess or control in any way the agricultural property of the state.

In *Crane vs. Campbell*, 245 U. S. 304, an act made it unlawful to have whiskey in possession for personal use to the end of making a prohibition law effective. The Supreme Court said:

"As the state has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise

of that power effective. (*Booth vs. Illinois*, 184 U. S. 425, 46 L. Ed. 623, 22 Sup. Ct. Rep. 425; *New York ex rel. Silz vs. Hesterberg*, 211 U. S. 31, 53 L. Ed. 75, 29 Sup. Ct. Rep. 10; *Murphy vs. California*, 225 U. S. 623, 56 L. Ed. 1229, 41 L. R. A. [N. S.] 153, 32 Sup. Ct. Rep. 697, and *Rast vs. Van Deman & L. Co.*, 240 U. S. 342, 364, 60 L. Ed. 679, 689, L. R. A. 1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455.) And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose."

In *Hebe Co. vs. Shaw*, 248 U. S. 297, the court said:

"The answer to the inquiry is that the provisions are of a kind familiar to legislation and often sustained, and that it is impossible for this court to say that they might not be believed to be necessary in order to accomplish the desired ends."

This court has sustained the same power. In *State vs. Somerville*, 67 Wash. 638, in upholding the eight-hour law for women, it said:

"Statutes regulating and restricting hours of labor, and the right of private individuals to contract therefor, when valid are sustained as a proper exercise of the police power, and many courts have held that a large discretion is necessarily invested in the legislature when exercising that power, and that the legislature may determine not only what the public interest demands, but also what measures are requisite and necessary to secure and protect the same." (Italics ours.)

See, also, *State vs. Mountain Timber Co.*, 75 Wash. 581, 589.

The Supreme Court of the United States invoked the identical principle in deciding the case of *Frick vs. Webb*, *supra*, in passing upon the validity of the section prohibiting aliens from owning stock in corporations authorized to deal in agricultural land. It said:

"The provisions of the act were framed and intended for general application and to limit the privileges of all ineligible aliens in respect of agricultural lands to those prescribed by treaty between the United States and the nation or country of which such alien is a citizen or subject. The state has power, and the act evidences its purpose, to deny to ineligible aliens permission to own, lease, use, or have the benefit of lands within its borders for agricultural purposes. (*Webb vs. O'Brien*, *supra*.) 'As the state has the power * * * to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective.' (*Crane vs. Campbell*, 245 U. S. 304, 307, 62 L. Ed. 304, 309, 38 Sup. Ct. Rep. 98, and cases cited; *Hebe Co. vs. Shaw*, 248 U. S. 297, 303, 63 L. Ed. 255, 258, 39 Sup. Ct. Rep. 125.) It may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens." (Italics ours.)

Certainly on the corporate entity theory, it cannot be said that an ineligible Japanese secures any control over land by becoming stockholder in a corporation, but this technicality was brushed aside by the court and the case decided on broad principles of what the act on the whole sought to accomplish.

Moreover, we believe that alien guardianship may be characterized not only as a means of evading the purpose of chapter 50, but also as a vehicle of fraud upon the state. It cannot be gainsaid that any attempt to circumvent the act would constitute plain fraud. In *Commonwealth vs. Hana*, 81 N. E. (Mass.) 149, in upholding an act which denied aliens the right to be licensed as peddlers, it was said:

"There is, however, an important question which was not much discussed in that case, whether the legislature, in the exercise of the police power, could discover a reason for withholding peddlers' licenses from aliens. The business of peddling furnishes such opportunities for the practice of fraud that it is a proper subject for legislative regulation."

Let us inquire for a moment into the exact situation with reference to alien guardianships in an effort to ascertain what motive could have induced the legislature to include them within the condemnation of the statute—although granting its immateriality to a determination of the question at issue.

The answer is found in the facts of the Yano case. The court itself conceded that the whole transaction was beyond cavil a plain evasion of the Alien Land Law. The father, an ineligible Japanese, paid the consideration for a tract of agricultural land, deed being taken in the name of his two-year-old infant, who was a citizen by reason of her native birth. By virtue of the guardianship he would be given full control and dominion, under court supervision, it is true, over the land for a period of about nineteen years. We submit that was the very character of evasion the statute sought to prevent. How can it be claimed, then, that section 3 has no relation to the main objects of the statute? Is the legislature helpless to prevent such a barefaced subversion of a legitimate enactment?

Parenthetically, we might say that in our opinion the decision of the California court was erroneous also on the point that no presumption of an implied trust arises in favor of an alien when he pays the consideration and title is taken in the name of a citizen. We believe the true rule to be that under the facts in the Yano case the minor child presumptively held title in trust for the alien, in which event the land was escheatable, although, as the court properly pointed out, it could not be escheated in a guardianship proceeding.

This question, of course, does not enter into the present controversy, but in passing we might point out that by chapter 70, Laws of 1923, the legislature has expressly provided:

"If a minor child of an alien hold title to land either heretofore or hereafter acquired, it shall be presumed that he holds in trust for the alien."

Under that statute Frank Fujimoto, presumptively, holds title to the land in trust for his alien father within the direct inhibition of section 2, chapter 50.

It is true the facts in the present case do not present the same unabashed attempt to evade the provisions of the act as did those in the Yano case. They indicate, on the surface, at least, that the transaction was entirely innocuous, that the Okudas simply made a gift of land to the minor and did not intend it as a subterfuge to award control thereover to the alien father. Be that as it may, the fact remains that, by securing appointment as guardian, R. Fujimoto, an alien incapable of owning, leasing, possessing or exercising control or dominion over land in this state, would defeat the ultimate purpose of the prohibition by obtaining some measure of control thereover. For ten or eleven years, at least, he is permitted to enjoy a dominion over the land practically unlimited, and by paying taxes thereon he obtains a lien, which, by foreclosure, gives him legal title.

In any event, even if we concede that the transaction in this case was a perfectly innocent and legitimate one, and not an evasion of the act, such concession does not render section 3 unconstitutional if applied thereto, for it is well settled that the legislature is not compelled to make a law applicable to each individual transaction, but may include within a general

prohibition all transactions of a class in which it feels an admitted evil is particularly pronounced. (*Purity Extract Co. vs. Lynch, supra.*) At page 204 the court says:

"It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of 'malt liquors.' In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law. *A contrary conclusion logically pressed would save the nominal power while preventing its effective exercise.* The statute establishes its own category. The question in this court is whether the legislature had power to establish it. The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." (*Italics ours.*)

See, also, *Booth vs. Illinois*, 184 U. S. 425, 429, 430; *Otis vs. Parker*, 187 U. S. 606, 609, 610.

IV.

RIGHT TO ACT AS GUARDIAN IS NOT INALIENABLE.

Appellant argues, however, that even though the Terrace, O'Connell, Frick and O'Brien cases be given the significance which we have given them, they cannot control the present inquiry for the reason that all individuals, whether aliens or citizens, have an inherent common law right to act as guardians. Stated otherwise, the contention seems to be that there is some transcendent, inalienable power reposed in individuals to be appointed guardians irrespective of statutory regulation.

We think it unnecessary to enter into an elaborate discussion of this question. The ultimate purpose of chapter 50, that is, prohibition of alien dominion of land, being admittedly valid, and the greater power including the lesser, it is clear that the prohibition of alien guardianship of land estates is valid irrespective of the abstract question of guardianship. The question of guardianship cannot in this case be disassociated from the main purpose of the act.

Let us, however, for the purpose of argument, assume that the abstract question of guardianship has a place in this brief. Can appellant derive any comfort therefrom? At page 18 of his brief we find:

"It remains to be seen whether this common law right so generally regarded as such, and not a mere privilege, can be denied to the father because he is an alien * * *"

We submit that this is a perversion of the law. Singularly enough, we have only to refer to the Yano case, which forms the keystone of the arch which he has attempted to erect, in order to refute the statement.

At page 999, the court said:

"The rights and privileges which it declares the Japanese citizen shall enjoy here are such rights and privileges only as may be necessary for the protection and security of his own person or property. It cannot be said that it is necessary for the security or protection of either the person or the property of a parent that he should become the guardian of his own child. *Eligibility to appointment as guardian is not property, nor is it a right to property. It pertains exclusively to the person. It may be given or*

withheld by the law of the state in which the parent and child reside. The withholding thereof from all parents would be within the power of the state. Undoubtedly, when given, it is a privilege pertaining to the individual parent, but it is not a privilege which enhances his own personal security or which assists him in protecting his property. A deprivation of the privilege would in no manner endanger the person of the parent, or jeopardize his property." (Italics ours.)

This is the undoubted rule. In 28 C. J. 1061, it is said:

"The legislature has the right to prescribe the form of a guardianship."

The case of *Duncan vs. N. Y. Mutual Life Ins. Co.*, 164 N. Y. S. 97, is cited in support of the text. A New York statute provided that a guardian could not accept or receive payments of money for the ward, excepting jointly with another person duly designated by the court. The court said with reference to the provision:

"The legislature undoubtedly has the right to prescribe forms of guardianship. We are not concerned on this appeal with the question as to whether or not the legislature acted wisely in enacting this statute. It is sufficient for us to say that *it had the power to make the law* and the courts are bound to follow it." (Italics ours.)

We cannot reconcile the statement of appellant that guardianship is a matter of right (p. 18 of his brief) with the statement (p. 23 of his brief) that a guardian "would be an officer of the court and nothing more. * * * and could even be removed by the court at pleasure." How can it be claimed that an alien has the *right* to be an officer in an American court? Further, if he should be appointed guardian, and it is admitted that he could be removed at pleasure, wherein can he claim the *right* of appointment in the first instance?

It must be borne in mind that there are two forms of guardianship for minors under our probate code, one for the person and the other for the estate (*In re Masterson's Estate*, 45 Wash. 48; *In re Hogen*, 104 Wash. 265), and that section 3, chapter 50, refers only to the latter. There is nothing in the statute preventing appellant from being named as guardian for the person of Frank Fujimoto. The case of *Lovell vs. House of the Good Shepherd*, 9 Wash. 419, was not a guardianship proceeding at all, but a *habeas corpus* proceeding to obtain the custody of the person of a child. It simply held that a parent, except in exceptional circumstances, is entitled to such custody as against a corporation which could not in the nature of things stand in *loco parentis*.

Russner vs. McMillan, 37 Wash. 416, was a guardianship proceeding, and it expressly negatives the right of a parent *when incompetent*. This court quoted from *Ex parte Crouse*, 4 Whart. (Pa. St.) 9, as follows:

"The parents are ordinarily intrusted with it because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its suffrance?"

Appellant contends that our probate code is a mere re-enactment of the rules of common law with reference to guardianship. This may be true, in a general sense, but can he honestly argue that this confers an absolute, indefeasible right upon fathers to act as guardians of the estates of minors? Section 6907, Rem. Comp. Stat., gives to husband and wife equal rights to the custody of children. Is that statute void, because it modified the rigid rule of the common law which gave to the father a right to the custody and services of his child, superior to that of the mother and all others?

Is section 6891, Rem. Comp. Stat., giving the wife full control over her separate property, void because in conflict with the common law? Under

the common law the husband in effect became guardian or custodian of his wife's property, nevertheless courts have held that it is competent for the legislature to abrogate that right and provide for the appointment or retention of an independent guardian for the property of a married infant female. (*Pace vs. Richardson*, 202 S. W. [Ark.] 852; *Matter of Herbeck*, 16 Abb. Pr. N. S. [N. Y.] 214.)

In 28 C. J. 1066, it is said:

"There may be a guardianship extending only to property, although the parent of the infant is living and fully authorized to act as guardian for the person."

See *Friesner vs. Symonds*, 20 Atl. (N. J.) 257.

And, under the common law, corporations could not act as guardians, but under our bank and trust statute (sec. 3231, Rem. Comp. Stat., as amended by chapter 115, Laws of 1923), trust companies have power "to be appointed * * * to act as guardian of the estates of * * * minors." This is clearly a modification of the law of guardianship.

Upon what theory, then, can it be argued that guardianship is not a matter of purely statutory regulation? We submit the true rule to be that guardianship of estates of minors is a privilege and not a right, although a parent, *when the privilege is conferred*, has a preferential right to exercise the same.

Viewed in this light, the court must consider section 3, chapter 50, simply as a further modification of the law of guardianship. The fallacy of the Yano case is at once apparent. At page 999 it was said that the Alien Land Law was void because it denied to aliens the rights conferred by the general guardianship statute (Code Civ. Proc., sec. 1751). Upon what principle is one statute to be given precedence over another? Both derive their existence from the same source, and the Alien Land Act being the later obviously modifies the general enactment. Simply because the State of California enacted the general guardianship statute, is it in duty bound never to alter or repeal the same?

Mr. Justice Lawlor stated the correct rule:

"As pointed out in the main opinion, matters of guardianship are within the control of the legislature. The qualifications and competency of guardians are therefore subject to statutory change. This provision is the latest expression of the legislative will on the subject of eligibility to guardianship. It is an additional qualification of the rule that a parent, or person nominated by a minor over fourteen years of age, may be appointed as guardian. * * * A parent, who is incompetent, has no right to be appointed guardian of his child. * * * This statute expressly renders ineligible to be guardians of a certain class of property in the estates of minors those in the class of whom petitioner is one. * * * Such a regulation is clearly within the legislative power."

V.

RIGHTS OF MINOR NOT DISCRIMINATED AGAINST UNLAWFULLY.

The foregoing has been considered largely from the standpoint of the alien. Appellant contends also that the act denies equal protection to the minor who is a citizen. Upon this phase, we think the logic of Justice Lawlor in the Yano case is irrefutable. He says:

"Considered from this viewpoint, the rights of the minor are not infringed upon by this provision. It cannot be questioned that this minor has, under section 21, art. 1, of the constitution of this state, the same rights as any other native-born citizen. Neither can it be questioned that the title to the land has vested in her. But no child has a right to have

its parent appointed its guardian, if the parent is incompetent to discharge the duties of guardianship. By the provision in question, an additional class of persons is rendered incompetent to be guardians of property of a particular character. A minor has no more right to have a parent, declared by law to be ineligible, appointed as a guardian than such parent would have to be the guardian. The rights of each are subject to statutory regulation and in such a case as this, neither can have more ground for complaint than if the parent were disqualified because of incompetency to discharge the duties of the office. This legislation applies to all minors, whatever the nationality of their parents may be, and it applies whether the person sought to be appointed guardian is the parent of the minor or a stranger."

We may summarize our conclusions as follows:

1. The prohibition against alien ownership or *control* of land is valid and does not deny the equal protection of the laws.

2. An alien guardian of minor's estate has sufficient control over the estate to establish a definite relation to the constitutional purpose of the act, and to sustain section 3 by a consideration of that purpose.

3. The purpose of the act being constitutional, any enactment designed to prevent evasion of that purpose, and to make it effective, is constitutional.

4. Even on the pure question of guardianship, the right of a person to be appointed guardian of a child's estate is a privilege, and section 3 being latest statutory enactment controls as against rights claimed under probate code.

5. Section 3 does not violate constitutional rights of the minor.

We cannot conclude this brief without calling to the court's attention the remarks made by the majority of the California court at the close of their opinion in the Yano case. The court concludes that the object sought to be attained by the statutory provisions "that is, to discourage the coming of Japanese into this state, may be a proper one, and may be even desirable for the promotion of the welfare and progress of the state." The court continues to say: "The court can only consider its validity under the limitations of the constitution. A similar object prompted the adoption of the anti-Chinese provisions of the constitution of 1879 which, so far as they were effectual, were declared invalid by the federal courts. This entire question is international in character and is a matter properly to be disposed of by the Federal Government. Appeal for its adjustment should be made to Congress, rather than to attempt to accomplish it by discriminatory legislative measures of the state."

In answer to this suggestion by the court, we would say that every effort has been made over a period of years to secure proper action by the federal authorities. This, however, in no way inhibits the states themselves from exercising their authority so far as permitted by the treaty and the constitution. The courts affirm the right of this state to independently prohibit ownership of its agricultural lands by aliens. We submit that section 3 is a necessary step in the same direction. It is a means and a necessary means in the judgment of the legislature of this state, whose judgment on such a question is not reviewable by the courts, to prevent a circumvention of our statutory provisions by those determined to defeat them if possible. The reference by the California court to the anti-Chinese provisions of the constitution of 1879 is a reference to enactments in no way similar to the provisions of the statute here in question. Those provisions were directed against the Chinese as such. Our provisions are directed against all ineligible and non-declarant aliens without discrimination against any particular race, and furthermore, and fundamental to our entire discussion, we again point out that in this case, unlike the

anti-Chinese provisions to which the court refers, we are dealing with a single subject matter, to-wit, the control by the State of Washington of its agricultural lands and the determination by the state that there shall be in effect no enjoyment, possession and dominion of such lands by ineligible aliens.

We submit that the order of the lower court should be affirmed.

Respectfully submitted,

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C. REPLY BRIEF OF APPELLANTS.

THE JURISDICTION.

Under this head the state attempted to make the point that, if the land in question is residential property, Fujimoto is entitled to appointment as guardian of his minor son's estate. We cannot persuade ourselves that this contention is sound. The only exception in the act is in section 1, by the terms of which "land" does not include "a right to the possession, use, or enjoyment of land for a period of not more than ten years for a purpose of which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen." In the first place, the appellants are not asking the "possession, use, or enjoyment of" the land owned by the minor, and that is all that is excepted by section 1. In the second place, the right to lease land for shops, warehouses and residential purposes, accorded in article 1 of the existing treaty between the United States and Japan, refers to personal rights of the nationals of Japan, and not to rights in a purely representative capacity, as a guardian, executor, etc. We submit that there is nothing in the point, and that the lower court had and that this court likewise possesses full and complete jurisdiction.

THE MERITS.

I.

The state bases its argument almost wholly upon the decisions of the Supreme Court of the United States in the following cases:

Terrace vs. Thompson, 263 U. S. 197, 68 Law Ed. 35; *Porterfield vs. Webb*, 263 U. S. 225, 68 Law Ed. 42; *Webb vs. O'Brien*, 263 U. S. 313, 68 Law Ed. 109; *Frick vs. Webb*, 263 U. S. 326, 68 Law Ed. 113.

In view of that fact, we must ascertain the effect of the language used in those opinions.

General language in an opinion of the court must be restrained to the exact facts and issues before the court.

Cohen vs. Virginia, 6 Wheat. 264, 399; *Reinman vs. Little Rock*, 237 U. S. 171, 179; *Bailey vs. Baker Ice Machine Company*, 239 U. S. 268, 272; *United States vs. Wong Kim Ark*, 169 U. S. 649, 678; *Wagner vs. Law*, 3 Wash. 500, 505; *Canadian Bank of Commerce vs. Bingham*, 30 Wash. 484, 498; *Ingham vs. Harper & Son*, 71 Wash. 286, 288; *State ex rel. Puget Sound & W. H. R. Co. vs. N. P. Ry. Co.*, 94 Wash. 10, 17; *Eilers Music House vs. Douglass*, 90

Wash. 683, 687; *State ex rel. Seattle vs. Seattle and Rainier Valley Ry. Co.*, 113 Wash. 684.

In the case of *Reinman vs. Little Rock (supra)*, 237 U. S. 171, 179, the court said:

"It is true that broad reasoning was employed; but, on familiar principles, the opinion is to be interpreted in the light of the issue as framed by the pleading."

In the case of *Bailey vs. Baker Ice Machine Company (supra)*, 239 U. S. 268, 272, the court said:

"True, in *Christie vs. Scott*, 77 Kan. 257, 94 Pac. 214, there is general language which, if taken broadly, makes against this distinction. But, according to a familiar rule (*Cohen vs. Virginia*, 6 Wheat. 254, 399, 5 Law Ed. 257, 290; *Pac. Exp. vs. Foley*, 46 Kan. 457, 464, 12 L. R. A. 799, 26 Am. St. Rep. 107, 26 Pac. 665), this language should be regarded as restrained by the circumstances in which it was used."

In the case of *Eilers Music House vs. Douglass (supra)*, 90 Wash. 683, 687, this court said:

"What was said in the opinion in that case must be read in the light of the question then before the court."

Viewed in the light of the above cases, and considered with respect to the rule they announce, the cases relied upon by the state do not rule this proceeding. In the case of *Terrace vs. Thompson (supra)*, 263 U. S. 197, 78 Law Ed. 35, the court had before it only the question raised by the issues, whether the state could constitutionally prohibit the vesting in an alien of an estate in real estate, less than a fee title. Parenthetically, it may be announced that in *American Sugar Refining Co. vs. Louisiana*, 179 U. S. 89, 92, that court had held that a state could not classify on the grounds of color, race, or nativity and that that opinion was the basis of the appeal to that court in the Terrace case, but that a contrary decision was reached in the Terrace case without even mention of the case so confidently relied upon before that court. We may further call attention to the fact that in its opinion in the Terrace case, the court said:

"In *State vs. O'Connell*, 121 Wash. 542, 209 Pac. 865, a suit for the purpose of escheating to the state an undivided one-half interest in land, or the proceeds thereof, held in trust for the benefit of an alien, a subject of the British Empire, decided since this appeal was taken, the supreme court of Washington held that the statute in question did not contravene this provision of the constitution of that state."

The fact that the constitutionality of the act was not raised in the O'Connell case was not mentioned in the briefs before the court, was not argued on the hearing of the case, was not considered by this court nor decided by it. In that case this court said:

"The sole question before us is: "Does the trust arrangement above set out violate our Anti-Alien Land Act?"

Again, in speaking of the doctrine of equitable conversion, this court said:

"While the doctrine may have some bearing in a general way on the question before us, yet we are convinced that a too elaborate discussion of it would only serve to confuse the real point in issue, which is, a proper construction of the Anti-Alien Land Law, and its application to the facts of this case."

Again, at the conclusion of the opinion, the court said:

"We are convinced that the transaction we have been considering violates our Anti-Alien Land Law, and the court erred in sustaining the demurrer to the complaint and in dismissing the action."

In *Porterfield vs. Webb*, 263 U. S. 225, 68 Law Ed. 42, there was before the court, in issue by the pleadings, the precise question before the court in the Terrace case. In *Webb vs. O'Brien (supra)*, 263 U. S. 313, 68 Law Ed. 109, the court reversed a judgment of the United States district court for the Northern District of California, granting an injunction to prevent enforcement of the California Alien Land Law against the making of a cropping contract by the complainants, despite the fact that the supreme court of California had theretofore held in *Ex parte Okahara (Cal.)*, 216 Pac. 614, that a cropping contract was not within the terms of the California Alien Land Act, contrary to the rule that the construction of a state statute by the higher court of the state is conclusive on the Supreme Court of the United States. That there may be no question of the accuracy of our statement we quote the following from the opinion of the court:

"The only question before us, therefore, is whether the acts, purposes, and objects as shown upon the face of the instrument are, in fact, such acts, agreements, purposes, and objects as are forbidden by subdivision 10 of the Alien Land Law. If by a reasonable construction of the agreement the case is fairly brought within the inhibition of the law the petitioner should be remanded, otherwise he must be discharged."

In the case of *Frick vs. Webb (supra)*, 263 U. S. 326, 68 Law Ed. 113, the court had before it the question whether the State of California could constitutionally prohibit an alien, ineligible to citizenship, from acquiring stock in a corporation authorized to acquire and hold land for agricultural purposes. It will be observed that the California Alien Land Act prohibited all stock ownership by ineligible aliens, a feature which distinguishes it from section 33 of article II of the constitution of the State of Washington, and the Alien Land Law of the State of Washington. This decision can easily be distinguished on the ground that if aliens were permitted to acquire all of the stock of a corporation authorized to acquire and hold land for agricultural purposes, they would thereby in effect become the owners of the land, contrary to the act.

However, in the Terrace case, the court said that the thing forbidden by the Alien Land Law of this state is "the privilege of owning or controlling agricultural lands within the state."

Therefore, to come within the terms of the act, the state must show that a guardian appointed by the superior court of this state could thereby own or control land. This the state seeks to do under the next division of its brief.

II.

THE RIGHT OF A GUARDIAN TO THE CONTROL OF HIS WARD'S ESTATE.

After quoting section 1575 of Remington's Compiled Statutes, relating to the duties of a guardian, the following occurs in the brief of the state:

"It seems clear that in managing the estate for the ward, the guardian has not only the right to control but possession of the estate as well."

A critical and careful reading of the statute fails to disclose anything in support of that statement. Persuasive evidence of this fact is furnished by that part of the brief of the state in which its contention is sought to be sustained. On page 24 of its brief is cited *Burgert vs. Caroline*, 31 Wash. 62, where it is held that a guardian, in order to protect the land belonging to his wards, and owned by them as tenants in common, pays delinquent taxes from his own funds, is entitled to a lien against the land for the amounts so paid. After calling attention to that case, and quoting from the opinion, the following is found on page 25 of the brief of the state:

"Under this section as construed in the *Burgert* case, the way is opened

for aliens to evade and completely nullify the prohibition against alien ownership of land if this court should hold section 3 unconstitutional. By taking title to land in the name of their minor children and securing appointment as guardians of their children's estates, the aliens by virtue of section 11270 can acquire liens against the lands for taxes paid, then foreclose these liens under the statute and the precedent set in the *Burgert* case, thereby acquiring valid title to the land in themselves under the pretense that it was acquired 'in the ordinary course of justice in the collection of debts,' as provided in section 33, article II, of the constitution, and sub-paragraph (f), section 1, of chapter 50."

In speaking of the right of the guardian in the *Burgert* case, this court said:

"While her duty did not go so far as to require her to pay from her own funds the taxes accumulated upon her wards' property, yet she had the right to do so, and to be reimbursed out of their property in the amount so paid. *Had she purchased the property with her own funds in a tax sale, equity would not have permitted her to hold it against the claim of her wards. As she could not purchase the estate for her own interest, justice requires that she should not be held a volunteer when she purchases for her ward.*" (Italics ours.)

In addition to the inability of a guardian to purchase at a tax sale the property of his ward, attention may be called to the fact that the rule with respect to purchases by a guardian at a guardian's sale is stated on page 1171 of 12 R. C. L. as follows:

"As a result of the guardian's status as a trustee, and one of a peculiarly confidential character, it is the well-established general rule that the guardian cannot be the buyer in a guardian's sale applied for and controlled by himself. But in a few cases it has been held that the guardian may purchase, and although his conduct will be watched with jealousy, yet, if it be manifest that he acted fairly, with the utmost good faith, and the transaction is free from any imputation of design on his part to gain a benefit to himself, to the prejudice of the interests of his ward, such purchase will be held valid. The rule prohibiting the guardian from purchasing the ward's property at a guardian's sale applies to one who is guardian *de son tort* or *de facto* only, as well as to one invested with legal title to his office; and in one case a sale was set aside, though it was made fairly and in good faith, where the purchaser was guardian of the person of the ward, and the sale was made by a curator of his estate. It also applies to a sale to the wife or husband of the guardian, or to a third person who immediately conveys to the guardian."

The same rule is stated by this court in even stronger terms. In *Hemrich vs. Hemrich*, 117 Wash. 124, 130, this court said:

"The rule—and it is a salutary one—which compels courts to scrutinize with caution transactions between trustees and the *cestui que trust*, and to lay upon the trustee the burden of proving immaculate faith, when title of the *cestui que trust* is found in the trustees, and especially where that *cestui que trust* is of immature age and judgment and experience, is a rule to which the facts of this case imperatively demand the application. * * * The rule which we have indicated is supported by a veritable Sinbad's treasure trove of legal authorities, and has been so well stated by so many courts and text writers that it is difficult to refrain from extensive quotation."

From the foregoing, it is conclusively settled that the appellants in this case could not acquire the land of the minor by an attempted purchase thereof at a sale for delinquent taxes.

The state must show that, by this appointment as guardian, the father would acquire "the right to control, possession, use, enjoyment, rent, issues or profits" of the ward's estate, as provided in section 2 of the Alien Land Act. Obviously the alien could not have the use, enjoyment, rents, issues or profits of the land, by reason of his appointment as guardian of the ward's estate, and we take it that no authority, in addition to the foregoing, is necessary in support of a proposition so conclusively established by all authorities. The state, therefore, must convince this court that the father would have the control and possession of the ward's estate, in his own individual capacity, because it is clearly established that as guardian he has them in a representative capacity only. This proposition is likewise fundamental and requires no authority in support of it. However, it is clearly stated in the opinion of the supreme court of California in *Re Tetsubumi Yano's Estate*, 206 Pac. 995, a portion of which is quoted in the brief of the state. We, however, quote the portion appearing in the state's brief, and the portion immediately preceding and following that quoted, as well.

"The appointment as guardian would not enable such parents to acquire, possess, or enjoy agricultural land, and therefore their ineligibility to such appointment could not prevent their so doing. A guardian neither acquires, possesses, or enjoys the property belonging to the ward, in any accurate or legal meaning of these terms. At most, he merely has, for some purposes, the control of the property, but the control is not in his own right and does not inure to his benefit. He controls it as trustee only, and is held to strict accountability to the child, for all the benefits accruing from the use of it. He must render such accounts annually, or oftener, if required by the court. (Code Civ. Proc., secs. 1773, 1774.) He must hold all the receipts from the farming operations as to the property of the native-born child, and must use so much of it for the support and education of the child as may be necessary, and no more, and must safely invest the remainder as the property of the child and for its sole use and benefit. In all of his acts as guardian he is under the supervision and control of the superior court of the county. His compensation is limited to the reasonable value of his services, and is to be fixed by that court. The use is in the child, not in the guardian. When the child becomes of age the control of the guardian immediately ceases. If the child should die, the control would pass forthwith to its heirs, and the alien parent, in that event, would not even inherit the property or any part thereof. It seems plain that, *since the alien parent could not by this means evade the operation of the law*, nor acquire, possess, or enjoy agricultural lands, the law cannot be upheld on the ground that such persons constitute a class, and the only class, who attempt to evade the law forbidding alien ownership. The classification is therefore clearly arbitrary, and does not 'suggest a reason which might rationally be held to justify the peculiar legislation addressed to the class,' as is said in *Darcy vs. Mayor*, *supra*." (Italics ours.)

It is obvious that the word "control" used in the Alien Land Law is used in its definite legal meaning. It is likewise obvious that a guardian does not have control of real estate of the ward except as an officer of the court, merely for the purpose of carrying out the orders of the court. The real and ultimate control is in the court. It is likewise true that the word "possess" as used in the act has also a definite legal meaning quite at variance with the meaning sought to be attributed to it by the state. In the case of *Ex parte Okahara* (Cal.), 216 Pac. 614, 618, the court, in considering the California Alien Land Act, in which the same term is used, said:

"The words 'acquire, possess, enjoy and transfer' used in an inhibitory sense are well understood legal terms. 'Acquire' as used in the law of contracts and descents means to become the owner of property; to make one's own. (1 Words and Phrases, 113.) 'Possess' used in reference to land titles and estates means to own; have as a belonging; property. (Cent. Dic.) 'In popular usage the word 'possess' includes real and personal property to which one has title as his landed possessions.' (Webster's Dict.; 6 Words and Phrases, 54, 63, and cases cited.) The word 'enjoy' is one frequently found in instruments of transfer and means to make such use of the thing transferred as is consistent with the tenure by which it is held. 'Transfer' is a word commonly used to denote a passing of title in property (usually realty) or an interest therein from one to another. The entire clause, if considered with reference to its context, leaves no room for doubt as to what is meant thereby. The purpose of the Alien Land Law, as is well said in *O'Brien vs. Webb, supra*, 'was apparently to prevent ownership and legal interest in farming lands from passing to aliens who never could become citizens;' and there is nothing from which it can be legitimately inferred that the design of the law is to prevent an alien from entering into a cropping agreement whereby he gives his labor for a share in the crops to be raised. It must be presumed that the act was adopted by the people with full understanding on their part of the law of estates, tenures and transfers as created by constitutional and legislative authority and as expounded by the courts of the land. It must further be presumed that the law was passed with full understanding on the part of the people of the state of existing laws governing or affecting cognate subjects. The argument that the law forbids the making of a contract of employment or agreement to till the soil on shares can only be sustained by adopting the theory that the particular agreement under consideration transfers an interest in land. To accept this theory it would become necessary to give a new and unwarranted interpretation to words and terms of ancient and established usage the meaning of which has long been settled by judicial pronouncements and legislative sanction."

The foregoing language was used with respect to a cropping contract in determining the question whether it violated the Alien Land Law of the State of California. By the terms of that contract the cropper was in as complete possession of the land as he could be under a lease, with the exception that the owner of the land also had access to it at any time. We respectfully submit that the contention of the state cannot be sustained.

III.

POWER OF LEGISLATURE TO PREVENT EVASION.

No one disputes the power of the legislature to prohibit all means by which an act can be evaded so long as it proceeds within constitutional limits. We may, therefore, lay to one side as undisputed, the power of the legislature to prevent evasion of the Alien Land Act of this state, so long as the means used therefor are within its constitutional power. However, we desire to notice a case of *Commonwealth vs. Hanna* (Mass.), 81 N. E. 149, in which that court took the position that total prohibition of a legitimate calling could be enacted by the legislature if it were of the opinion that it was necessary. This court adopted the same view with respect to Initiative No. 8, respecting employment agencies, adopted at the general election in 1914 in this state, as shown by the opinions in *Huntworth vs. Tanner*, 87 Wash. 670, and *State vs. Rossmann*, 93 Wash. 530. In the former case this court held squarely that the legislature might constitu-

tionally prohibit an honest calling to all honest men, if, in its opinion it was necessary to prevent fraud by dishonest men. The Supreme Court of the United States held otherwise in *Adams vs. Tanner*, 244 U. S. 590.

On page 46 of its brief, the state takes the position that a trust arises in favor of an alien when he pays the purchase price of real estate and has the deed made to his minor child. The law is directly contrary. *Adley vs. Pletcher*, 55 Wash. 82; *Estate of Tetsubumi Yano* [Cal.], 206 Pac. 995; 3 Pomeroy's Eq. Juris., sec. 1039.)

We agree with the state that the application of chapter 70, Laws of 1923, does not arise in this case. But in passing we desire to call attention to the fact that the legislature has, by that act, sought to cloud the title to every piece of real estate owned by an American citizen of alien parentage, even though the land was held in fee simple prior to the passage of the act, by tacking on such titles a presumption of alien ownership, and so doing it that such an American citizen cannot quiet title to his real estate because of the fact that he cannot on oath allege that the state claims an interest in the real estate. Consequently, he cannot mortgage his estate, even though it may be necessary for the purpose of paying the taxes on it. And this we do in the name of the state and demand that the citizens of the state hold it in veneration. The validity of this statute will come before this court in a case now pending, but we desire to call the court's attention to the effect of the act.

IV.

RIGHT TO ACT AS GUARDIAN.

An error inadvertently crept into appellants' brief as appears on page 23 thereof, where it is said that a guardian could be removed by the court at leisure. A reading of the brief of appellants shows that this statement was inadvertent. We had no intention of making the same, and it did not come to our attention until we received the brief of the state. Our position was and at all times has been that a guardian can be removed for cause only, and not at pleasure of the court.

We believe that the state fails to distinguish between incompetency and ineligibility of a person to act as guardian. Consideration of the cases dealing with these subjects show that the word incompetent is used to describe character, ability, honesty, integrity, etc., and not the arbitrary mandate of the statute that certain persons shall not be appointed guardians, irrespective of their fitness therefor in all respects. In consideration of this case the court must at all times bear in mind that the superior court affirmatively found that the father is in all respects fit, suitable and competent to be appointed guardian of the estate of his minor son, but that he is ineligible because an alien.

The history of alien land legislation reveals an interesting fact. Nowhere has hostility to the Japanese race reached the degree of intensity it has in California, but despite that fact the courts of California have enforced the law to the extent only that they found it constitutional, and have held that the right of a father to be appointed guardian of the estate of his minor child and of the minor child to have his father appointed the guardian of its estate is beyond legislative interference. We respectfully submit this case on the authority of the California decisions.

Respectfully submitted,

GUIE & HALVERSTADT,
Attorneys for Appellants.

d. DECISION OF THE COURT.

(Filed June 10, 1924.)

Chapter 50, Laws 1921, provided, in section 1, that "land" included every "interest therein and the right to the control, possession, use, enjoyment, rents, issues or profits thereof", and to "own" means "to have the legal or equitable title to or the right to any benefit thereunder." Section 2 provides "any alien shall not own land or take or hold title thereto and no person shall take or hold land or title to land for an alien. * * *" Section 3 provides that an alien "is not qualified to be * * * guardian, if any part of the estate is land."

The petition states that the Fujimotos, husband and wife, are residents of King County and subjects of the Emperor of Japan; that Frank T. Fujimoto is their son, born in Seattle, King County, in September, 1913, and during his entire life has lived with the Fujimotos, the petitioners; that in 1915 Frank T. Fujimoto, by deed, received title to real estate in King County, Washington, and is now the owner thereof; that this property needs the care and attention of a guardian; that the minor has no such guardian, and alleges that the father, one of the petitioners, is in all respects a fit and suitable person to be appointed guardian of such minor and asks for such appointment. Upon a hearing on the petition it was denied on the ground that the father is a subject of the Emperor of Japan and therefore disqualified under chapter 50, Laws 1921, though in other respects he is found to be a fit and suitable person to be guardian of the person and estate of his minor son. From this order the petitioners have appealed, alleging that chapter 50, Laws 1921, is unconstitutional in so far as it prohibits the appointment of an alien as guardian of his American-born child's estate when any part of that estate is real; in that it violates section 12, article 1, of the state constitution and the Fourteenth Amendment of the Federal Constitution by denying to the child and to the father the equal protection of the law.

Upon the general question of the constitutionality of the so-called Alien Land Law, as it may be affected by the constitutional provisions referred to, the Supreme Court of the United States has already passed, and that in thoroughly considered opinions.

In the case of *Terrace vs. Thompson*, 68 Law Ed. 35, ch. 50 of the Laws 1921, the Washington act was under consideration in the Supreme Court, and it was there held that the legislation was valid and that a citizen has no constitutional right to lease his land to aliens and that aliens could lawfully be forbidden to take and hold such land.

In the case of *Porterfield vs. Webb*, 68 Law Ed. 42, the Supreme Court of the United States came to a similar conclusion in considering some aspects of the California Alien Land Law almost identical with the Washington act.

In *Webb vs. O'Brien*, 68 Law Ed. 109, the Supreme Court of the United States, again having before it the California act, held that a contract permitting an ineligible alien to live upon and work land for a share in the crops gave him a right to use and share in the profits of the land in violation of the statutory prohibition against the acquisition of any interest in real estate.

In the case of *Frick vs. Webb*, 68 Law Ed. 122, it was held that under the California act an alien ineligible to citizenship could not acquire stock in corporations which hold land for agricultural purposes. So it may be taken as settled that such aliens as are covered by ch. 50, Laws 1921, may not take or rent or hold any title to land.

The question first arises then whether a guardian has any such interest

as is covered by the term "own", as we have already indicated, the statute includes in the definition of "own" "to have the right to any benefit of." This court, in *State vs. O'Connell*, 121 Wash. 542, considering a trust agreement under which an alien had neither the legal nor equitable title nor the right to the control, possession or use of the real property, hold that nevertheless an alien having the "right to the benefit of the property", the agreement was illegal, the court saying:

"For the purpose of this discussion, it may be conceded that, under the declaration of trust involved here, the alien does not have the right to the control, possession and use of the lands involved, and that he does not own the legal or equitable title; but that he owns the 'right to the benefit of' the land, and has the 'right to' the 'enjoyments, rents, issues and profits thereof,' there cannot be any doubt. These rights are by the legislature defined to be land or an interest in or benefit of land, and they are most surely in violation not only of the spirit of our legislative act, but the very words thereof."

While it is true that the guardian has no legal or equitable title, it does not necessarily follow that he does not have the right to any benefit arising from the land. Under section 1575, Rem. Comp. Stats., it is provided that it shall be the duty of the guardian "(2) to manage the estate for the best interest of his ward," and the law of course provided for compensation to the guardian from the estate of the ward. It is plausibly argued that the guardian can do nothing in regard to the ward's land antagonistic to the ward's interest or to in any way handle the estate so as to inure to his interest as opposed to that of the ward, and that in his conduct as guardian he is at all times an officer of the court and that his acts are in effect the acts of the court. Theoretically, this argument is sound, but we know that, as a practical matter, the guardian is virtually a free agent so long as he is guilty of no acts detrimental to his ward; that in handling the estate he exercises his own judgment and in his control of the real property, except in so far as its title may be concerned, he operates as freely as though the property were his own. The control exercised by the court is largely theoretical, in actual practice the court knows very little concerning the guardian's acts; it is usually not informed except by reports which appear when requests are made to dispose of the property by sale. With the great amount of business coming before the probate courts this is the natural result. The purpose of the Alien Land Act is, as has been stated by the courts, to prevent the land of the state passing into the ownership or possession or control of noncitizens, in the interest of the welfare of the state, and it would be an evasion of that clear intent and policy to allow the actual control of land to pass into the hands of aliens through the means of guardianship, although in theory the guardian is not capable of assuming control. The interest which a guardian really could have is but a degree less than that which he would acquire under a contract such as was passed on in *Webb vs. O'Brien*, *supra*, or by reason of the ownership of stock in a corporation owning real estate, which was forbidden in *Frick vs. Webb*, *supra*, or the interest which the alien had under a trust agreement such as was declared inoperative in *State vs. O'Connell*. It is often easier to sense the effect of certain relations than to clearly express them, and where common sense indicates that to allow alien guardians to be appointed for citizen wards owning real estate is to confer upon them certain rights to the benefit in such real estate, it is a more satisfactory guide than the mere precisions of technical legal adroitness.

In any event, the provisions of sec. 3, chapter 50, Laws 1921, has a di-

rect relation to the general purpose of the entire act, which is, as we have said, to prevent there developing in the community a large body of land under the control of persons not attached to nor obligated to our form of government. As was said in the Frick case, *supra*:

"The state has power, and the act evidences its purpose, to deny to ineligible aliens permission to own, lease, use or have the benefit of lands within its borders for agricultural purposes. (*Webb vs. O'Brien, supra.*) 'As the state has the power * * * to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective' (citing cases). It may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens."

It would seem therefore, that the act in question is not violative of any of the rights of the petitioners, and there only remains the question whether the act is unconstitutional as discriminating against native-born minors whose parents are ineligible aliens.

There exists the natural law that minors are entitled to the guidance and care of their parents, no matter what the nationality of the latter may be, and the statute law recognizes the rights of minors to such guidance from such sources and provides for their guardianship. But the law also provides that certain classes of people, although parents, are disqualified from acting as guardians. No minor, whether his parent be alien or native, has a right to have such parent appointed guardian if the parent be disqualified by mental incapacity, conviction of crime or moral delinquency or physical disability as to prevent his properly discharging the duties of a guardian. The Act of 1921 adds another disqualification in the general interest of society, forbidding the control of land by aliens and says that no alien shall act as guardian of the estate which consists of land. This act has the same effect on all minors and prevents the appointment of such alien for a minor, whether the minor be native born or foreign, and whether the guardian be the parent of the minor or not, and it may prevent, in some instances, certain minors from having as guardian the one who would be most interested in the protection of the minor's estate. But this situation arises just as readily with native-born minors having native parents but desiring to have an alien to whom he may not be related appointed guardian, either because of affectionate regard between them or because the alien may have been possessed of extraordinary qualifications which would inure greatly to the ward's benefit if the alien were permitted to manage his affairs. The right which a minor has to have an alien appointed guardian is no greater than the right a parent has to be appointed guardian and the law having the right to say that certain persons are disqualified as guardians, the minor cannot be heard to say that he has a right to have an alien parent appointed guardian. The matter of guardianship is a proper subject of legislative action and the legislature has the power to say that certain persons or classes of persons are disqualified as long as the law is uniform and not discriminatory. As was said in *In re Tetsubumi Yano's Estate*, 206 Pac. 995:

"The rights and privileges which it declares the Japanese citizen shall enjoy here are such rights and privileges only as may be necessary for the protection and security of his own person or property. It cannot be said that it is necessary for the security or protection of either the person or property of a parent that he should become the guardian of his own child. Eligibility to appointment as guardian is not property, nor is it a right to property. It pertains exclusively to the person. It may be given or with-

held by the law of the state in which the parent and child reside. The withholding thereof from all parents would be within the power of the state."

The act under consideration is not discriminatory, for it applies alike to all minors, no matter what governments they may be subjects of, and applies equally to the person attempting to be guardian, whether he be the parent of a minor or an alien.

It is to be remembered that the dire consequences pointed out as a result of the failure of the native-born minor to be allowed to have the guiding hand of his alien parent lead him through the mazes of minority are merely argumentative pictures, for our statutes provide for two sorts of guardians: one of the person and the other of the property of the minor, and as we read sec. 3, ch. 50, *supra*, it relates only to guardianship of the property of the minor. If this is true, the native-born child of alien parents can have all the benefit of that alien as his guide, philosopher and friend generally and only prevents his turning his real property over to that guardian, which could in a great many instances result in an evasion of what the state legislature has determined to be a beneficent policy. The supreme court of California in *In re Tetsubumi Yano's Estate*, *supra*, considered the question of the appointment of an alien as guardian of his American-born child, where part of the child's estate was land, and there arrived at a conclusion contrary to that which we have reached, largely basing its opinion upon the theory that the appointment of alien guardians does not permit evasion of the law forbidding aliens ineligible to citizenship to own agricultural land, the court saying:

"The appointment as guardian would not enable such parents to acquire, possess or enjoy agricultural land, and therefore their ineligibility to such employment could not prevent their so doing. A guardian neither acquires, possesses or enjoys the property belonging to the ward, in any accurate or legal meaning of these terms. At most he has merely for some purposes the control of the property, but the control is not in his own right and does not inure to his benefit. He controls it as a trustee only, and is held to strict accountability to the child for all the benefits accruing from the use of it. He must render such accounts annually, or oftener, if required by the court * * *. He must hold all of the receipts from the farming operations as the property of the native-born child, and must use so much of it as may be necessary and no more, and must safely invest the remainder as the property of the child and for its sole use and benefit. In all of his acts as guardian he is under the supervision and control of the superior court of the county. His compensation is limited to the reasonable value of his services and it is to be fixed by that court. The use is in the child, not in the guardian. When the child becomes of age the control of the guardian immediately ceases. If the child should die, the control would pass forthwith to its heirs, and the alien parent, in that event, would not even inherit the property or any part thereof. It seems plain that since the alien parent could not by this means evade the operation of the law, nor acquire, possess, or enjoy agricultural land, the law can not be upheld on the ground that such persons constitute a class, and the only class, who attempt to evade the law forbidding alien ownership. They could not by the use of such guardianship enjoy the rights of ownership. The classification is therefore clearly arbitrary and does not 'suggest' a reason which might rationally be held to justify 'the peculiar legislation addressed to the class' * * *."

We think the California court was wrong in taking the purely academic view of the situation and blinding itself to the practical operations. It takes no imagination and only a limited understanding of the real situation to

know that whatever judges may say upon the subject a very large nullification of the Alien Land Law would occur where the native-born progeny of the fecund aliens are permitted to have alien parents as guardians of their real estate.

The trial court was correct in denying the petition and the judgment is affirmed.

MACKINTOSH, J.
HOLCOMBY.
TOLMAN, J.

We concur:

WAIN, J.

PARKER, J.

CHAPTER XXII.—APPENDIX.

1. CALIFORNIA ALIEN LAND LAW, 1913.

An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, and repealing all acts or parts of acts inconsistent or in conflict herewith.

(Approved May 19, 1913.)

The people of the State of California do enact as follows:

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject and not otherwise, and may in addition thereto lease lands in this state for agricultural purposes for a term not exceeding three years.

(The above paragraph refers to the Treaty of Commerce and Navigation of 1911 between America and Japan.)

Sec. 3. Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in section one of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy and convey real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such members or stockholders are citizens, or subjects, and not otherwise, and may in addition thereto lease lands in this state for agricultural purposes for a term not exceeding three years.

Sec. 4. Whenever it appears to the court in any probate proceedings that by reason of the provisions of this act any heir or devisee cannot take real property in this state which, but for said provisions, said heir or devisee would take as such, the court, instead of ordering a distribution of such real property to such heir or devisee, shall order a sale of said real property to be made in the manner provided by law for probate sales of real property, and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such real property.

Sec. 5. Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to and become and remain the property of the State of California. The attorney-general shall institute proceedings to have the

escheat of such real property adjudged and enforced in the manner provided by section four hundred seventy-four of the Political Code and title eight, part three, of the Code of Civil Procedure. Upon the entry of final judgment in such proceeding, the title to such real property shall pass to the State of California. The provisions of this section and of sections two and three of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon, or interest in such property, so long as such real property so acquired shall remain the property of the alien, company, association or corporation acquiring the same in such manner.

Sec. 6. Any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association, or corporation mentioned in section three of this act, shall escheat to the State of California. The attorney-general shall institute proceedings to have such escheat adjudged and enforced as provided in section five of this act. In such proceedings the court shall determine and adjudge the value of such leasehold, or other interest in such real property, and enter judgment for the state for the amount thereof together with costs. Thereupon the court shall order a sale of real property covered by such leasehold, or other interest, in the manner provided by section 1271 of the Code of Civil Procedure. Out of the proceeds arising from such sale, the amount of the judgment rendered for the state shall be paid into the state treasury and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein.

Sec. 7. Nothing in this act shall be construed as a limitation upon the power of the state to enact laws with respect to the acquisition, holding or disposal by aliens of real property in this state.

Sec. 8. All acts and parts of acts inconsistent or in conflict with the provisions of this act are hereby repealed.

2. CALIFORNIA ALIEN LAND LAW, 1923.

Explanation of amendments to the 1920 Initiative California Alien Land Act adopted by the 1923 session of the legislature.

(Note.—The italicized portion of the following sections of the said act indicate language added to the act at the 1923 session of the legislature. The other language is identical with the 1920 Act, except as explanations are given in the body of the sections hereinafter enumerated.)

Section 1. "All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, *use, cultivate, occupy, transfer,* transmit and inherit real property, or any interest therein, in this state, *and have, in whole or in part, the beneficial use thereof,* in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

Sec. 2. "All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, *use, cultivate, occupy* and transfer real property, or any interest therein, in this state, *and have, in whole or in part, the beneficial use thereof,* in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, *and not otherwise.*"

Sec. 3. "Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the mem-

bers are aliens other than those specified in section one of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy, *use, cultivate, occupy and transfer*" ("transfer" was formerly "convey") "real property, or any interest therein, in this state, *and have, in whole or in part, the beneficial use thereof*, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise. Hereafter all aliens other than those specified in section one hereof may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy, *use, cultivate, occupy and transfer*" ("transfer" was formerly "convey") "*real property*" ("real property" was formerly "agricultural land"), "*or any interest therein, in this state*, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Sec. 4. "Hereafter no alien mentioned in section two hereof, and no company, association or corporation mentioned in section three hereof, may be appointed guardian of that portion of the estate of a minor which consists of property which such alien" (formerly there was here inserted "or which such company, association or corporation") "is inhibited from acquiring, possessing, enjoying, *using, cultivating, occupying*, transferring, *transmitting or inheriting*, or which such company, association or corporation is inhibited from acquiring, possessing, enjoying, *using, cultivating, occupying* or transferring, by reason of the provisions of this act. The public administrator of the proper county, or any other competent person or corporation, may be appointed guardian of the estate of a minor citizen whose parents are ineligible to appointment under the provisions of this section.

"On such notice to the guardian as the court may require, the superior court may remove the guardian of such an estate whenever it appears to the satisfaction of the court:

"(a) That the guardian has failed to file the report required by the provisions of section five hereof; or

"(b) That the property of the ward has not been or is not being administered with due regard to the primary interest of the ward; or

"(c) That the facts exist which would make the guardian ineligible to appointment in the first instance; or

"(d) That facts establishing any other legal ground for removal exist."

Sec. 5. "(a) The term 'trustee' as used in this section means any person, company, association or corporation that as guardian, trustee, attorney in fact or agent, or in any other capacity has the title, custody or control of property, or some interest therein, belonging to an alien mentioned in section two hereof, or to the minor child of such an alien, if the property is of such a character that such alien is inhibited from acquiring, possessing, enjoying, *using, cultivating, occupying*, transferring, *transmitting or inheriting it*.

"(b) Annually on or before the thirty-first day of January every such trustee must file in the office of the secretary of state of California and in the office of the county clerk of each county in which any of the property is situated, a verified written report showing:

"(1) The property, real or personal, held by him for or on behalf of such alien or minor;

"(2) A statement showing the date when each item of such property came into his possession or control;

"(3) An itemized account of all such expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof.

"(c) Any person, company, association or corporation that violates any provision of this section is guilty of a misdemeanor and shall be punished by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

"(d) The provisions of this section are cumulative and are not intended to change the jurisdiction or the rules of practice of courts of justice."

Sec. 7. "Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat, *as of the date of such acquiring*, to and become and remain the property of the State of California. The attorney-general or district attorney of the proper county shall institute proceedings to have the escheat of such real property adjudged and enforced in the manner provided by section four hundred seventy-four of the Political Code and title eight, part three, of the Code of Civil Procedure. Upon the entry of final judgment in such proceedings, the title to such real property shall pass to the State of California *as of the date of such acquisition in violation of the provisions of this act*. The provisions of this section and of sections two and three of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon or interest in such property so long as such real property so acquired shall remain the property of the alien company, association or corporation acquiring the same in such manner. No alien company, association or corporation mentioned in section two or section three hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt."

Sec. 8. "Any leasehold or other interest in real property less than the fee, *including cropping contracts which are hereby declared to constitute an interest in real property less than the fee*, hereafter acquired in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to the State of California, *as of the date of such acquiring in violation of the provisions of this act*. The attorney-general or district attorney of the proper county shall institute proceedings to have such escheat adjudged and enforced *in the same manner* as is provided in section seven of this act. In such proceedings the court shall determine and adjudge the value of such leasehold or other interest in such real property, *as of the date of such acquisition in violation of the provisions of this act*, and enter judgment for the state for the amount thereof together with costs. *The said judgment so entered shall be considered a lien against the real property in which such leasehold or other interest less than the fee is so acquired in violation of the provisions of this act, which lien shall exist as of the date of such unlawful acquisition*. Thereupon the court shall order a sale of the real property covered by such leasehold, or other interest, in the manner provided by section one thousand two hundred seventy-one of the Code of Civil Procedure. Out of the proceeds arising

from such sale, the amount of the judgment rendered for the state shall be paid into the state treasury and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein. Any share of stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section three of this act shall escheat to the State of California *as of the date of such acquiring in violation of the provisions of said section three of this act*, and it is hereby declared that any such share of stock or the interest of any member in such a company, association or corporation so acquired in violation of the provisions of section three of this act is an interest in real property. Such escheat shall be adjudged and enforced in the same manner as is provided in this section for the escheat of a leasehold or other interest in real property less than the fee."

Sec. 9. "Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state *as of the date of such transfer*. If the property interest involved is of such a character that an alien mentioned in section two hereof is inhibited from acquiring, possessing, enjoying, *using, cultivating, occupying*, transferring, *transmitting or inheriting it*, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein, "A *prima facie* presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:

"(a) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof;

"(b) The taking of the property in the name of a company, association or corporation if the memberships or shares of stock therein held by aliens mentioned in section two hereof, together with the memberships or shares of stock held by others but paid for or agreed or understood to be paid for by such aliens, would amount to a majority of the memberships or issued capital stock of such company, association or corporation;

"(c) The execution of a mortgage in favor of an alien mentioned in section two hereof if such mortgagee is given possession, control or management of the property.

"The enumeration in this section of certain presumptions shall not be so construed as to preclude other presumptions of inferences that reasonably may be made as to the existence of intent to prevent, evade or avoid escheat as provided for herein."

Sec. 10. "If two or more persons conspire to *violate any of the provisions of this act*" (this language formerly was "effect a transfer of real property, or of an interest therein, in violation of the provisions hereof") "they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years or by a fine not exceeding five thousand dollars, or both."

Sec. 11. "Nothing in this act shall be construed as a limitation upon the power of the state to enact laws with respect to the acquisition, *possession, enjoyment, use, cultivation, occupation, transferring, transmitting or inheriting*" (this language formerly was "holding or disposal") "by aliens of real property in this state."

Sec. 12. "All acts and parts of acts inconsistent or in conflict with the provisions hereof are hereby repealed; provided, that

"(a) This act shall not affect pending actions or proceedings, but the

same may be prosecuted and defended with the same effect as if this act had not been adopted;

"(b) No cause of action arising under any law of this state shall be affected by reason of the adoption of this act whether an action or proceeding has been instituted thereon at the time of the taking effect of this act or not and actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as if this act had not been adopted;

"(c) This act, in so far as it does not add to, take from or alter an existing law, shall be construed as a continuation thereof."

Sec. 13. "The legislature may amend this act in furtherance of its purpose and to facilitate its operation."

Sec. 14. "If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this action. The people hereby declare that they would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional."

4. CALIFORNIA CODE OF CIVIL PROCEDURE RELATING TO THE ALIEN LAND LAW OF 1923.

Chapter 280.

An act to add a new section to the Code of Civil Procedure to be numbered one thousand seven hundred fifty-one a, relating to disqualification of certain aliens, companies, associations and corporations for appointment as guardians of estates.

(Approved May 31, 1923.)

The people of the State of California do enact as follows:

Section 1. A new section is hereby added to the Code of Civil Procedure to be numbered one thousand seven hundred fifty-one a and to read as follows:

1751a. No person ineligible to citizenship in the United States and no company, association or corporation of which a majority of the members are aliens ineligible to citizenship in the United States, or in which a majority of the issued capital stock is owned by such aliens, may be appointed guardian of any estate which consists in whole or in part of real property.

5. WASHINGTON ALIEN LAND LAW, 1923.

(H. B. 70.)

An act relating to the rights and disabilities of aliens with respect to lands and amending chapter 50 of the Laws of 1921.

Be it enacted by the legislature of the State of Washington:

Section 1. That chapter 50 of the Laws of 1921 be amended by adding thereto a new section to be known as section 2a (sec. 10582 of Remington's Compiled Statutes) to read as follows:

"Sec. 2a. If an owner of land knowingly convey to or create in an alien an estate or interest therein less than his own, the state, instead of taking the lesser estate or interest, may take its value in money out of the greater estate, and such value may be determined and be charged upon and recovered out of the greater estate in an equitable action."

Sec. 2. That chapter 50 of the Laws of 1921 be further amended by adding thereto a new section to be known as section 2b (10582b of Remington's Compiled Statutes) to read as follows:

"Sec. 2b. If a minor child of an alien hold title to land either heretofore or hereafter acquired, it shall be presumed that he holds in trust for the alien."

Passed the house February 16, 1923.

Passed the senate February 28, 1923.

Approved by the governor March 10, 1923.

6. OREGON ALIEN LAND LAW, 1923.

An act relating to the rights, powers, and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state; providing for escheats in certain cases, prescribing for procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, and prescribing penalties for violation of the provisions hereof.

Be it enacted by the people of the State of Oregon:

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

Sec. 2. All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Sec. 3. Any company, association or corporation organized under the laws of this or any other state or nation of which a majority of the members are aliens, other than those specified in section 1 of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy and convey real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise. Hereafter all aliens other than those specified in section 1 hereof may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or a subject, and not otherwise.

Sec. 4. Hereafter no alien mentioned in section 2 hereof and no company, association or corporation mentioned in section 3 hereof may be appointed guardian of that portion of the estate of a minor which consists of property which such alien or such company, association or corporation is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of this act. Any competent person or corporation may be appointed guardian of the estate of a minor citizen whose parents are

ineligible to appointment under the provisions of this section. On such notice to the guardian as the court may require, the county or circuit court may remove the guardian of such an estate whenever it appears to the satisfaction of the court:

(a) That the guardian has failed to file the report required by the provisions of section 5 hereof; or

(b) That the property of the ward has not been or is not being administered with due regard to the primary interest of the ward; or

(c) That facts exist which would make the guardian ineligible to appointment in the first instance; or

(d) That the facts establishing any other legal ground for removal exist.

Sec. 5. (a) The term "trustee," as used in this section, means any person, company, association or corporation that as guardian, trustee, attorney in fact, or agent, or in any other capacity, has the title, custody or control of property, or some interest therein, belonging to an alien mentioned in section 2 hereof, or to the minor child that such alien is inhibited from acquiring, possessing, enjoying or transferring it.

(b) Annually, on or before the thirty-first of December, every such trustee must file in the office of the secretary of state of Oregon and in the office of the county clerk of each county in which any of the property is situated, a verified written report showing:

1. The property, real or personal, held by him for or on behalf of such alien or minor;

2. A statement showing the date when each item of such property came into his possession or control;

3. An itemized account of all expenditures, investments, rents, issues and profits in respect to the administration and control of such property, with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land, and the handling or sale of products thereof.

(c) Any person, company, association or corporation that violates (violating) any provision of this section is guilty of a misdemeanor, and shall be punished by a fine not exceeding one thousand dollars (\$1000) or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

(d) The provisions of this section are cumulative and not intended to change the jurisdiction or the rules of practice of courts of justice.

Sec. 6. Whenever it appears to the court in any probate proceedings that by reason of the provisions of this act any heir or devisee cannot take real property in this state or membership or share of stock in a company, association or corporation, which but for said provisions said heir or devisee would take as such, the court, instead of ordering a distribution of such property to such heir or devisee, shall order a sale of said property to be made in the manner provided by law for probate sales of property, and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such property.

Sec. 7. Hereafter it shall be unlawful for any person, firm, company, copartnership, association, corporation or other organization to directly or indirectly convey, grant, sell, bargain, create, or cause, suffer or permit to be conveyed, granted, sold, bargained or created any real property in fee to or in any alien mentioned in section 2 of this act, or to or in any firm, company, copartnership, association, corporation or other organization mentioned in section 3 of this act. Any real property acquired in violation of the provisions of this act shall escheat to, and become, and remain the

property of the State of Oregon. In any such case it shall be the duty of the district attorney of the county in which the said real property, or any part thereof, is situated, to institute proceedings in the circuit court of that county to have such escheat adjudged and enforced. Such proceedings shall be commenced by the filing of a complaint in said court by said district attorney in which the State of Oregon shall be plaintiff, and all other parties known to be interested shall be named as defendants. The complaint shall describe the real property, the name of the owner or owners of the fee and of any others who are known to have or claim to have any interest therein, the name of the occupant, and the facts and circumstances showing the escheat, and the prayer shall be for the escheat of said land so unlawfully acquired. Summons shall issue to all of the persons named as defendants, which summons shall be in the form prescribed for summons in action of law, and shall issue and be served in like manner. At any time after the complaint is filed and summons issued, upon the application of the district attorney, the court may, either before or after answer and upon such notice to the defendants as the court shall prescribe, and if sufficient cause therefor is shown to the court, appoint a receiver to take charge of such estate and receive the income and profits of the same during the pendency of such proceeding. Any defendant may appear and answer or otherwise plead to the complaint. Any person claiming any interest in said land who is not named in the complaint as a defendant may appear at any time before trial and by motion, for that purpose, be made a defendant. Any issue of fact shall be tried as issues of fact are tried in an action at law, with the aid of a jury if requested by either party. If the judgment upon trial be for the state, it shall include that such land has escheated and that the state is seized of the title thereof, and shall recover costs and disbursements against the defendants. The provisions of this section and of sections 2 and 3 of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon, or interest in, such property, so long as such real property so acquired shall remain the property of the alien, company, association or corporation acquiring the same in such manner. No alien, company, association or corporation mentioned in sections 2 or 3 hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt.

Sec. 8. Hereafter it shall be unlawful for any person, firm, company, copartnership, association, corporation or other organization to directly or indirectly convey, grant, sell, bargain, create, or cause, suffer or permit to be conveyed, granted, sold, bargained or created any leasehold or other interest in real property less than the fee, to or in any alien mentioned in section 2 of this act, or to or in any firm, company, copartnership, association, corporation or other organization mentioned in section 3 of this act. Any real property in which any leasehold or other interest less than the fee shall be hereafter acquired in violation of this act shall be subject to sale as hereinafter provided. Any leasehold or other interest in real property, less than the fee, hereafter acquired in violation of the provisions of this act by an alien mentioned in section 2 of this act, or by any company, association or corporation mentioned in section 3 of this act, shall escheat to the State of Oregon. The district attorney of the proper county shall institute proceedings to have such escheat adjudged and enforced as provided in section 7 of this act. It shall be determined upon the trial, as an issue of fact, what is the value of the leasehold or other

interest involved in the proceedings, and if the decision or verdict be for the state, then the judgment rendered thereon shall declare said leasehold or other interest to be escheated to the state, and for judgment for said value, so determined, in favor of the state, including costs and disbursements. Thereupon the court shall order a sale of the real property covered by such leasehold or other interest by the sheriff of the county where the land lies, at public auction, and for cash, in the same manner as is provided by law for the sale of real estate upon execution, and report of said sale shall be made to the court, and the same confirmed, or the land resold, in the same manner as in sales of land upon execution. Out of the proceeds arising from such sale, the amount of the judgment, including costs and disbursements rendered for the state, shall be paid into the state treasury, and the balance shall be deposited with and distributed by the court in accordance with the interests of the parties therein. Any share of stock or the interest of any member in a company, firm, copartnership, corporation, association or other organization hereafter acquired in violation of the provisions of section 3 of this act shall escheat to the State of Oregon. Such escheat shall be adjudged and enforced in the same manner as provided in this section for the escheat of a leasehold or other interest in real property less than the fee.

Sec. 9. Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section 2 hereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein. A *prima facie* presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:

(a) The taking of the property in the name of a person other than the person mentioned in section 2 hereof, if the consideration is paid or agreed or understood to be paid by an alien mentioned in section 2 hereof.

(b) The taking of the property in the name of a company, association or corporation, if the memberships or shares of stock therein held by aliens mentioned in section 2 hereof, together with the memberships or shares of stock held by others, but paid for and agreed or understood to be paid for by such aliens, would amount to a majority of the memberships or the issued capital stock of such company, association or corporation.

(c) The execution of a mortgage in favor of an alien mentioned in section 2 hereof, if said mortgagee is given possession, control or management of the property.

The enumeration in this section of certain presumptions shall not be so construed as to preclude other presumptions or inferences that reasonably may be made as to the existence of intent to prevent, evade or avoid escheat as provided for herein.

Sec. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years or by a fine not exceeding five thousand dollars (\$5000), or both.

Sec. 11. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act.

Approved by the governor February 16, 1923.

Filed in the office of the secretary of state February 16, 1923.

7. NEBRASKA ALIEN LAND LAW, 1921.

An act to amend sections 6273, 6275 and 6276 of the Revised Statutes of Nebraska for 1913 and to repeal said original section.

Be it enacted by the people of the State of Nebraska:

Section 1. Amendment.—That section 6273 of the Revised Statutes of Nebraska for 1913 be amended to read as follows:

"6273. Sec. 87. Aliens Cannot Acquire Real Estate.—Aliens and corporations not incorporated under the laws of the State of Nebraska are hereby prohibited from acquiring title to or taking or holding any land, or real estate, or any leasehold interest extending for a period of more than five years, or any other greater interest less than fee in any land or real estate in this state, by descent, devise, purchase or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have prior to March 16, 1889, acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten years and no longer, and if at the end of such time herein limited such lands, so acquired, have not been sold to a *bona fide* purchaser for value, such lands or other interest therein shall revert and escheat to the State of Nebraska; and it shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeitures of all such lands or other interests therein as provided by this article. Any resident alien may acquire title to lands in this state by devise or descent only, provided such alien shall be required to sell and convey said real property within five years from the date of acquiring the same, and if he shall fail to dispose of the same to a *bona fide* purchaser for value within said time, said land and property shall revert and escheat to the State of Nebraska. No corporation organized under the laws of this state and no corporation organized under the laws of any other state or country, doing business in this state, which were organized to hold or are holding real estate, except real estate necessary for the construction and operation of railroads or real estate necessary for the purpose of erecting and maintaining manufacturing establishments, or real estate lying within the corporate limits of cities and towns, shall elect aliens as members of its board of directors or board of trustees in number sufficient to constitute a majority of such board, nor elect aliens as executive officers or managers, nor shall have a majority of capital stock owned by aliens; and any such corporation violating the provisions of this section shall be construed and held to be an alien and within the provisions of this article applicable to alien persons. Any such domestic corporation violating the provisions of this article shall forfeit their charter and be dissolved. Any such foreign corporation violating the provisions of this article shall forfeit its right to do business in the State of Nebraska."

Sec. 2. Amendment.—That section 6275 of the Revised Statutes of Nebraska for 1913 be amended to read as follows:

(Sec. 5689, Comp. Stat. 1922.) "6275. Sec. 89. Aliens May Dispose of Real Estate.—Any alien who owned land in this state on the date of the passage and taking effect of this act may dispose of the same during his life to *bona fide* purchasers for value, and may take security for the purchase money with the same rights as to securities as a citizen of the United States except as hereinafter limited by this article."

Sec. 3. Amendment.—That section 6276 of the Revised Statutes of Nebraska for 1913 be amended to read as follows:

(Sec. 5690, Comp Stat. 1922.) "6276. Sec. 90. Act Not Retroactive.—This article shall not, nor shall anything in the statutes of Nebraska prevent the holders, whether aliens or corporations not organized under the laws of the

State of Nebraska, of aliens upon real estate or any interest therein, whether heretofore or hereafter acquired, from holding or taking valid title to the real estate subject to such liens, nor shall it prevent any such alien or corporation from enforcing any lien or judgment for any debt or liability now existing, or which may hereafter be created, nor from becoming a purchaser at any sale made for the purpose of collecting or enforcing the collection of such debt or judgment; provided, however, all lands so acquired shall be sold within ten years after the title thereto shall be perfected in such alien or foreign corporation, and in default of such sale within such time, such real estate shall revert and escheat to the State of Nebraska, as provided in this article; provided further, the provisions of this article shall not apply to the real estate necessary for the construction and operation of railroads; and provided further, nothing in this article shall be construed to prohibit any alien or foreign corporation from purchasing and acquiring title to so much real estate as shall be necessary for the purpose of erecting and maintaining manufacturing establishments; and provided further, the provisions of this article shall not apply to any real estate lying within the corporate limits of cities and towns; and provided further, that the provisions of this article shall not apply to any real estate acquired by any alien prior to the passage and taking effect of this act, as long as such real property shall remain the property of such alien."

Sec. 4. Repeal.—That sections 6273, 6275 and 6276 of the Revised Statutes of Nebraska for 1913 be and the same are hereby repealed.

Approved April 25, 1921.

(Compiled Statutes of Nebraska, 1922 Ed., article V, chapter 60, sections 5687 to 5690.)

8. TEXAS ALIEN LAND LAW, 1921.

ALIENS—AMENDING ACT RELATING TO THE RIGHTS, POWERS AND DISABILITIES OF. Chapter 134.

An act to amend title 3 of the Revised Civil Statutes of the State of Texas, 1911, entitled "Aliens," relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for the violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith, and declaring an emergency.

Be it enacted by the legislature of the State of Texas:

Section 1. That title 3 of the Revised Civil Statutes of the State of Texas, 1911, and all amendments thereto be amended so as to hereafter read as follows:

"Article 15. No alien or person who is not a citizen of the United States shall acquire title to or own any lands in the State of Texas, or acquire any leasehold or other interest in such lands, except as hereinafter provided; but he shall have and enjoy in the State of Texas such rights as to personal property as are or shall be accorded to citizens of the United States by the laws of the nation to which such alien shall belong, or by the treaties of such nation with the United States, except as the same may be affected by the provisions of this title and the general laws of the state.

"Article 16. This title shall not apply to any land now owned in this state by aliens, not acquired in violation of any law of this state, so long as it is held by the present owners; nor to lots or parcels of land owned

by aliens in any incorporated town or city of this state, nor to the following classes of aliens, who are, or who shall become, *bona fide* inhabitants of this state, so long as they shall continue to be such *bona fide* inhabitants of the State of Texas:

"(1) Aliens who were *bona fide* inhabitants of this state on the date on which this act becomes a law.

"(2) Aliens eligible to citizenship in the United States who shall become *bona fide* inhabitants of this state, and who shall, in conformity with the naturalization laws of the United States, have declared their intention to become citizens of the United States.

"(3) Aliens who are natural-born citizens of nations which have a common land boundary with the United States.

"(4) Aliens who are citizens or subjects of a nation which now permits American citizens to own land in fee in such country; and any resident alien who shall acquire land under the provisions of this article shall have five years after he shall cease to be a *bona fide* inhabitant of this state in which to alienate said land.

"Article 17. The provisions of this title shall not prevent aliens from acquiring lands, or any interest therein, in the ordinary course of justice in the collection of debts; nor from acquiring liens upon real estate, or any interest therein; nor from lending money and securing the same upon real estate, or any interest therein; nor from enforcing any such lien; nor from acquiring and holding title to such real estate, or any interest therein, upon which a lien may have heretofore or may hereafter be fixed, or upon which a loan of money may have been heretofore or hereafter may be made and secured.

"Article 18. All aliens, prohibited from owning land in this state under the provisions of this title, who shall hereafter acquire real estate in Texas by devise, descent or by purchase as permitted by this title, may hold same for five years; and if such alien is a minor, he may hold same for five years after attaining his majority, or if of unsound mind, for five years after the appointment of a legal guardian.

"Article 19. Any alien who shall hereafter hold lands in Texas, in contravention of the provisions of this title, may, nevertheless, convey the fee simple title thereof at any time before the institution of escheat proceedings as hereinafter provided; provided, however, that if any such conveyance shall be made by such alien either to an alien or to a citizen of the United States, in trust, and for the purpose and with the intention of evading the provisions of this title, such conveyance shall be null and void; and any such land so conveyed shall be forfeited and escheated to the state absolutely.

"Article 20. It shall be the duty of the attorney-general, or the district or county attorney, when he shall be informed, or have reason to believe that lands in the state are being held contrary to the provisions of this title, to institute suit in behalf of the State of Texas in the district court of the county where such lands are situated, praying for the escheat of the same on behalf of the state, as in case of estates of persons dying without devise thereof and having no heirs.

"Article 21 (a). No alien shall ever be appointed or permitted to qualify as guardian of the estate of any minor or person of unsound mind, or as executor or administrator of the estate of any *decedent* in this state, unless he is permitted to own land under the provisions of this title.

"Article 21 (b). No corporation in which the majority of the capital stock is legally or equitably owned by aliens prohibited by law from owning land in the State of Texas shall acquire title to or own any lands in the

State of Texas, or any leasehold or other interest in such lands, and land so owned shall be subject to escheat under the provisions of this title as though owned by a nonresident alien.

"Article 21 (c). Land owned in trust, either by an alien or by a citizen of the United States, for the beneficial use of any alien or aliens, or any corporation prohibited from owning land in this state under the provisions of this title, shall be subject to forfeiture as though the legal title thereto was in such alien or corporation.

"Article 21 (d). All aliens now owning lands in the State of Texas shall, on or before the 1st day of January, 1923, file a written report, under oath, with the clerk of the county court of the county in which such land is located, giving the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date and place of arrival of said alien in the United States, and his or her present residence and postoffice address, and the length of time of residence in the State of Texas, the foreign prince, potentate, state or sovereignty of which the alien may at the time be a citizen or subject, and the number of acres of land owned by such alien in such county, the name and number of the survey, the abstract and certificate number, the name of the person or persons from whom acquired, the date when acquired, and shall either describe said land by metes and bounds or refer to recorded deed in which same is so described, which report shall be known as '*Report of Alien Ownership.*' Provided further, that all aliens hereafter purchasing or in any manner acquiring lands located in Texas shall, within six months after such purchase or acquisition, file with the county clerk of the county in which such land is located a '*Report of Alien Ownership*' in terms as above required.

"Any alien who may now own land in Texas, or who may hereafter acquire any land in Texas, by purchase or otherwise, who does not, within the time prescribed in this article, file the reports herein provided for, shall be subject to have such land forfeited and escheated to the State of Texas. The reports herein acquired shall, when the alien is a minor or insane person, be filed by the parent or guardian of such alien. It shall be the duty of the clerk of the county court of each county to file and record the reports above provided for in a separate volume, to be entitled '*Record of Alien Owned Lands,*' for said county, which record shall be alphabetically indexed. The recording fees for recording such reports shall be paid by the alien owner."

Sec. 2. All laws and parts of laws in conflict herewith are hereby expressly repealed.

Sec. 3. The fact that aliens who do not propose becoming citizens of the United States are now attempting to acquire title to large bodies of fertile land in this state creates an emergency and an imperative public necessity that this bill shall and it hereby does take effect from and after its passage, and it is so enacted.

[NOTE.—The enrolled bill shows that the foregoing act passed the senate, no vote given, and passed the house of representatives with amendments, no vote given, and that the senate concurred in the house amendments, no vote given.]

Approved April 1, 1921.

Effective 90 days after adjournment.

9. CONSTITUTIONAL AMENDMENT OF NEVADA.

The Nevada legislature of 1921 passed senate joint resolution No. 2. It was again passed by the legislature of 1923, and approved by the governor on

March 5, 1923. It was passed by the people at the 1924 November election.

The resolution in substance merely states:

"Resolved that article I of the constitution of the State of Nevada be amended by striking out section sixteen (16) thereof."

CONSTITUTION OF THE STATE OF NEVADA.

Article I.

Declaration of Rights.

Sec. 16. Foreigners who are, or may hereafter become, *bona fide* residents of this state shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property as native-born citizens.

10. ALIEN LAND LAW OF IDAHO, 1923.

An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state; providing for escheats in certain cases; prescribing the procedure therein; requiring reports of certain property holdings to facilitate the enforcement of this act, and prescribing penalties for violation of the provisions hereof; and declaring the provisions of this act paramount to any existing acts or parts of acts in conflict herewith.

Be it enacted by the legislature of the State of Idaho:

Section 1. All aliens eligible to citizenship under the laws of the United States and all companies, associations and corporations organized under the laws of this or any other state or nation of which a majority of the members are eligible to citizenship under the laws of the United States and in which a majority of the issued capital stock is owned by such aliens eligible to citizenship under the laws of the United States may acquire, take, hold, possess, enjoy, dispose of and inherit real property, or any interest therein in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

Sec. 2. All aliens other than those mentioned in section 1 of this act may acquire, take, hold, possess, enjoy and dispose of real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise; and may in addition thereto lease lands for agricultural purposes in this state; provided, however, that no lease may be made the term of which shall be for a longer period than five years, and any lease hereafter made, the term of which is for a longer term than five years, shall be illegal and null and void.

Sec. 3. Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in section 1 of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, take, hold, possess, enjoy and dispose of real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise.

Hereafter all aliens other than those specified in section 1 hereof may become members of or acquire shares of stock in any company, association or corporation, that is, or may be, authorized to acquire, take, hold, possess, enjoy and dispose of agricultural land in the manner and to the extent and

for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Sec. 4. Hereafter no alien mentioned in section 2 hereof and no company, association or corporation mentioned in section 3 hereof may be appointed guardian of that portion of the estate of a minor which consists of property which such alien or such company, association or corporation is inhibited from acquiring, taking, holding, possessing, enjoying or disposing of by reason of the provisions of this act. The public administrator of the proper county or any other competent person or corporation may be appointed guardian of the estate of a minor citizen whose parents are ineligible to appointment under the provisions of this section. On such notice to the guardian as the court may require, the probate court may remove the guardian of such estate whenever it appears to the satisfaction of the court:

(a) That the guardian has failed to file the report required by the provisions of section 5 hereof; or

(b) That the property of the ward has not been or is not being administered with due regard to the primary interest of the ward; or

(c) That facts exist which would make the guardian ineligible to appointment in the first instance; or

(d) That facts establishing any other legal ground for removal exist.

Sec. 5. (a) The term "trustee" as used in this section means any person, company, association or corporation that as guardian, trustee, attorney-in-fact, or agent, or in any other capacity, has the title, custody, or control of property, or some interest therein, belonging to an alien mentioned in section 2 hereof, or to the minor child of such an alien, if the property is of such a character that such alien is inhibited from acquiring, taking, holding, possessing, enjoying or disposing of the same.

(b) Annually on or before the thirty-first day of January every such trustee must file in the office of the secretary of state of Idaho and in the office of the county clerk of each county in which any of the property is situated a verified written report showing:

1. The property, real or personal, held by him for or on behalf of such an alien or minor;

2. A statement showing the date when each item of such property came into his possession or control;

3. An itemized account of all expenditures, investments, rents, issues and profits, in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof.

(c) Any person, company, association or corporation that violates any provision of this section is guilty of a misdemeanor and shall be punished by a fine not exceeding three hundred dollars (\$300) and by imprisonment in the county jail not exceeding six months.

(d) The provisions of this section are cumulative and are not intended to change the jurisdiction or the rules of practice of courts of justice.

Sec. 6. Whenever it appears to the court in any probate proceeding that by reason of the provisions of this act any heir or devisee cannot take real property in this state or membership or shares of stock in a company, association or corporation which, but for said provisions, said heir or devisee would take as such, the court, instead of ordering a distribution of such property to such heir or devisee, shall order a sale of said property to be made in the manner provided by law for probate sales of property.

and the proceeds of such sale shall be distributed to such heir or devisee of such property.

Sec. 7. Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section 2 hereof or by any company, association or corporation mentioned in section 3 of this act shall escheat to the State of Idaho, and shall be held and treated as school lands and may be disposed of in the same manner. The attorney-general of the State of Idaho shall institute proceeding to have the escheat of such real property adjudged and decreed; such action may be instituted in the district court of any county in this state in which such real property, or any portion thereof, is situated. Upon the entry of such judgment and decree the title of such real property shall pass to the State of Idaho. The provisions of this section and of sections 2 and 3 of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon, or interest in, such property so long as such real property so acquired shall remain the property of the alien, company, association or corporation acquiring the same in such manner.

No alien, company, association or corporation mentioned in section 2 or section 3 of this act shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt.

Sec. 8. Any leasehold or other interest in real property less than the fee hereafter acquired in violation of the provisions of section 2 of this act by any alien mentioned in section 2 thereof or by any company, association or corporation mentioned in section 3 of this act shall escheat to the State of Idaho.

The attorney-general of the state shall institute proceedings in the district court of the county in which such real property, or a portion thereof, is situated to have such escheat adjudged and decreed. In such proceeding the court shall determine the value of such leasehold or other interest in such real property and enter judgment for the state for the amount thereof, together with costs. Thereupon the court shall order a sale of the real property covered by such leasehold, or other interest, in the same manner as prescribed by the laws of Idaho for sales of real estate under mortgage foreclosure. Out of the proceeds arising from such sale the amount of the judgment rendered for the state shall be paid into the state treasury for the credit of the school fund and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein.

Any share of stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section 3 of this act shall escheat to the State of Idaho. Such escheat shall be adjudged and decreed and enforced in the same manner as in this section provided for the escheat of a leasehold or other interest in real property less than the fee.

Sec. 9. Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such character that an alien mentioned in section 2 hereof is inhibited from acquiring, taking, holding, possessing, enjoying or disposing of the same, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

A *prima facie* presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:

(a) The taking of the property in the name of a person other than the persons mentioned in section 2 hereof if the consideration is paid, agreed or understood to be paid by an alien mentioned in section 2 hereof;

(b) The taking of the property in the name of a company, association or corporation if the membership or shares of stock therein held by aliens mentioned in section 2 hereof, together with the memberships or shares of stock held by others but paid for or agreed or understood to be paid for by such aliens, would amount to a majority of the membership or the issued capital stock of such company, association or corporation.

(c) The execution of a mortgage in favor of an alien mentioned in section 2 hereof if said mortgagee is given possession, control or management of the property.

The enumeration in this section of certain presumptions shall not be so construed as to preclude other presumptions or inferences that reasonably may be made as to the existence of intent to prevent, evade or avoid escheat as provided for herein.

Sec. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years or by a fine not exceeding five thousand dollars (\$5000.00), or both.

Sec. 11. Nothing in this act shall be construed as a limitation upon the power of the state to enact laws with respect to the acquisition, holding, taking, enjoying, possessing or disposing of, by aliens, of real property in this state.

Sec. 12. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act, and the provisions hereof are hereby declared paramount to any existing acts or parts of acts that may conflict with the provisions hereof, to such extent only, however, as the same conflict.

Approved March 10, 1923.

Chapter 122, Session Laws, Idaho, 1923.

11. ALIEN LAND LAWS OF OTHER STATES.

a. ALIEN LAND LAW OF ARIZONA.

An act relating to the rights, powers, and disabilities of aliens and of certain companies, associations, and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof and repealing all acts or parts of acts inconsistent or in conflict herewith.

Be it enacted by the legislature of the State of Arizona:

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

Sec. 2. All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property or any interest therein

in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Sec. 3. Any company, association, or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in section 1 of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy and convey real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise. Hereafter all aliens other than those specified in section 1 hereof may become members of or acquire shares of stock in any company, association, or corporation that is or may be authorized to acquire, possess, enjoy, or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Sec. 4. Hereafter no alien mentioned in section 2 hereof and no company, association, or corporation mentioned in section 3 hereof may be appointed guardian of that portion of the estate of a minor which consists of property which such alien or such company, association, or corporation is inhibited from acquiring, possessing, enjoying, or transferring by reason of the provisions of this act. Any competent person, corporation, or official may be appointed guardian of the estate of a minor citizen whose parents are ineligible to appointment under the provisions of this section.

On such notice to the guardian as the court may require the superior court may remove the guardian of such an estate whenever it appears to the satisfaction of the court:

(a) That the guardian has failed to file the report required by the provisions of section 5 hereof; or

(b) That the property of the ward has not been or is not being administered with due regard to the primary interest of the ward; or

(c) That facts exist which would make the guardian ineligible to appointment in the first instance; or

(d) That facts establishing any other legal ground for removal exist.

Sec. 5. (a) The term "trustee" as used in this section means any person, company, association, or corporation that as guardian, trustee, attorney in fact or agent, or in any other capacity has the title, custody, or control of property, or some interest therein, belonging to an alien mentioned in section 2 hereof, or to minor child of such alien, if the property is of such a character that such alien is inhibited from acquiring, possessing, enjoying, or transferring it.

(b) Annually on or before the 31st day of January every such trustee must file in the office of the secretary of state of Arizona and in the office of the county recorder of each county in which any of the property is situated a verified written report showing:

(1) The property, real or personal, held by him for or on behalf of such an alien or minor;

(2) A statement showing the date when each item of such property came into his possession or control;

(3) An itemized account of all expenditures, investments, rents, issues and profits in respect to the administration and control of such property

with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof.

(c) Any person, company, association, or corporation that violates any provision of this section is guilty of a misdemeanor and shall be punished by a fine not exceeding \$1000 or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

(d) The provisions of this section are cumulative and are not intended to change the jurisdiction or the rules of practice of courts of justice.

Sec. 6. Whenever it appears to the court in any probate proceeding that by reason of the provisions of this act any heir or devisee cannot take real property in this state or membership or shares of stock in a company, association, or corporation which but for said provisions said heir or devisee would take as such, the court instead of ordering a distribution of such property to such heir or devisee shall order a sale of said property to be made in the manner provided by law for probate sales of property and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such property.

Sec. 7. Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section 2 of this act, or by any company, association, or corporation mentioned in section 3 of this act shall escheat to and become and remain the property of the State of Arizona. The attorney-general or county attorney of the proper county shall institute proceedings to have the escheat of such real property adjudged and enforced in the manner provided by chapter 4, title 6, of the Civil Code, Revised Statutes of Arizona, 1913, known as escheats. Upon the entry of final judgment in such proceedings the title to such real property shall pass to the State of Arizona. The provisions of this section and of sections 2 and 3 of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon, or interest in such property, so long as such real property so acquired shall remain the property of the alien, company, association, or corporation acquiring the same in such manner.

No alien, company, association, or corporation mentioned in section 2 or section 3 hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt.

Sec. 8. Any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section 2 of this act, or by any company, association, or corporation mentioned in section 3 of this act, shall escheat to the State of Arizona. The attorney-general or county attorney of the proper county shall institute proceedings to have such escheat adjudged and enforced as provided in section 7 of this act. In such proceedings the court shall determine and adjudge the value of such leasehold or other interest in such real property and enter judgment for the state for the amount thereof together with costs. Thereupon the court shall order a sale of the real property covered by such leasehold or other interest in the manner provided by section 519, Revised Statutes of Arizona, Civil Code, 1913. Out of the proceeds arising from such sale the amount of the judgment rendered for the state shall be paid into the state treasury and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein. Any share of stock or the interest of any member in

a company, association, or corporation hereafter acquired in violation of the provisions of section 3 of this act shall escheat to the State of Arizona. Such escheat shall be adjudged and enforced in the same manner as provided in this section for the escheat of a leasehold or other interest in real property less than the fee.

Sec. 9. Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section 2 hereof is inhibited from acquiring, possessing, enjoying, or transferring it, and if the conveyance is made with intent to prevent, evade, or avoid escheat as provided for herein.

A *prima facie* presumption that the conveyance is made with such intent shall arise upon proof of any of the following group of facts:

(a) The taking of the property in the name of a person other than the persons mentioned in section 2 hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section 2 hereof;

(b) The taking of the property in the name of a company, association, or corporation, if the membership or shares of stock therein held by aliens mentioned in section 2 hereof, together with the memberships or shares of stock held by others but paid for or agreed or understood to be paid for by such aliens would amount to a majority of the membership or the issued capital stock of such company, association, or corporation;

(c) The execution of a mortgage in favor of an alien mentioned in section 2 hereof if such mortgagee is given possession, control, or management of the property. The enumeration in this section of certain presumptions shall not be construed as to preclude other presumptions or inferences that reasonably may be made as to the existence of intent to prevent, evade, or avoid escheat as provided for herein.

Sec. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding \$5000, or both.

Sec. 11. All acts and parts of acts inconsistent or in conflict with the provisions hereof are hereby repealed; provided that,

(a) This act shall not affect pending actions or proceedings, but the same may be prosecuted and defended with the same effect as if the act had not been adopted;

(b) No cause of action arising under any law of this state shall be affected by reason of the adoption of this act whether an action or proceeding has been instituted thereon at the time of the taking effect of this act or not, and actions may be brought upon such causes in the same manner, under the same terms and conditions and with the same effect as if this act had not been adopted;

(c) This act, in so far as it does not add to, take from, or alter an existing law, shall be construed as a continuation thereof.

Whereas this act requires early operation to preserve the public peace, health, and safety, an emergency is hereby declared to exist and this act shall be in full force and effect from and after its passage and approval by the governor, and is hereby exempt from the operation of the referendum provisions of the state constitution.

Approved by the governor February 26, 1921.

b. ALIEN LAND LAW OF DELAWARE.

An act to amend chapter 91 of the Revised Code of the State of Delaware relating to aliens.

Be it enacted by the senate and house of representatives of the State of Delaware in general assembly met:

Section 1. That chapter 91 of the Revised Code of the State of Delaware be, and the same is hereby, amended by repealing 3194, sec. 1 thereof, and by inserting in lieu thereof the following new section, to be styled 3194, sec. 1:

"3194, Sec. 1. On and after the approval of this act, only such aliens as are eligible to citizenship under the laws of the United States may acquire, possess, inherit, transfer or transmit, in any manner whatever, real and personal property, or any interest therein, in the State of Delaware, and all aliens eligible to citizenship under the laws of the United States as aforesaid may acquire, hold, possess, inherit, transfer or transmit real and personal property, or any interest therein, in the State of Delaware, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this State."

Sec. 2. That chapter 91 of the Revised Code of the State of Delaware be, and the same is hereby, further amended by repealing 3195, sec. 2 thereof, and by inserting in lieu thereof the following new section, to be styled 3195, sec. 2:

"3195, Sec. 2. All aliens, other than those mentioned in section 1 of this act, may acquire, possess, inherit, transfer or transmit real and personal property, or any interest therein, in the State of Delaware, in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Sec. 3. That chapter 91 of the Revised Code of the State of Delaware be, and the same is hereby, further amended by adding the following new section, to be styled 3195A, sec. 2A:

"3195A, Sec. 2A. Any real or personal property in the State of Delaware hereafter acquired in violation of the provisions of this act, by any alien mentioned in section 2 of this act, shall escheat to and become and remain the property of the State of Delaware, in the same manner and subject to the same conditions as now provided by law in reference to escheats."

Sec. 4. That nothing in this act shall be construed as a limitation upon the power of the State of Delaware to enact laws with respect to the acquisition, holding or disposal by aliens of real or personal property in the State of Delaware.

Sec. 5. That all acts and parts of acts inconsistent or in conflict with the provisions of this act be, and the same are hereby, repealed to the extent of such inconsistency or conflict.

Approved April 7, A. D. 1921.

Laws of Delaware 1921, chapter 188.

c. ALIEN LAND LAW OF LOUISIANA.

Article XIX.

Sec. 21. No alien who is ineligible to citizenship of the United States shall be permitted or allowed or shall have any right whatsoever to acquire by purchase, devise, inheritance, lease, assignment, gift or other-

wise, or shall own or control, directly or indirectly, in his or her name, or through another interposed or by means of any corporation or association, or through ownership in his or her own name or through another of any stock or other form of security, any land or real property or any real rights or interests therein, including mortgage rights, of any kind or character whatsoever within the State of Louisiana. The legislature may pass any additional legislation to carry the purpose of this section into effect.

Constitution of the State of Louisiana. Adopted in convention at the City of Baton Rouge, June 18, 1921.

d. ALIEN LAND LAW OF MONTANA.

An act relating to the rights and disabilities of aliens with respect to lands, providing for forfeitures in certain cases, prescribing penalties, and repealing all laws in conflict herewith.

Be it enacted by the legislative assembly of the State of Montana:

Section 1. Definitions of terms used in this act.

Sec. 2. An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state. Nothing herein contained shall be construed to destroy or limit existing or vested rights of any person at the time of the passage of this act.

Sec. 3. An alien is not qualified to be trustee, under a will, executor, administrator or guardian, if any part of the estate is land; provided, an alien now lawfully acting in such capacity may continue for not more than two years.

Sec. 4. If hereafter an alien acquires land by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts and, remaining an alien, hold the same for more than twelve years from the date title was so acquired or control or possession taken, the land shall be forfeited to the state.

Sec. 5. If an alien, claiming or holding under a mortgage, has control, possession, use or enjoyment of the mortgaged land, the obligations secured by the mortgage shall be deemed matured and the mortgage shall be foreclosed; and if the land be not sold under foreclosure within three years after the alien has obtained control, possession, use or enjoyment, the mortgage and the obligation thereby secured shall be forfeited to the state and shall be foreclosed for the use of the state.

Sec. 6. Whoever

(a) Knowingly transfers or conveys land or title to land to an alien; or
 (b) Knowingly takes land or title to land in trust for an alien; or
 (c) Holding in trust for an alien land or title to land, either heretofore or hereafter acquired, fails for thirty days after acquiring knowledge or notice that he holds in trust for an alien to disclose the fact to the attorney-general or the prosecuting attorney of the county where the land is situated; or

(d) Being an alien and having a title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney-general or the prosecuting attorney of the county where the land is situated the nature and extent of his interests in and title to the land; or

(e) Being an officer or agent of a corporation or other organized group of persons which has title to land or control, possession, use, or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney-general or the prosecuting attorney of the county where the land is situated the nature and extent of his interest in and title to the land; or

(f) Being an officer or agent of a corporation or other organized group of persons which has title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney-general or the prosecuting attorney of the county where the land is situated the nature and extent of the interest of persons not citizens of the United States in the corporation or other organized group of persons; or

(g) Being an officer or agent of a corporation or other organized group of persons which holds in trust for an alien title to land or control or possession of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney-general or the prosecuting attorney of the county where the land is situated the nature and extent of the alien's interest in and title of the land; or

(h) Wilfully counsels, aids or abets another in violating or evading this act; is guilty of a misdemeanor and punishable by a fine of not less than one hundred dollars (\$100.00) or more than one thousand dollars (\$1000.00) or six months in jail, or both such fine and imprisonment.

Sec. 7. Property forfeited to the state by this act shall inure to the permanent common school fund and be managed and disposed of accordingly.

Sec. 8. This act shall not impair any title or right heretofore or hereafter acquired from or derived through an alien in good faith and for value by a person not under an alien's disability.

Sec. 9. All acts and parts of acts which are in conflict herewith are hereby repealed.

Passed by the 18th assembly, 1923.

e. ALIEN LAND LAW OF MISSOURI.

Chapter 68.

Sec. 4764. *Unlawful for persons or corporations to hold or own real estate, when.*—It shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States or of some state or territory of the United States, to hereafter acquire, hold or own real estate so hereafter acquired, or any interest therein, in this state, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts: Provided, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries; which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer. (Laws 1895, p. 207.)

Sec. 4765. *Corporation or association not to acquire or hold real estate except in certain instances, etc.*—No corporation or association more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire or hold or own any

real estate hereafter acquired in this state: Provided, that nothing contained in this chapter shall be construed to forbid any person or corporation from acquiring an interest in any real estate in this state as *cestui que* trust or mortgagee in any deed of trust or mortgage taken in good faith to secure the repayment of any money lent upon such real estate and interest thereon nor as assignee of such *cestui que* trust or mortgagee, nor to forbid the person or corporation lending such money or becoming such assignee from purchasing such real estate at its sale upon foreclosure of said deed of trust or mortgage, when the amount for which such property is sold at said sale does not exceed the amount due under said deed of trust or mortgage at the time of such sale and the costs of such foreclosure; provided, however, that all right, title or interest acquired by such person or corporation at such sale or foreclosure shall be forfeited to the State of Missouri unless such person or corporation shall in good faith sell all of such right, title and interest to a citizen of the United States, within six years after the person or corporation so purchasing at such sale or foreclosure shall have held the possession of such real estate according to the interest purchased or acquired by him or it at such sale or foreclosure. (Laws 1895, p. 207, Amended Laws 1897, p. 144, amended.)

Sec. 4766. *Property to be forfeited to state for violation of this chapter—duty of attorney-general, prosecuting and circuit attorneys.*—All property acquired, held or owned in violation of the provisions of this chapter shall be forfeited to the State of Missouri, and it shall be the duty of the attorney-general, or circuit or prosecuting attorney of the proper city or county, to enforce every such forfeiture by bill in equity or other proper process. And in any suit or proceeding that may be commenced to enforce the provisions of this chapter, it shall be the duty of the court to determine the very right of the matter, without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights, either of the state or of the parties concerned, in any such proceeding arising out of the matters in this chapter mentioned. (Laws 1895, p. 207.)

Missouri Annotated Statutes 1906, vol. 3, p: 4762.

f. ALIEN LAND LAW OF NEW MEXICO.

Constitutional Amendment No. 2.

A resolution proposing an amendment to section 22 of article II of the constitution of the State of New Mexico.

J. R. No. 9 (as amended); approved March 8, 1921.

Be it resolved by the legislature of the State of New Mexico:

Section 1. That section 22 of article II of the constitution of the State of New Mexico be amended so that the said section shall read as follows:

"Sec. 22. Until otherwise provided by law no alien, ineligible to citizenship under the laws of the United States, or corporation, co-partnership or association, a majority of the stock or interest in which is owned or held by such aliens, shall acquire title, leasehold or other interest in or to real estate in New Mexico."

Laws of New Mexico, 1921. (P. 469.)

ADDENDA.

DECISIONS OF THE CALIFORNIA SUPREME COURT IN LAND CASES UNDER:

- Chapter XVI. Carter Case. (See p. 808.)
Chapter XVII. F. S. Jones and T. Makimoto Case. (See p. 813.)
Chapter XVIII. Porterfield and Mizuno Case. (See p. 820.)
Chapter XIX. Nose Case. (See p. 831.)
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CARTER CASE.

L. A. No. 8237. In Bank. December 9, 1924.

GEORGE A. CARTER and HAMAK SINGH, Plaintiffs and Respondents, v.
ERNEST R. UTLEY, District Attorney in and for the County of Imperial,
State of California, and U. S. WEBB, Attorney-General of the State of
California, Defendants and Appellants.

Appeal by defendants from a judgment of the Superior Court of Imperial
County, M. W. Conklin, Judge, in an action to enjoin the bringing of
escheat or forfeiture proceedings under the Alien Land Law. *Reversea.*

For Appellants—U. S. Webb, Attorney-General; Frank English, Deputy
Attorney-General; Ernest R. Utley, District Attorney, Imperial County.

For Respondents—Harry W. Horton; Albert H. Elliot, *amicus curiae*.

The trial court overruled appellants' general demurrer to the complaint
and upon their refusal to answer, judgment was entered in favor of
respondents. The appeal is from the judgment so entered.

Respondent George A. Carter is a citizen of the United States of America
and a resident of Imperial County, this state, and the owner of agricultural
lands situate therein. His co-respondent, Hakam Singh, also a resident of
said Imperial County, is a native of the Province of Punjab, India, and
respondents admit that he is not eligible to citizenship in the United States
of America. The action was brought to enjoin the attorney-general of the
state and the district attorney of Imperial County from bringing escheat
or forfeiture proceedings against them under the provisions of the Alien
Land Law (Stats. 1920, lxxxiii) and amendments thereto (Stats. 1923, p.
1020), or from prosecuting them criminally, as threatened by appellants,
should they enter into a certain proposed cropping contract providing for
the production of crops to be raised by the ineligible alien upon the lands
owned by said Carter, which contract they wish to and would execute but
are deterred from so doing by said threats of prosecution made by appel-
lants aforesaid.

The main features of said contract will be briefly noticed. By its lan-
guage the owner, Carter, is denominated employer and the ineligible alien
is called the employee. The parties agree that Carter is the owner of and
entitled to the possession of said lands and has the right to grow crops
thereon. It is recited in the proposed contract that the ineligible alien
owns the tools and equipment required for the preparation of the soil and
the planting, cultivating and harvesting of such crops as the landowner

may designate to be sown or grown in the soil of said premises. It is provided that the ineligible alien shall receive from the landowner rent for the use of the former's tools and equipment which are to be used in the production of said crops. The ineligible alien is required to furnish all labor necessary for the performance of the terms of the contract. It is the further agreement of the parties that said ineligible alien owns no interest whatsoever in the real property or in the crops and that the relation of employer and employee exists between the landowner and the ineligible alien. Said alien is to be under the direction of the landowner and if he "shall fail or neglect to properly care for or perform the services, required to properly prepare the soil, raise and harvest said crops" the owner may employ other or additional services necessary therefor and any cost so incurred may be deducted from the compensation of said alien or his employment may be terminated at the option of the landowner. Said alien is to receive \$50 per month in consideration of his services and the landowner is to make such cash advancements to the alien as the landowner may deem to be warranted in the production of said crops and after the crops are harvested they are to be sold by the landowner, who is to pay to the alien for his services in the production thereof an amount equal to eighty per cent of the highest sale price obtainable, less advances made by the landowner.

There is nothing in the contract in this case, and we have stated all of its important provisions, to exempt it from the rule announced in *Porterfield et al. vs. Webb et al.* (L. A. No. 8214), this day decided.

By the contract the ineligible alien would be given the use and benefit of agricultural lands. He is not guaranteed this right by treaty or otherwise. (*Porterfield et al. vs. Webb et al.*, 44 Sup. Ct. Rep. 21.) The contract is more than an arrangement for employment only. The evident effect of contracts cannot be changed by the adoption of names which at best are nothing more than misnomers.

Porterfield et al. vs. Webb et al. (L. A. No. 8214) discusses every issue raised in this case and it is, therefore, made the grounds of decision of the instant case.

Judgment reversed.

SEAWELL, J.

We concur:

MYERS, C. J.

LENNON, J.

SHENK, J.

WASTE, J.

RICHARDS, J.

LAWLOR, J.

F. S. JONES AND T. MAKIMOTO CASE.

L. A. No. 8215. In Bank. December 9, 1924.

F. S. JONES and TAKEO MAKIMOTO, Plaintiffs and Appellants, v. U. S. WEBB, as Attorney-General of the State of California, and ASA KEYES, as District Attorney of the County of Los Angeles, State of California, Defendants and Respondents.

Appeal by plaintiffs from a judgment of the Superior Court of Los Angeles County, Ralph H. Clock, Judge, in an action to enjoin the bringing of escheat or forfeiture proceedings under the Alien Land Law. *Affirmed.*

For Appellants—Chas. W. Fourl, Edward W. Tuttle; Albert H. Elliot, *amicus curiae*.

For Respondents—U. S. Webb, Attorney-General; Frank English, Deputy Attorney-General; Asa Keyes, District Attorney, Los Angeles County; Tracy Chatfield Becker, Deputy District Attorney, Los Angeles County.

Appeal from a judgment entered in favor of respondents after demurrer sustained without leave to amend.

Appellant F. S. Jones is a citizen of the United States of America, a resident of and an owner of a parcel of land consisting of ten acres, situate in the County of Los Angeles, this state. Appellant Takeo Makimoto is a native of Japan and ineligible to citizenship in the United States of America. They have prepared a contract for the production of berries, vegetables and other farm crops, which they desire to and would execute but are deterred from doing so by fear of prosecutions threatened to be instituted against them by the attorney-general of the state and the district attorney of the County of Los Angeles under and by the authority of the forfeiture and escheat provisions of the initiative Alien Land Law of the state (Stats. 1921, lxxxiii; Hennings General Laws 1920, p. 59) and the amendment thereto (Stats. 1923, p. 1020) should they do so. The same kind of injunctive relief is sought here as was prayed for in *Porterfield vs. Webb et al.* (L. A. No. 8214)—this day decided.

By the language of the proposed contract it is denominated a contract of employment and the landowner is designated as "employer" and the ineligible alien is designated "employee". The ineligible alien undertakes, under the direction of the landowner, to plant, cultivate, harvest and pack all crops to be grown upon the lands and do all work necessary to be done in the production of crops in a farmerlike manner. He is to furnish all machinery, horses, tools and equipment required in the production of and the packing of said crops. The landowner agrees to pay the ineligible alien, as compensation for his services of husbandry, the sum of \$25 per month on the last day of each and every month. In addition thereto, quoting the language of the contract, said employer promises "to give, as a bonus, an additional sum to make the total compensation equal to sixty-six and two-thirds per cent of the net profit realized by the employer (landowner) from the operation of said property after deducting all costs and expenses paid by the employer (landowner) in the planting, cultivation, harvesting and marketing of said crops, said net profit to be determined at the end of each year of the continuance of this agreement". It is stipulated that the alien shall have no right, title or interest of any kind whatsoever in or to the land on which said crops are produced or in the crops grown thereon, and it is agreed that said contract or agreement shall not constitute a partnership of any kind nor shall it be construed to be a cropping agreement or a contract for the working of said lands on shares. The only material difference between the contract in this case and the one this day passed upon in *Porterfield et al. vs. Webb et al.* (L. A. No. 8214) is that this case contains a so-called "bonus clause", which, appellants claim in their briefs, distinguishes it from the *Porterfield-Mizuno* contract and reduces it, in legal effect, from a cropper's contract to a simple contract of employment. The monthly payment provision, standing alone and in no way interrelated or forming a part of any forbidden considerations, would constitute a contract of employment. But this single provision cannot control other provisions of the contract unqualified by it or neutralize the effect of the provision which gives a sixty-six and two-thirds per cent of the net profits realized from the crops gathered to the alien, which, unquestionably, was the real inducement that

moved the alien to enter into the contract. The joining or uniting of the two does not absolve the other of its essence. The word "bonus" as used in the contract is mere surplusage. A bonus is "something given in addition to what is ordinarily received by, or strictly due to, the recipient; . . . money, or other valuable, given in addition to an agreed compensation." (Webster's New International Dictionary; see also 9 C. J., 135-136.) The provision in the contract for a percentage of the crops raised is not unlike the provisions ordinarily found in croppers' contracts, and the use of the word "bonus" therein does not operate to change the legal effect of the contract or to disguise the real intent of the parties. The clause providing for a percentage of the crops is a fixed, unalterable part of the contract. The percentage is definite and is not dependent upon any personal exertion on the part of the inclicable alien. There is no way in which it can be increased or diminished. It remains at sixty-six and two-thirds per cent under any and all circumstances. The contract contains none of the elements of a bonus. It contains nothing of a substantial character which would differentiate it from the contract in *Porterfield et al. vs. Webb et al.*, *supra*. There is no merit in the bonus claim or suggestion.

All other points in the case have been sufficiently considered in the case last cited. We make that case, therefore, the ground of our decision in this as to those points.

Judgment affirmed.

SEAWELL, J.

We concur:

MYERS, C. J.

LENNON, J.

SHENK, J.

WASTE, J.

RICHARDS, J.

LAWLOR, J.

PORTERFIELD AND MIZUNO CASE.

L. A. No. 8214. In Bank. December 9, 1924.

W. L. PORTERFIELD and YOSHITARO MIZUNO, Plaintiffs and Appellants, v. U. S. WEBB, as Attorney-General of the State of California, and ASA KEYES, as District Attorney of the County of Los Angeles, State of California, Defendants and Respondents.

Appeal by plaintiffs from a judgment of the Superior Court of Los Angeles County, Ralph H. Clock, Judge, of dismissal of an action to enjoin the enforcement of the provisions of the Alien Land Law relating to cropping contracts. *Affirmed*.

For Appellants—Charles W. Foul, Edward W. Tuttle; Albert H. Elliot, *amicus curiae*.

For Respondents—U. S. Webb, Attorney-General; Frank English, Deputy Attorney-General; Asa Keyes, District Attorney, Los Angeles County; Tracy Chatfield Becker, Deputy District Attorney, Los Angeles County.

Appeal from a judgment of dismissal after a general demurrer sustained to the complaint without leave to amend.

Plaintiff Porterfield, a citizen and resident of the County of Los Angeles, this state, and an owner of agricultural land situate in said County of Los Angeles, and his co-plaintiff Mizuno, a resident of this state, but born of Japanese parents in Japan and a subject of the Emperor of that country,

being mutually desirous of entering into a cropping contract for the planting, cultivating and harvesting of garden produce for the market and the growing of such other crops as the owner of the lands might designate, prepared an agreement acceptable to both, and claim the right to execute the same, whereby Mizuno proposes to undertake, inter alia, the planting, cultivating and farming of said agricultural lands, situate in said County of Los Angeles and belonging to Porterfield, for which farm-service he is to receive a percentage of all the crops (in kind) raised or grown upon said farm lands. Upon being threatened by the attorney-general of the state and the district attorney of Los Angeles County with prosecutions under the escheat and forfeiture sections of the Alien Land Law (Stats. 1921, lxxxiii), an initiative measure, and the amendments thereto adopted at the session of the legislature of 1923 (chap. 441, p. 1020), should they enter into said agreement, they deferred the execution thereof by reason of said threatened prosecutions and applied to the court for an order perpetually enjoining said attorney-general and district attorney from the threatened enforcement of said Alien Land Law and the amendments thereto. The averments here are substantially the same as were the averments in *Webb et al. vs. O'Brien et al.*, 44 Sup. Ct. Rep. 112, and are to the effect that said initiative act is so drastic and the penalties for its violation are so great that neither plaintiff may execute the contract for the purpose of testing the validity of said act and its application thereto, and that, unless the court may determine the validity of said act and its application, they will be compelled to submit to it, whether it be valid or invalid. It is the complaint of plaintiffs that they have been unlawfully coerced by said threats of prosecution from entering into said agreement and are thereby deprived of their property without due process of law and are denied the equal protection of the law in contravention to the Fourteenth Amendment of the Federal Constitution. It is further contended that said initiative measure and amendments deny to an ineligible alien the right to labor or to engage in the common and ordinary employments of the country.

The right to maintain such a proceeding as here instituted is elaborately discussed in *Terrace et al. vs. Thompson*, 44 Sup. Ct. Rep. 15. It is not necessary to do more than to cite that case. It is supported by a long list of authorities.

The cropping contract or agreement which appellants desire to execute and which would affect the realty of appellant Porterfield is not distinguishable in material respects from the contract construed in *Webb vs. O'Brien*, *supra*. We are mindful that the O'Brien contract makes provision for the housing accommodations of the cropper on the premises. A similar provision is not carried into the Mizuno contract. The latter contains a provision that no interest in or possession of the lands is given the cropper "except the right of ingress and egress as shall be necessary and proper for the carrying out this contract". The foregoing quoted clause does not appear in the O'Brien contract. The housing provision, however, is not sufficient to make a material difference. The occupancy and use of the lands and the privileges incidental thereto by ineligible aliens would have the practical effect of a denial of the use, occupancy, enjoyment and benefit of the land to the citizen. In all other respects the contracts are substantially the same. The Mizuno contract provides in substance that he shall plant, cultivate and harvest certain designated garden-truck and vegetables and such other crops as Porterfield, the owner of the soil, may thereafter designate, in a good and farmerlike manner. He shall furnish all necessary tools, farming implements and all labor necessary to carry out the terms of the contract.

He is to keep the banks and bottoms of irrigation ditches on and adjacent to or tributary to said lands free from weeds and foul growths; to repair and maintain all levees; to prevent the loss of irrigation water and to protect the driveways and roads from overflows and to guard against and protect the property from fires. He is to harvest and pack the crops in accordance with the best standards and prepare said crops for shipping and to haul the same to market. Porterfield is to give to Mizuno sixty per cent of all crops grown upon said lands during the period of the agreement (which is for the term of one year) as compensation for his services. He also grants to Mizuno the right to a division of the crops after the same are harvested and before the removal thereof from the land. In the event that said cropper fails to remove his share of said crops from the premises before the termination of the contract he is granted a reasonable time thereafter to remove the same. The contract contains the provision that "this contract is not intended to create a lease nor to give to the cropper any interest whatever in, or possession of, any of said land except the right of ingress and egress as shall be necessary and proper for the purposes of carrying out the terms and conditions of the contract during the continuance thereof". We have mentioned all of the material portions of the proposed contract which the parties desire to execute.

Respondents contend that the Alien Land Law of this state prohibits the owner of agricultural lands from making a contract such as the one above described with an ineligible alien and cite *Webb vs. O'Brien*, 44 Sup. Ct. Rep. 112; *Terrace vs. Thompson et al.*, 44 Sup. Ct. Rep. 15; *Frick et al. vs. Webb et al.*, 44 Sup. Ct. Rep. 115, as authorities, which, it is claimed, fully and completely justify the institution of the threatened proceedings against appellants should they execute said contract, and admit that it is their intention to proceed against them in accordance with the escheat and forfeiture provisions of said Alien Land Law in the event that appellants as between themselves enter into said contract. Appellants and the *amicus curiae*, on the other hand, insist that the case *In re Okahara*, 66 Cal. Dec. 15, 216 Pac. 614, clearly recognizes the right of appellants to enter into said contract and that this court is bound to follow the interpretation placed upon the Alien Land Law by the latter decision, which, as construed by them, permits the making of the proposed contract for the purposes and uses therein set out. There can be no doubt but that the contention of respondents is fully sustained by the decisions of the United States Supreme Court above cited. *In re Okahara*, *supra*, relied upon by appellants as ruling the present situation, will be hereafter noticed.

The sections of the Alien Land Law bearing upon the question presented are as follows:

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Section 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Sections 7 and 8 of the act provide that any real property or any leasehold, or any other interest in real property less than the fee, acquired

in violation of the provisions of the Alien Land Law shall escheat to the State of California and the attorney-general of the state or district attorney of the proper county shall institute proceedings to have such escheat adjudged. Section 9 provides that every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section 2 thereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as in said act provided.

"Section 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

"Section 13. The legislature may amend this act in furtherance of its purpose and to facilitate its operation."

The act closes with a general saving clause to the effect that if any part of it is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the act.

It has been definitely determined that the provisions of the Alien Land Law, to which reference is herein made and which are germane to the questions presented by this appeal, do not offend any clause or provision of the state or Federal Constitution or violate any treaty obligation or right existing between this country and the Empire of Japan. (*In re Y. Akado*, 188 Cal. 739, 207 Pac. 245; *In re Okahara*, *supra*; *O'Brien vs. Webb*, 44 Sup. Ct. Rep. 112; *Terrace vs. Thompson*, 44 Sup. Ct. Rep. 15; *Porterfield vs. Webb*, 44 Sup. Ct. Rep. 21; *Frick vs. Webb*, 44 Sup. Ct. Rep. 115; see, also, *Blythe vs. Hinckley*, 127 Cal. 431, 59 Pac. 787.)

We think that appellants rely with a greater degree of confidence upon the Okahara case, *supra*, than the real and only question there presented for decision warrants. That case arose out of a criminal prosecution instituted by virtue of the provisions of section 10 of the Alien Land Act and was decided on the basis of a criminal action. In such cases all presumptions arising upon questions of either law or fact must be construed in favor of the innocence of a person charged with crime, if such a construction can be reasonably indulged. Okahara, being restrained of his liberty upon a charge of having feloniously conspired with another to effect a transfer of an interest in real property in violation of said act, petitioned this court for the issuance of a writ of habeas corpus, which was granted, and we ordered his discharge. The contract which formed the basis of the criminal prosecution in that case is different in material respects from the one in the instant case, as a comparison of the contracts will show. It provided for the clearing of a twenty-acre tract of land and the planting of the same to orchard, for which service Okahara was to receive \$50 per acre, all trees to be furnished by the landowner. This provision of the contract undoubtedly constituted a contract of employment. It further provided for the planting between the rows of the fruit trees a designated number of acreage to raspberries, blackberries, strawberries and garden vegetables. Okahara was to harvest the crops and make delivery of the same at any market or station designated by said landowner. He was also to furnish all labor, tools and machinery necessary for the performance of the terms of the agreement. The products of the soil, including fruits, were to be sold by the landowner on such terms as he should deem best and Okahara

was to receive in addition to said \$50 per acre for clearing the land and planting the orchard, 50% of the net proceeds derived from the sale of the fruits and farm products. Okahara's share was to be paid to him in cash by the owner 30 days after the sale of said products, certain deductions to be made in favor of the owner for outlays of money made by him for materials furnished, etc. It was expressly stipulated that Okahara was to have access to the land for the purpose of doing the work and "all crops of every nature and character grown thereon were to be the property of the landowner and the contractor (Okahara) shall have no interest, right or claim in or to any part of the said crop but his sole right shall be to the compensation paid by the employer (landowner) as herein provided and the said compensation shall be in payment for all services for said contractor (Okahara) for outlays and expenses paid or incurred by the contractor in or about said work". It was also provided that the landowner might at any time, if dissatisfied with the work or with its progress, immediately terminate the same on ten days' written notice by paying to Okahara compensation equal to the usual wages paid for similar work in the same neighborhood. The contract was non-assignable without the consent of the landowner. This court, upon considering the matter before it, said: "The only question before us is whether the acts, purposes and objects as shown upon the face of the instrument are, in fact, such acts, agreements, purposes and objects as are forbidden by *section ten* of the Alien Land Law. If by a reasonable construction of the agreement, the case is fairly brought within the inhibition of the law the petitioner should be remanded, otherwise he must be discharged." In the concluding paragraph of the decision we find this clause: "We can only say that we have examined the questions presented with care and feel convinced that we are not authorized by the language of the act *under which the charge is laid* to hold that the facts as presented are sufficient to justify us in holding that petitioner has committed a public offense." (*Italics ours.*)

Again, it will be noticed that in a statement of the case at the very outset we used the following language: "The gravamen of the offense charged is that on March 20, 1922, petitioner, *in furtherance of an unlawful conspiracy*, executed an agreement and contract with said Vicencio whereby said Vicencio transferred to petitioner for a term of 5 years *an interest* in a certain parcel of agricultural lands containing 20 acres, situate in the County of Placer. The portions of the act which bear directly on the case are sections 2 and 10, which provide as follows:" (*Said sections follow.*) (*Italics supplied.*) In order to determine whether or not a conspiracy *to transfer an interest in real property*, as defined by the penal sections of said act had been committed, it was necessary to consider the effect of section 2. The power of the court to impose imprisonment, however, as a penalty for the violation of the act, must be measured by the language of section 10, under which the prosecution was laid. This court held that the contract in the Okahara case failed to establish a criminal conspiracy *to transfer an interest in real property* and the authorities cited to the point whether a cropper actually has an interest in the land upon which the crops are grown must be regarded as limited to that issue. But here we have presented practically the identical question, referable to the same section of the act that was presented to the United States Supreme Court in the several cases heretofore cited. Mr. Justice Butler in *Webb vs. O'Brien*, *supra*, in distinguishing the Okahara case from *Webb vs. O'Brien*, said:

"The decision of the Supreme Court of California in *In the Matter of Okahara*, *supra*, a *habeas corpus* case, does not support the appellee's con-

tention. In that case an ineligible Japanese was held on a warrant charging him with a conspiracy to effect a transfer of real property in violation of section 10 of the Alien Land Law. The gravamen of the offense charged was that Okahara, in furtherance of the conspiracy, executed a contract with another, whereby the latter transferred to him for a term of five years an interest in 20 acres of agricultural land. The only question before the court in that case was whether the contract amounted to a transfer of real property or of an interest therein in violation of section 10. The court said: ' . . . The instrument before us cannot be characterized as a lease or transfer of any interest in real property because it lacks many of the essential elements of a lease, while on the other hand it bears all the characteristics of an agreement of hiring. But if it cannot be said to be an agreement of employment pure and simple, it cannot under any rule of construction be held to be more than a cropping contract.'

"After referring to the terms of the contract and reviewing the authorities, it said: 'The argument that the law forbids the making of a contract of employment or agreement to till the soil on shares can only be sustained by adopting the theory that the particular agreement under consideration transfers an interest in land.'

"The court held that the contract did not violate section 10 and discharged Okahara. The contract in that case differs in important particulars from the one before us; but, in the view we take of the case, we need not determine whether, within the meaning of the act, the contract between O'Brien and Inoye, if executed, would effect a transfer of an interest in real property. The question in this case is not whether the proposed contract is prohibited by section 10, but it is whether appellees have shown that they have a right under the Constitution or treaty to make and carry out the contract, and are entitled to an interlocutory injunction against the officers of the state. A negative answer must be given.

"The privilege to make and carry out the proposed cropping contract, or to have the right to the possession, enjoyment and benefit of land for agricultural purposes as contemplated and provided for therein, is not given to Japanese subjects by the treaty. The act denies the privilege because not given by the treaty. No constitutional right of the alien is infringed. It therefore follows that the injunction should have been denied."

The decision last above cited effectually disposes of appellants' argument to the effect that the denial to them of the right to make and carry out a cropper's contract also denies to them the ordinary means of earning a livelihood in the following unmistakable language: "The right to make and carry out cropper contracts such as that before us is not safeguarded to ineligible aliens by the Constitution. A denial of it does not deny the ordinary means of earning a livelihood or the right to work for a living. The practical results of such contract is that the cropper has use, control and benefit of land for agricultural purposes substantially similar to that granted to a lessee. Conceivably, by the use of such contract, the population living on and cultivating the farm lands might come to be made up largely of ineligible aliens. The allegiance of the farmers to the state directly affects its strength and safety. (*Terrace et al. vs. Thompson, supra.*) We think it within the power of the state to deny to ineligible aliens the privilege so to use agricultural lands within its borders." It is apparent that the decision rests largely upon broad principles of national safety and public welfare. Unquestionably the farming of lands by ineligible aliens would give them a use, occupancy and benefit of agricultural lands which in effect would amount to a deprivation of its use, enjoyment and occupancy

by the citizen. Any other theory would be incompatible with the occupation of husbandry. To all practical purposes this would, *pro tanto*, constitute a withdrawal of agricultural lands from the use, occupancy and benefit of the citizen. Furthermore, it is said in *Webb vs. O'Brien, supra*, that the contract in that case, which cannot in a practical sense be distinguished from the contract in the instant case, will give to the ineligible alien a right to use and enjoy the benefit of the land for agricultural purposes. And that is so "notwithstanding other clauses of the contract to the effect that the general possession of the land is reserved to the owner, that the cropper shall have no interest or estate whatever in the land, that he is given one-half of all crops grown as compensation for his services and labor, and that division of the crops is to be made after they are harvested and before their removal from the land". Racial distinctions may furnish legitimate grounds for classifications under some conditions of social or governmental necessities. (*Piper, by Guardian ad litem, vs. Big Pine School District of Inyo County et al.*, 67 Cal. Dec. 486, 226 Pac. 926.) Ineligible alienage is not deprived of any constitutional or treaty rights by reserving the agricultural lands of the nation for the use, occupancy, benefit and enjoyment of its citizens or those eligible to become citizens, nor denied the right to engage in the ordinary employments or means of earning a livelihood. The ordinary employments and occupations by which a livelihood may be earned remain open to the ineligible alien. The principle of constitutional law which forms the basis of the instant case differs from *Truax vs. Raich*, 239 U. S. 33, 33 Sup. Ct. 7, 60 Law. Ed. 331, L. R. A. 1916D 545, Ann. Cas. 1917B 283, strongly urged by appellants as being in their favor, as pointed out in *Webb vs. O'Brien, supra*.

The many insistent efforts of the landowners and ineligible croppers to frame a contract that will accomplish the obvious purpose of the contracting parties as interpreted by the recent decisions of the Supreme Court of the United States have been thus far futile and must continue to be so under the construction which is compelled by the Alien Land Act. "The treaty gives no permission to enjoy, use, or have the benefit of land for agricultural purposes. The privileges granted by the act are carefully limited to those prescribed in the treaty. The act as a whole evidences legislative intention that ineligible aliens shall not be permitted to have or enjoy any privilege in respect to the use or the benefit of land for agricultural purposes. And this view is supported by the circumstances and negotiations leading up to the making of the treaty. See *Terrace et al. vs. Thompson, supra*."

If a civil action had been instituted against Okahara under the general provisions of the act, as was done in the O'Brien case, instead of a criminal prosecution under section 10 thereof, and it had been carried to the United States Supreme Court by a writ of error, there is but little doubt that that court would have ruled as it did in the O'Brien case. This court in deciding the Okahara case adopted a portion of the language of the United States district court for the Northern District of California (three judges sitting) in *Webb vs. O'Brien*, which decision was afterwards appealed to the United States Supreme Court and by it reversed. The reasoning of the United States district court was held to be unsound upon appeal even as applied to the general provisions of the act upon which a civil action was based. If the reasoning of the United States district court was faulty when applied to questions directly involved in the issues of that case and its conclusion was wrong, surely it would have no persuasive force even by way of analogy in determining whether or not a conspiracy to commit

the crime defined by section 10 of the act had been committed. As stated by Mr. Justice Butler, the sole question involved in the latter case was whether a conspiracy had been formed to transfer an interest in real property—concretely stated, whether the cropping contract in that case conveyed to the cropper an interest in real property. Anything said by way of argument or injected into the decision by way of illustration and not bearing on the offense charged was *obiter dictum* and is not to be followed here. A different question is presented by this proceeding.

The questions presented by the issues of the instant case are not ordinary questions involving property rights as between individuals merely, but they are questions which affect our relations as a nation with foreign countries. This alone furnishes a sufficient reason for the adoption by this court of the construction placed upon the Alien Land Act by the Supreme Court of the United States.

The general provisions of the initiative Alien Land Law being sufficiently comprehensive to include every essential element of the instant case, and section 10 of said act not being in anywise involved, the question whether it was within the power of the legislature to adopt the amendment (Stats. 1923, p. 1020) which, it is claimed by appellants, attempts, unlawfully, to extend the scope of the inhibitive provisions of the original act, contrary to the express provisions of the act itself, is a question which does not arise in the instant case and what we might say in reference to it here would be but mere dicta.

Judgment affirmed.

SEAWELL, J.

We concur:

MYERS, C. J.

LENNON, J.

SHENK, J.

WASTE, J.

RICHARDS, J.

I concur in the judgment:

LAWLOR, J.

NOSE CASE.

Crim. No. 2713. In Bank. December 9, 1924.

In the Matter of the Application of S. NOSE for a Writ of *Habeas Corpus*.

Application for writ of *habeas corpus* prayed to be directed to the constable of Los Angeles Township, Los Angeles County, to secure the release of petitioner from custody under a warrant issued upon a complaint charging criminal violation of the Alien Land Law. Writ *denied*.

For Petitioner—Hickox, Crenshaw & Trude; Albert H. Elliot, *amicus curiae*.

For Respondent—U. S. Webb, Attorney-General; Frank English, Deputy Attorney-General; Asa Keyes, District Attorney, Los Angeles County; Tracy Chatfield Becker, Deputy District Attorney, Los Angeles County.

Petitioner, a native and subject of Japan and admittedly ineligible to citizenship in the United States of America, is restrained of his liberty by the constable of Los Angeles Township, County of Los Angeles, on a warrant issued upon a complaint charging him with a criminal violation of the initiative Alien Land Law adopted by the electors of this state November 2, 1920 (Stats. 1921, lxxxiii). He claims that his detention is illegal.

Specifically the complaint charges that petitioner unlawfully entered into a conspiracy with one M. P. Bischof to execute a contract the purpose of which was to give to petitioner the right to possess, use, cultivate, occupy and have the beneficial use of a body of agricultural lands containing about eight acres situate in the County of Los Angeles, this state, of which Bischof is lessee and Manuella E. Letton is the owner. The contract upon which the charge of conspiracy is based does not differ in material respects from the contract in the case of *Jones et al. vs. Webb et al.* (L. A. No. 8215), this day decided. It specifically limits the days and hours of labor and fixes a monthly wage of a hundred dollars, and *ex industria* provides that "as an incentive to the said employee (ineligible alien) to be industrious and efficient, and as an additional wage", Bischof is to pay the alien a sum equal to 50 per cent of the net profits of the crops to be grown and harvested on the premises by the alien. The contract closes with the following paragraph: "It is further provided that in the event the employee (alien) is discharged for cause, or shall abandon this contract, the employer shall be relieved from all liability for said additional wage." The last paragraph is merely one providing for a breach of contract, and in no way changes the true character of the instrument. The contract is one which, if valid, would confer upon the alien the use and benefits arising from the control, occupancy and enjoyment of real property, which is denied to an ineligible alien by the Alien Land Law of the state.

Certain amendments were made to the original initiative Alien Land Law by the legislature (Stats. 1923, p. 1020), which, petitioner insists, the legislature had no power to enact for the reason that said amendments are not "in furtherance of its purpose" and do not "facilitate its operation", but are, in fact, extensions or additions to the inhibitory provisions of the original act. These amendments consist of the insertion of specific words and terms which in no wise enlarge upon the intent of the act but are in furtherance of its purpose and do in fact facilitate its operation. Section 2 of the original act as amended furnishes a fair example of the extent and character of the amendments. We have emphasized the amendatory language of that section by the use of italics and reproduce it as thus amended:

"All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, *use, cultivate, occupy* and transfer real property, or any interest therein, in this state, *and have in whole or in part the beneficial use thereof*, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Criticism is especially directed at the amendment to section 8. Before amendment it read: "Sec. 8. Any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section 2 of this act, * * * shall escheat to the State of California." * * * Following the word "fee" the legislature added a cropping contract clause, to-wit, "including cropping contracts which are hereby declared to constitute an interest in real property less than the fee". It was competent for the legislature to include within the inhibitions "cropping contracts". It is not necessary to decide whether or not the legislature had the authority to provide that a "cropping contract" in this class of cases shall impress lands affected thereby with an interest therein in favor of the cropper. For the purposes of this decision the effect of the contract upon real property may be regarded as surplusage.

Section 10 has been so amended as to make its penal provisions clearly applicable to each section of the act in case of a violation thereof. Other amendments were made to the act, but they do not affect the questions raised here.

We conclude that if the privileges of making and carrying out the proposed contract, or to have the right of the possession, enjoyment and benefits of lands for agricultural purposes is not given to Japanese subjects by treaty or otherwise, and the original Alien Land Act denies the privilege because not given, as held in *Porterfield et al. vs. Webb et al.*, 44 Sup. Ct. Rep. 21, and which doctrine we here affirm, then it must follow that the amendments are in furtherance of the purpose of the act as construed by this court in *Porterfield vs. Webb et al.* (L. A. No. 8214), this day decided, and it was competent for the legislature to amend the act in conformity with the authority therein given. (Sec. 13, initiative Alien Land Act.)

From what is said in this and cited cases it follows that the writ must be dismissed and the petitioner remanded.

It is so ordered.

SEAWELL, J.

We concur:

MYERS, C. J.

LENNON, J.

SHENK, J.

WASTE, J.

RICHARDS, J.

LAWLOR, J.





